THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No: 2018-001262

Dorchester County Taxpayers Association, individually and on behalf of all others similarly situated, Weatherstone Property Owners Association, individually and on behalf of all others similarly situated, George Resnick, William A. Harbeson, James Stephen Greene, Jr., Homer P. Gonzalez, Gerald E. Ziegler and South Carolina Public Interest Foundation, ...Appellants,

v.

Dorchester County, Dorchester County Council, David Chinnis, George Bailey, Jay Byars, Willie Davis, Carroll S. Duncan, Larry Hargett and William R. Hearn, Jr., in their official capacities as members of Dorchester County Council, Town of Summerville, Summerville Town Council, William E. McIntosh, III, in his official capacity, Dorchester County Sheriff, Luther C. Knight, in his official capacity, Dorchester School District Two, Dorchester School District Two Board of Trustees, Joseph R. Pye, Justin Farnsworth, Gail Hughes, Brian Mitchum, Tanya Robinson, Sam Clark, Barbara Crosby and Lisa Tupper, in the official capacities, Dorchester School District Four, Dorchester School District Four Board of Trustees, Dorchester County Career and Technology Center, and Dorchester County Career and Technology Center Board of Trustees,.....Respondents.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN DISMISSING THE APPELLANTS' COMPLAINT CHALLENGING THE USE OF OWNER-OCCUPIED TAX REVENUES FOR STUDENT RESOURCE OFFICERS IN VIOLATION OF ACT 388 WHEN THE COMPLAINT DID NOT SEEK A REFUND OR CHALLENGE TAX ASSESSMENT OR COLLECTION BUT RATHER LOCAL GOVERNMENT ACTION USING PUBLIC FUNDS?

II. DID THE CIRCUIT COURT ERR IN DISMISSING THE APPELLANTS' COMPLAINT AGAINST DORCHESTER DISTRICT 4 CHALLENGING THE USE OF OWNER-OCCUPIED TAX REVENUES FOR STUDENT RESOURCE OFFICERS IN VIOLATION OF ACT 388 WHEN IT PARTICIPATED IN THE PAYMENT OF THOSE OFFICERS IN VIOLATION OF THE STATE STATUTE AND COULD BE AFFECTED BY A DECLARATORY JUDGMENT OR AN INJUNCTION ISSUED IN THIS CASE?

III. DID THE CIRCUIT COURT ERR IN DISMISSING THE SECTION 1983 CLAIMS OF APPELLANT MESSINGER WHEN THE COMPLAINT ALLEGED THAT TOWN AND COUNTY OFFICIALS CONSPIRED AND ACTED TO DEPRIVE MESSINGER OF HIS FIRST AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION THROUGH A PATTERN OF HARASSMENT AND INTIMIDATION AND INTERFERENCE WITH HIS EMPLOYMENT?

STATEMENT OF THE CASE

On May 2, 2016, the plaintiffs, now Appellants, filed this action for a declaratory judgment and injunctive relief and amended its original complaint on May 6, 2018 (R. p. 145). After responses by the defendants, the plaintiffs filed their Second Amended Complaint on December 12, 2016 (R. p. 102). In response, the parties representing the County and Town government defendants filed a motion to dismiss the Second Amended Complaint. (R. pp. 496-502, 503-536, 537-569) The parties representing the Dorchester District 4 school district and school board filed a

separate motion to dismiss, and the remaining defendants filed responsive pleadings but did not move to dismiss (R. p. 474).

A hearing on the two pending motions to dismiss was held on December 12, 2017. After briefing and argument the Circuit Court issued two orders on March 15, 2018 dismissing the case in its entirety as to the County, Town and District 4 defendants (R. pp. 3, 12). On March 20, 2018, Appellants received written notice of entry of the two orders filed on March 15, 2018. On March 29, 2018, Appellants timely served and filed a motion to alter, amend or reconsider those orders (R. pp. 413-421; 422-436). On June 13, 2018, Appellants received written notice of entry of the June 11, 2018 order denying their motion to alter or amend the March 15, 2018 orders (R. pp. 1-2).

On July 3, 2018, the appellants filed a notice of appeal of the two orders dated March 15, 2018 and the order of June 11, 2018 with the Circuit Court and the Court of Appeals and served copies on all counsel of record.

STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). The Court must deny a motion to dismiss under Rule 12(b)(6) if "'facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.'" *Id.; Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) ("The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom

would entitle the plaintiff to any relief on any theory."). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.* "Pleadings in a case should be construed liberally so that substantial justice is done between the parties." *Cricket Cove Ventures, LLC v. Gilland,* 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Plyler,* 373 S.C. at 645, 647 S.E.2d at 192.

Under Rule 12(b)(1), SCRCP, the movant challenges the power of the court over the subject matter. "The question of subject matter jurisdiction is a question of law for the court." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009), citing *Chew v. Newsome Chevrolet, Inc.,* 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993) (citing *Bargesser v. Coleman Co.,* 230 S.C. 562, 96 S.E.2d 825 (1957)). Subject matter jurisdiction is defined as "the power to hear and determine cases of the general class to which the proceedings in question belong." *See Skinner v. Westinghouse Elec. Corp.,* 380 S.C. 91, 93-94, 668 S.E.2d 795, 796 (2008); *Ward v. State,* 343 S.C. 14, 17 n.5, 538 S.E.2d 245, 246 n.5 (2000).

FACTS

The plaintiffs are individual residents and taxpayers of Dorchester County or Berkeley County, a neighborhood association and two nonprofit public advocacy organizations dedicated to transparent and efficient government in compliance with the laws and constitution of this state (R. p. 105, line 11- p. 110, line 4).

School Resource Officers ("SROs") are sworn law enforcement officers assigned to one or more school districts in the state with their primary duty being to provide safety and security of students, staff and property within the school system. (R. p. 113, line 11- p.114, line 19). Their use in the schools is for school operating purposes within the definition of S.C. Code Ann. § 12-39-220(b)(47)(a), (c) ("Act 388") as they provide for security and order within the schools and school districts themselves, a task that would otherwise be filled by principals, teachers, coaches or other employees of the school district, and often develop safety policies and procedures as "an advisor and teacher" (R. p. 114, lines 4-19 and p. 134, lines 17-28).

The South Carolina General Assembly passed Act 388 to provide that "one hundred percent of the fair market value of owner-occupied residential property... is exempt from all property taxes imposed for school operating purposes but not including millage imposed for the repayment of general obligation debt". In other words, Act 388 exempts owner-occupied residential property from all property taxes imposed for "school operating purposes" with the exception of the service of bond indebtedness (R. p. 114, line 27-p. 115, line 24).

In 2015, the General Assembly, through the South Carolina Oversight Committee, funded an "independent review of the efficiency" of Dorchester School District 2 ("DD2") by Tidwell and Associates. In May 2015, Tidwell issued its report, divided into tiers of recommendation, with Tier 1 being those of "Greatest Impact: the district should implement these recommendations immediately to take maximum advantage of their opportunities." One of those Tier 1 recommendations was for DD2

to directly employ its own district security officers or contract with a private security company to provide security in DD2 schools, rather than using deputies from the County Sheriff's office. The Tidwell report found that such a change would save DD2 $1,755,600 over 5 years (R. p. 118, line 3-21).

DD2 attempted to implement this change but met with significant opposition from the Dorchester County Sheriff, and the elected leaders of Dorchester County and the Town of Summerville (R. p. 119, lines 1-12). In the course of the public debate over this issue, the Sheriff, a deputy sheriff and a Summerville Town Council member, all defendants, crossed the line between permissible free speech and impermissible intimidation and slander (R. p. 119, line 13- p. 122, line 23). One individual citizen who supported this change in SRO staffing, David Messinger, is a plaintiff in this case, stating claims against the Sheriff, Deputy Sheriff and Town Council members for their unconstitutional actions taken with intent to harm him and squelch his advocacy of this measure.

In the end, the County, Town and Sheriff got their way and DD2, Dorchester District Four ("DD4") and the Dorchester County Career and Technology Center ("DCCTC") all entered into contracts providing that Dorchester County and the Town of Summerville would pay the salaries and other expenses of SROs in the school district, using County and Town taxes collected on primary residences (R. p. 123, line 6- p. 128, line 12).

As a result, the County through the Sheriff's office provides SROs to the three school districts for an approximate amount of $60,000 per officer per year for salaries,

plus other expenses. Under these contracts, the school district is required to use taxes it has collected on 6% properties, including businesses, to subsidize the salaries and other expenses of SROs employed and supervised by the Sheriff. In addition, Dorchester County is required to use taxes it has collected on all property owners, including owner-occupied homes, to subsidize the salaries and other DD2 school operating expenses for SROs working at schools within each school district (R. p. 123, line 6- p. 128, line 12). All funds paid by the County or the Town to any of the school districts for SROs have been paid with property taxes raised, among others, on owner-occupied homes in the County and/or the Town in violation of Act 388 (R. p. 128, lines 3-7). The Plaintiffs who reside in Berkeley County are being taxed by the Town to provide SROs for DD2 and DD4 schools when no resident of Berkeley County attends any DD2 or DD4 school (R. p. 133, lines 1-10).

ARGUMENT

This case challenges Dorchester County and the Town of Summerville's practice of funding the payment of Deputy Sheriffs to act as School Resource Officers out of the collection of taxes on primary residences in violation of Act 388, a state statute that forbids the expenditure of residential property taxes for school operating expenses. The trial court's order is grounded primarily on the exclusive jurisdiction of the Revenue Procedures Act ("RPA") over tax collection challenges. The order points out that the RPA provides a "straightforward procedure to determine... a dispute concerning property taxes," and that the RPA is "the sole and specific remedy for deciding tax disputes involving the illegal or wrongful collection of taxes...." See

S. C. Code Sec. 12-60-80. ("There is no remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes or attempt to collect taxes.")

Appellants do not quarrel with that statement. The trial court must be reversed, though, because Appellants have stated claims for which relief can be granted. The case does not challenge the collection of taxes. Rather, it challenges the expenditure of public funds - the **use** of taxes - specifically a practice of paying deputy sheriffs to serve as School Resource Officers in a manner that explicitly violates a state statute. The only connection to the collection of taxes in this case is that public funds, raised by the collection of taxes, are being used to pay these deputies. Neither the manner nor the amount of taxes collected is being challenged in this case, nor is any Appellant seeking a refund of their taxes paid. They do seek to have the public officials cease spending and receiving the funds in violation of state law.

If the trial court's conclusions about the scope and breadth of the Revenue Procedures Act are correct, no challenge to a state or local government's action can be brought in Circuit Court, if that challenge involves the expenditure of public funds. That is not what the RPA says, what the exclusive remedy provision for deciding tax disputes is meant to provide, nor is it consistent with the precedents set by numerous decisions of our appellate courts.

I. THE CIRCUIT COURT ERRED IN DISMISSING THE APPELLANTS' COMPLAINT CHALLENGING THE USE OF OWNER-OCCUPIED TAX REVENUES FOR STUDENT RESOURCE OFFICERS IN VIOLATION OF ACT 388 WHEN THE COMPLAINT DID NOT SEEK A REFUND OR

CHALLENGE TAX ASSESSMENT OR COLLECTION BUT RATHER LOCAL GOVERNMENT ACTION USING PUBLIC FUNDS.

Numerous court decisions have established the right of taxpayers to ask Circuit Courts to halt illegal expenditures by South Carolina government entities, starting over a hundred years ago with the South Carolina Supreme Court decision in *Mauldin vs. City Council of Greenville*, 33 S.C. 1, 11 S.E. 434 (1890). As stated by the South Carolina Court of Appeals in *Sloan v. School District of Greenville County*, 342 S.C. 515, 523, 537 S.E.2d 299, 303 (Ct. App. 2000) (emphasis added):

> In this case, the public interest involved is the prevention of the unlawful expenditure of money raised by taxation. Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts . . .. Taxpayers must have some mechanism of enforcing the law.
>
> *Id.* (citation omitted).

South Carolina circuit courts are vested with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law. *Rainey v. Haley,* 404 S.C. 320, 323, 745 S.E.2d 81, 83 (2013), citing S.C. Const. art. V, § 11. "In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." *Id.*, citing *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009).

The trial court found that it does not have jurisdiction over this matter because it is a case "involving the illegal or wrongful collection of taxes" and the

Administrative Law Court, under the RPA, has exclusive jurisdiction over those matters. If this were a case challenging the wrongful assessment or collection of taxes, that would be true, but this case is not.

Looking for guidance to the relevant statute, "the legislative intent of the RPA is to provide the people of this State with a straightforward procedure to determine a dispute with the Department of Revenue and a dispute concerning property taxes. The South Carolina Revenue Procedures Act must be interpreted and construed in accordance with, and in furtherance of, that intent." S.C. Code Ann. § 12-60-20. The entire statute is concerned with a taxpayer's ability to challenge what that taxpayer contends is the wrongful collection of taxes. "Except as provided in subsection (B), there is no remedy other than those provided in this chapter in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes." S.C. Code Ann. § 12-60-80.

The process to which the trial court concluded it must cede jurisdiction and dismiss this action is described as follows:

> For the purposes of this section, the administrative tax process includes matters connected with presentation to a state or local tax authority, or their officials or employees, relating to a client's rights, privileges, or liabilities pursuant to laws, regulations, or rules administered by state or local tax authorities. These presentations include the preparation and filing of necessary documents, correspondence with, and communications to, state and local tax authorities, and the representation of a client at conferences and meetings, including conferences with the county boards of assessment appeals. It does not include contested case hearings held by the Administrative Law Court or the courts.
>
> S.C. Code Ann. § 12-60-90.

By its plain and unambiguous allegations, this Second Amended Complaint challenges the payment[1] of money for the funding of SROs for the school districts, using property taxes on owner-occupied homes. That these are public funds, collected by the local government through property taxation, does not make this a tax appeal.

The only references to the Plaintiffs as taxpayers in the Second Amended Complaint are allegations meant to establish their standing to bring this action. The Second Amended Complaint does not seek to reduce or challenge the amount of taxes that the Plaintiffs are collecting or seek refunds to any of the Plaintiffs. Rather, the Second Amended Complaint only seeks cessation of illegal expenditures of public funds by the County and the Town in the ordinary courses of their business, in accordance with their budgets approved by County and Town Councils by ordinance.

Decisions of the Supreme Court and Court of Appeals support this conclusion. For example, *Brackenbrook North Charleston LP v. County of Charleston*, 360 S.C. 390, 602 S.E.2d 39 (S.C. 2004) involved a challenge to the validity of the amount of taxes collected by Charleston County using a certain millage calculation rate and sought a tax refund after payment of the taxes sought to be refunded. However, unlike in *Brackenbrook*, Plaintiffs in this case absolutely do not challenge the validity of the amount or nature of the taxes collected from them and do not seek a refund but, instead, object as unlawful the manner in

[1] R. p. 103, line 11- p. 104, line 5; p. 108, line 22- p. 109, line 16; p. 129, lines 9- 17; p. 129, lines 18-23; p. 132, lines 11-13; p. 132, lines 14-21; p. 133, lines 1-10; p. 191, line 12- p. 134, line 3; p. 136, lines 1- 5; p. 136, lines 10-15; p. 136, lines 16-20; p. 137, lines 1-6; p. 137 lines 7- 11; p. 140 line 17 – p. 142 line 16

which those collected tax monies have been spent and will be spent after they are collected. *Id.* (R. p. 102).; *supra* at 9. Therefore, the ruling requiring the exhaustion of administrative remedies in *Brackenbrook* is not precedent for requiring compliance with the RPA regarding Plaintiffs' challenges to the legality of tax expenditures by the Defendants.

Similarly, *B&A Development, Inc. v. Georgetown County,* 372 S.C. 261, 641 S.E.2d 888 (2007) involved a challenge to the legality of a county's millage rate resulting in the alleged excessive collection of taxes and requests for a refund. Unlike in *B&A Development, Inc.*, Plaintiffs in this case do not challenge the validity of the amount or nature of the taxes collected from them and do not seek a refund; therefore, the ruling requiring the exhaustion of administrative remedies in *B&A Development, Inc.* is not precedent for requiring compliance with the RPA regarding Plaintiffs' challenges to the legality of tax expenditures by the Defendants.

Similarly, *Riverwoods, LLC v. Charleston Cnty.*, 349 S.C. 378, 563 S.E.2d 651, 657 (2002) involved a challenge to the collection of taxes and request for a refund. Unlike in *Riverwoods, LLC*, Plaintiffs in this case absolutely do not challenge the validity of the amount or nature of the taxes collected from them and do not seek a refund but, instead, object as unlawful the manner in which those collected tax monies have been spent and will be spent after they are collected. *Id.*; (R. p. 129, lines 9-23). , supra at 9. Therefore, the ruling requiring the exhaustion of administrative remedies in *Riverwoods, LLC* is not precedent

for requiring compliance with the RPA regarding Plaintiffs' challenges to the legality of tax expenditures by the Defendants.

As such, this court does have jurisdiction over this challenge to actions by local governments that the Plaintiffs, as taxpayers, assert are illegal and therefore *ultra vires*. The RPA does not apply to this dispute. Plaintiffs' First and Second Causes of Action are not subject to dismissal.

II. THE CIRCUIT COURT ERRED IN DISMISSING THE APPELLANTS' COMPLAINT AGAINST DORCHESTER DISTRICT 4 CHALLENGING THE USE OF OWNER-OCCUPIED TAX REVENUES FOR STUDENT RESOURCE OFFICERS IN VIOLATION OF ACT 388 WHEN IT PARTICIPATED IN THE PAYMENT OF THOSE OFFICERS IN VIOLATION OF THE STATE STATUTE AND COULD BE AFFECTED BY A DECLARATORY JUDGMENT OR AN INJUNCTION ISSUED IN THIS CASE.

The trial court erred in dismissing the causes of action against the Dorchester District 4 defendants on the basis that the school district is not a taxing entity. That point is irrelevant to the causes of action stated in the complaint. The Dorchester District 4 defendants are proper defendants to this declaratory judgment action because they participated in the practice of paying School Resource Officers with owner-occupied residential property taxes in violation of state statute. The declaration of violations of the statute would affect and involve them as a participant, as much as it would the County or the Town. Further, if the courts determine that the practice violates state law as the complaint alleges, the injunction requested by the complaint would necessarily cover the school district as much as the relevant local governmental authority, whether the Town or the County. As a result, it was error

to dismiss the school district defendants and this Court should reverse the trial court and remand this matter for further proceedings against the school district.

III. THE CIRCUIT COURT ERRED IN DISMISSING THE SECTION 1983 CLAIMS OF APPELLANT MESSINGER WHEN THE COMPLAINT ALLEGED THAT TOWN AND COUNTY OFFICIALS CONSPIRED AND ACTED TO DEPRIVE MESSINGER OF HIS FIRST AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION THROUGH A PATTERN OF HARASSMENT AND INTIMIDATION AND INTERFERENCE WITH HIS EMPLOYMENT.

Mr. Messinger's constitutional claims alleged in the Second Amended Complaint are that Defendants Phinney, McIntosh and Chinnis acted collaboratively and with malicious intent to cause Messinger to lose his employment and become unemployable as a police officer, and to threaten, intimidate, retaliate against and punish Messinger with the effect and for the common purpose of preventing and deterring Messinger from making statements criticizing a candidate or policy one or more of them supported. Messinger alleged Defendants contacted and/or threatened to contact Messinger's employers to cause Messinger to become unemployed and unemployable, if Messinger continued expressing views unsatisfactory to these Defendants.[2] Messinger alleged Defendants caused Messinger's employer to counsel Messinger and to require that Messinger stop serving as the Administrator of a website as a condition of Messinger's continued employment as a police officer with the Mt. Pleasant police

[2] R. p. 119, line 13- p. 122, line 24; p. 138 lines 8-28; p. 139, line 15- p. 140, line 6.

department.[3] The complaint alleges Defendants made harsh, derogatory and defamatory statements about Messinger's competency as a police officer and motives to the point that Messinger feared being unemployed and unemployable if Messinger continued expressing his views.[4]

Specifically, for example, the Second Amended Complaint alleges that:

> Captain Phinney repeatedly called the Chief ("Chief") of the Mt. Pleasant Police Department ("Department") during which conversations Phinney made statements to the Chief discrediting Messinger and trying to get the Mt. Pleasant Police Department to terminate the employment of Messinger. Captain Phinney told the Chief of the Mt. Pleasant Police Department that Captain Phinney was calling that Chief at the request of Captain Phinney's supervisors at the Dorchester County Sheriff's office, to state that the Chief and the Department should terminate the employment of Messinger because Messinger was the Administrator of the Facebook page for Concerned Citizens of Dorchester County where Messinger was claimed to have made slanderous statements. As a result, Messinger was involuntarily counseled and warned by the Chief and the Internal Affairs Sergeant of the Mt. Pleasant Police Department; Messinger was required by that Chief to cease being the Administrator of the Concerned Citizens of Dorchester County Facebook page as a condition of his continued employment with the City of Mt. Pleasant; and Messinger was intimidated and deterred from exercising his Constitutional rights of expression and assembly and to petition his government for redress of grievances.[5]

Similarly, the Second Amended Complaint alleges that:

> Defendant McIntosh repeatedly threatened to interfere with the employment of Messinger, by providing derogatory information about Messinger to Messinger's employer, for the purpose and with the effect of making Messinger afraid to express his views regarding these SRO matters.[6]

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[3] R. p. 121, line 8- p. 122, line 23
[4] R. p. 119, line 13- p. 122, line 24; p. 138 lines 8-28; p. 139, line 15- p. 140, line 6
[5] R. p. 121, line 8- p. 122, line 23
[6] R. p. 120, line 23- p. 121, line 7

In addition, the Second Amended Complaint alleges that:

> . . . "[O]n multiple occasions McIntosh gratuitously questioned Messinger about whether Messinger's current boss at the Mt. Pleasant Police Department would disapprove of McIntosh's statements and opposition to the SRO funding scheme McIntosh supported."[7]

Evidence of malicious and purposeful intent by McIntosh to render Messinger unemployed and unemployable, and to intimidate, harm, punish and deter Messinger from exercising his Constitutional Rights, is alleged to have been provided by the following publication by McIntosh on Facebook of statements about Messinger and Michael Turner, Messinger's associate who advocated views similar to those of Messinger to which McIntosh objected:

> Mr. Messinger is just sore that the county didn't go along with his and Mike Turner's hare-brained scheme to create a taxpayer-financed private security force for washed-out enforcement officers.
>
> . . . .
>
> The truth is you were part of a group of unemployed and barely employed law enforcement officers and former (and with good reason former) law enforcement officers who rallied behind Mike Turner to hoo-doo District 2 into supportting the creation of private security force in our schools. It was nothing more than a full employment scheme for washed-out cops. The county saw right through it, and now you're mad at the county council chairman. You are right – I do have a sense of humor. Hopefully, your chief in Mt. Pleasant has one too.
>
> . . . .
>
> [Messinger] spent countless hours emailing folks to support this hare-brained private security scheme for all our scools, and he is spitting nails at the county for quashing it.[8]

The Second Amended Complaint further alleges that:

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[7] R. p. 121, line 8- p. 122, line 23

[8] R. p. 119, line 13- p. 120, line 22

> Defendants McIntosh's and Chinnis' threats and personal attacks on Plaintiff Messinger described above are part of a pattern, a conspiracy and a continuation of past efforts by Dorchester County, the Town and the Dorchester County Sheriff to discredit, defame, intimidate and interfere with the Constitutional rights and with the employment of Messinger and others who criticize or oppose their actions or policies.[9]

Evidence of this "pattern, conspiracy and continuation of past efforts by [Defendants] to discredit, defame, intimidate and interfere with the Constitutional rights and with the employment of Messinger and others who criticize or oppose their actions or policies,"[10] and of the malicious intent of the Defendants to interfere with the Constitutional rights of Messinger, is alleged to have been provided in part by the following additional statements in the Second Amended Complaint:

1. "After reading these statements by McIntosh on Facebook Chinnis republished them by stating on Facebook `Nailed it Bill!'";[11]

2. "Defendant McIntosh is an employee or a member of the law firm owned, in whole or in part, by the daughter of the Sheriff, who adamantly objected to DD2's hiring its own SROs, as private contractors or as in-house employees of DD2, as recommended by the Tidwell Report. Defendant McIntosh made these statements and took these actions, and other actions, to help the Town of Summerville, the County, the Dorchester County Sheriff and other Defendants continue the illegal *status quo* methods of funding SROs advantageous to the Dorchester County Sheriff and to avoid implementing the SRO funding recommendations in the Tidwell Report."[12]

3. "Similarly, Captain Tony Phinney of the Dorchester County Sheriff's Office e-mailed the then Director of the Department of Public Safety at the Medical University of South Carolina stating in part the following regarding Rowland Turner:

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[9] R. p. 121, line 8- p. 122, line 23
[10] R. p. 121, line 8- p. 122, line 23
[11] R. p. 119, line 13- p. 120, line 22
[12] R. p. 119, line 13- p. 120, line 22

> . . . [M]y supervision requested I drop you a note and inform you of the actions of one of your employees, Rowland Turner.
>
> Mr. Turner has posted inaccurate, slanderous comments in an open forum on Facebook in an attempt to harm my reputation and to aid his brother in his bid as a candidate for Sheriff. . . . There are at least 4 other persons that are preparing actions against Mr. Turner also . . . .
>
> The Facebook forum is `Concerned Citizens for Dorchester County.' Mr. Turner is listed as the `administrator' for this site.
>
> I have asked to have the comments removed and they have not, one week later. My attorney is preparing a `cease and desist' letter.
>
> The only reason I would ever bother a man with your responsibilities with such pettiness is to inform you that the press has already asked me about this and my attorney will probably push the matter. Cops suing cops is too juicy to ignore, but I must protect my reputation. As a professional courtesy my supervisor asked that I let you know what lay on the horizon. E-mail dated May 1, 2012, from Lt. Tony Phinney, Dorchester County Sheriff's Office, to Anthony Dunbar, attached as Exhibit #2."[13]

A. Plaintiff Messinger stated a valid § 1983 cause of action based on violation of his First Amendment rights.

The trial court erred in finding that the Plaintiff Messinger did not state a cause of action for a § 1983 cause of action for violation of his rights to freedom of expression and association, and to petition a government for redress of grievances, in violation of the First and Fourteenth Amendments of the United States Constitution. See, e.g., Lee, David W., 2014 Handbook of Section 1983 Litigation (Wolters Kluwer Law & Business 2014) at §§ 6.01[A], 6.01[E], 6.08, 6.08[A], 6.08[B], 6.09[F]. In addition, a

[13] R. p. 121, line 8- p. 122, line 23

cause of action can be be stated under 42 USC §1983 due to retaliation against a plaintiff for having exercised his First and Fourteenth Amendment rights. *Id.* at §§ 4.01[F][1], 6.01[A], 6.01[B], 6.01[D], 6.02[A], 6.09[A].

Indeed, the United States District Court for the District of South Carolina has stated:

> The "right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right." (citations omitted) (reasoning that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited").

Int'l Ass'n of Machinists & Aerospace Workers v. Haley, 832 F.Supp.2d 612, 627 (D.S.C. 2011).

In addition, that Court has stated "plaintiffs should rest assured that if the defendants actually infringe their rights through imminent threats or retaliatory action, the federal courts stand ready to grant relief," *id.* at 635, and that:

> To establish a First Amendment § 1983 retaliation claim, a plaintiff must demonstrate (1) "that his or her speech was protected," (2) "that the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech," and (3) "that a causal relationship exists between its speech and the defendant's retaliatory action."

Id. at 628, quoting *Suarez Corp. Indus. v. McGraw,* 202 F.3d 676, 685-686 (4th Cir. 2000)(quotation marks and citations omitted).

For the purposes of reviewing this motion to dismiss, assuming the allegations of the complaint in the light most favorable to the plaintiff, Messinger's speech about

the method by which some of the Defendants funded SROs[14] was private[15] speech protected by the First Amendment. Defendant Phinney's complaints to Messinger's employer about Messinger's private speech on Messinger's private website resulted in Messinger's foreseeable removal as the Administrator of the website and, therefore, cessation of Messinger's expression of his views on that website.[16] Phinney's complaints to Turner's employer[17] about Turner expressing views similar to those expressed by Messinger further made Messinger fear Messinger could lose his job. Further, McIntosh's written and verbal threats[18] that McIntosh would contact Messinger's employer, and McIntosh's repeated harsh public defamatory public statements denigrating Messinger's worth and performance as a police officer,[19] all made Messinger fear loss of his employment if he continued expressing his views. The allegations of the Second Amended Complaint expressly and/or impliedly state these points, and Messinger should be able to proceed to discovery to obtain additional evidence to use at trial.

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[14] R. p. 119, line 13- p. 120, line 22

[15] Plaintiff Messinger's speech pertained to his disagreements with the manner of funding SROs for Dorchester School District Two and other actions by governments in Dorchester County, not regarding anything involving his employment by the Mt. Pleasant Police Department (R. p. 119, line 13- p. p. 122, line 23). Thus, Messinger's speech was as a private citizen about a matter of public concern, and therefore was protected by the First Amendment. See, e.g., 2014 Handbook of Section 1983 Litigation, supra at 23.

[16] R. p. 121, line 8- p. 122, line 23

[17] R. p. 120, line 23- p. 121, line 7; p. 138 lines 8-28; p. 139, line 15- p. 140, line 6

[18] R. p. 103, lines 5-10; p. 119, line 13- p. 122, line 24; p. 138 lines 8-28; p. 139, line 15- p. 140, line 6

[19] R. p. 119, line 13- p. 120, line 22; p. 121, line 8- p. 122, line 23; p. 138 lines 8-28; p. 139, line 15- p. 140, line 6

Similarly, "the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved." *Rutan v. Republican Party*, 497 U.S. 62, 64 (1990). The First Amendment provides that protection to Messinger, who is a public employee as a police officer at the Mt. Pleasant police department.[20]

Moreover, according to the Second Circuit Court of Appeals:

> Where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim can be stated. Similarly, claimants who can demonstrate that the distribution of items containing protected speech has been deterred by official pronouncements might raise cognizable First Amendment issues.

Hammerhead Enters., Inc. v. Brezenoff, 707 F. 2d 33, 39 (2d Cir. 1983).

The Fourth Circuit has held that "[g]overnment action [is] sufficiently chilling when it is 'likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights.'" *Benham v. City of Charlotte,* 635 F.3d 129, 135 (4th Cir. 2011). This determination calls for an objective analysis, which "can be resolved as a matter of law." *Balt. Sun Co. v. Ehrlich,* 437 F.3d 410, 416 (4th Cir. 2005). Further, "[w]hat the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan*, 497 U.S. at 77-78.

Messinger's Constitutional Claims are based in part on allegations of intimidating and retaliatory actions by the Defendants to prevent future private

[20] R. p. 121, line 8- p. 122, line 23

speech and government protests by Messinger and to punish Messinger for his past private speech and protests that the Defendants disliked. They are alleged to have been based also on the coerced, involuntary removal of Messinger as the Administrator of a private website expressing Messinger's private views; on involuntary counseling sessions with him by his employer; and on the Defendants' repeated attempts to cause and threats to cause Messinger to lose his employment -- all caused by the Defendants.

Allegations in the Second Amended Complaint state that Phinney, while an officer of and upon the instructions of his supervisors at the Dorchester County Sheriff's Department,[21] contacted the employer of Messinger[22] and the employer of Rowland Turner,[23] on separate occasions, and attempted to have their employments terminated because the Defendants disliked their speech.[24] Phinney complained by e-mail to the Director of the Department of Public Safety at the Medical University of South Carolina, Turner's employer, that Turner was the Administrator of the Facebook page for Concerned Citizens of Dorchester County where Phinney claimed Messinger made slanderous statements about Phinney and the Dorchester County Sheriff's Office.[25] Similarly, Phinney complained to the Chief of the Mt. Pleasant Police Department, Messinger's employer, that Messinger was the Administrator of the Facebook page for Concerned Citizens of Dorchester County where Phinney

[21] R. p. 121, line 8- p. 122, line 23
[22] R. p. 121, line 8- p. 122, line 23
[23] R. p. 121, line 8- p. 122, line 23
[24] R. p. 121, line 8- p. 122, line 23
[25] R. p. 121, line 8- p. 122, line 23

claimed Messinger made slanderous statements.[26] As a result, and as sought and desired by Phinney, Messinger was required to cease being the Administrator of that Facebook page and, thereby, to cease criticizing the Dorchester County Sheriff on that webpage, as a condition of his continued employment with the Mt. Pleasant Police Department.[27] Phinney knew or should have know that result would occur.

Further, as alleged in the Second Amended Complaint, McIntosh harrassed and instilled fear in Messinger by repeatedly threatening Messinger that McIntosh would interfere with Messinger's employment by contacting Messinger's employer, as had Phinney, to denigrate Messinger and to complain about Messinger's statements and opposition to the Sherriff's SRO funding scheme.[28]

B. Plaintiff Messinger stated a valid § 1983 cause of action based on violation of his due process rights.

The trial court erred in finding that the Plaintiff Messinger did not state a cause of action for a § 1983 cause of action for violation of his rights under the due process clause of the Fourteenth Amendments of the United States Constitution by interfering with his liberty or property, including employment and/or rendering him virtually unemployable. See, e.g., *Paul v. Davis*, 424 U.S. 693, 705, 96 S.Ct. 1155, 1162, 47 L.Ed.2d 405 (1976)(stigmatization coupled with loss of legal status, including loss of employment, can be a deprivation of liberty for due process purposes).

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[26] *Id.*
[27] *Id.*
[28] R. p. 119, line 13- p. p. 122, line 23

The Complaint alleges McIntosh and Chinnis evidenced their malicious and vindictive motives and animus against Messinger with harsh and angry words denigrating Messinger's professional abilities that McIntosh published, gratuitously and unprovoked, and that Chinnis republished, on a Facebook website. McIntosh and Chinnis did not just express their views on issues. They are alleged to have publicly attacked and denigrated the professional qualifications and competence of Messinger. Phinney gratuitously volunteered false statements about Messinger to Messinger's employer, the Chief of Police of Mt. Pleasant, SC, for the purpose and with the effect of getting Messinger removed as the administrator of a website expressing views disapproved by Phinney and his supervisors. Those statements coupled by attempts to get Messinger's employment terminated and to get Messinger to fear termination of his employment (in part by publishing those defamatory words), as well as requiring Messinger to be involuntarily counseled by his employer and to cease being the Administrator of a website on which his speech was constitutionally protected, constitute a loss of liberty and property in violation of the due process clause of the Fourteenth Amendment of the United States Constitution and of Section 1983. False statements allegedly resulting in exclusions from employment but not associated with termination have been upheld as actionable under Section 1983. See *Larry v. Lawler*, 605 F.2d 954 (7th Cir. 1978); *Bone v. City of Lafayette*, 763 F.2d 295 (7th Cir. 1985); *Sudeikis v. Chicago Transit Authority*, 774 F.2d 766, 771 (C.A. 7 (Ill.), 1985).

The Second Amended Complaint alleges that the Defendants' threats and personal attacks on Plaintiff Messinger were part of a pattern, a conspiracy and a

continuation of past efforts by officials of Dorchester County, the Town and the Dorchester County Sheriff to discredit, defame, intimidate and interfere with the Constitutional rights and with the employment of Messinger and others who criticize or oppose their actions or policies.

These alleged facts, in combination, provide an ample basis for Messinger's Constitutional Claims not to be dismissed for violations of the First and Fourteenth Amendments of the United States Constitution, as well as of Article I, Section 2 of the South Carolina Constitution.

C. Eleventh Amendment Immunity does not support dismissal of Messinger's causes of action.

"Municipalities are not protected by the Eleventh Amendment," *City of Oakland v. Federal Maritime Commission,* 724 F.3d 224, 227 (D.C. Cir. 2013), and "the Eleventh Amendment does not bar a § 1983 lawsuit against counties and municipalities." 2014 Handbook of Section 1983 Litigation, supra at 7-32, 7-33, § 7.02[D], citing *Northern Insurance Company of New York v. Chatham County,* 547 US. 189 (2006) (noting that only states and arms of the state possess Eleventh Amendment immunity from suits authorized by federal law; this immunity does not extend to counties); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 123 n. 34 (1984). *See also Frazar v. Gilbert*, 300 F.3d 530, 543 n. 67 (5th Cir. 2002) (cities do not enjoy Eleventh Amendment immunity).

Therefore, the Eleventh Amendment does not bar Messinger's constitutional claims against Dorchester County and the Town of Summerville; against Chinnis,

who acted as an official of Dorchester County; and against McIntosh, who acted as an official of the Town of Summerville.

Concededly, the "Eleventh Amendment bars § 1983 lawsuits against a state, its agencies, and its officials sued in their official capacities for damages." 2014 Handbook of Section 1983 Litigation, supra at 7-35, § 7.02[D], citing *Cady v. Arrowneck County*, 574 F.3d 334, 342 (6th Cir. 2009) (emphasis added).[29]

> However, the Eleventh Amendment generally does not bar a federal-court suit so long as it (1) seeks only declaratory and injunctive relief rather than monetary damages for alleged violations of federal law; and (2) is aimed at state officers acting in their official capacities, rather than against the state itself.

2014 Handbook of Section 1983 Litigation, supra at 7-36, § 7.02[D], citing *Hill v. Kemp*, 478 F.3d 1236, 1255 (10th Cir. 2007) (emphasis added).

Moreover, the Eleventh Amendment has not prevented federal suits against state officials in their personal capacities, since it is well-established that personal liability suits are not barred by the Eleventh Amendment. *Ex parte Young*, 209 US 123, 28 S.Ct 441, 52 LE 714 (1908); *Scheur v. Rhodes*, 416 US 232, 94 S.Ct 1683, 40 LE2d 90 (1974); *American Civil Liberties Union of Mississippi, Inc. v. Finch*, 678 F.2d 1336 (5th Cir. 1981).

As stated in Civil Actions Against State Government Its Divisions, Agencies and Officers (Shepard's/McGraw-Hill 1982):

> When officials' conduct exceeds the sphere of their allocated power, or violates the constitutional rights of others, the officials will be stripped of their representative nature and, as a result, of the Eleventh Amendment shield. *Ex parte Young*, 209 US 123, 28 S.Ct 441, 52 LE 714 (1908) . . .. [A]n action may be instituted against a state employee who is charged with depriving others of

[29] "Units of government [e.g., counties and cities], however, are not entitled to sovereign immunity under the Eleventh Amendment. Id. at 345

their constitutional rights while acting under color of state law. *Scheur v. Rhodes*, 416 US 232, 94 S.Ct 1683, 40 LE2d 90 (1974).

Id. at 197-198, § 4.35.

The trial court ruled that the Sheriff of Dorchester County is an agency of the State of South Carolina and, therefore, that the Eleventh Amendment bars Plaintiff Messinger's Constitutional Claims under § 1983 against the Sheriff of Dorchester County and against Lt. Phinney, the Sheriff's subordinate employee. However, as shown by the authorities cited above, although the Eleventh Amendment may bar Messinger's Constitutional Claims for damages against the Sheriff and Phinney in their official capacities, the Eleventh Amendment does not bar Messinger's § 1983 claims for damages against Phinney in his personal[30] capacity and does not bar Messinger's § 1983 claims for declaratory and prospective injunctive relief against the Sheriff and Phinney in their official capacities. The trial court's ruling to the contrary was error.

D. Legislative Immunity does not provide a basis to dismiss Messinger's causes of action.

The United States Supreme Court has held that "municipal bodies sued under § 1983" for constitutional violations "cannot be entitled to . . . absolute immunity." *Monell v. DSS*, 436 U.S. 658, 701 (1978). Moreover, a municipality is not entitled to qualified immunity under section 1983 based upon the good faith of its officers or

[30] Phinney is being sued in his personal and official capacities. R. p. 112 lines 12-14.

agents. See *Owen v. City of Independence*, 445 U.S. 622, 650 (1980) (concluding that because "a municipality has no 'discretion' to violate the Federal Constitution," review of a municipality's conduct under section 1983 does not interfere with the municipality's policy discretion, which the immunity was accorded to preserve. Id. at 649.

The *Owen* Court surveyed the common law and found that there was "no [common law] tradition of [qualified] immunity for municipal corporations" based upon the good faith of their officers or agents. *Id.* at 638. It then considered whether Congress intended to import into section 1983 either of the municipal immunities that were recognized at common law. It concluded that Congress could not have intended either the common law municipal immunity for "governmental" (as distinguished from proprietary) activities or the immunity for "discretionary" or "legislative" (as distinguished from ministerial) activities to limit municipal liability under section 1983. See *id.* at 644-50.

In § 1983 actions for violations of constitutional rights, immunity "attaches to all acts taken `in the sphere of legitimate legislative activity,' and "[w]hether an act is legislative turns on the nature of the act itself, rather than on the motive or intent of the official performing it. *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (citations omitted). The United States Supreme Court has recognized that the applicability of immunity in a Section 1983 action depends on the answer "to the question whether from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity;" that "[l]egislatures may not of course acquire power

by an unwarranted extension of privilege;" and that the Supreme Court "has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Tenney v. Brandhove,* 341 U.S. 367, 376-77 (1951).

In *Bogan,* the United States Supreme Court ruled that a city's Mayor and other officials had immunity from civil liability for their conduct in introducing, voting for and signing an ordinance to eliminate a plaintiff's office, despite the fact that that the elimination was found by a jury to be racially motivated, because the nature of the actions to introduce, vote for and sign an ordinance was by definition "legitimate legislative activity."

In contrast, however, the actions by Phinney, McIntosh, Chinnis, Dorchester County, the Dorchester County Sheriff and the Town of Summerville that are the gravamen of Messinger's § 1983 action against them for violating his constitutional rights are not legitimately legislative in nature. There is nothing legitimately "legislative" about those Defendants contacting the employers of Messinger and Turner to attempt to get Messinger's and Turner's employments terminated. There is nothing legitimately "legislative" about Phinney contacting Messinger's employer causing Messinger to be removed as administrator of a website where Messinger had been expressing his protected private political speech. There is nothing legitimately "legislative" about McIntosh threatening Messinger that McIntosh might provide derogatory information about Messinger to Messinger's employer, thereby jeopardizing Messinger's continued employment. Further, there is nothing legitimately "legislative" about Phinney, McIntosh and Chinnis publicly discrediting

and attacking Messinger personally and professionally on Facebook in retaliation for Messinger's expressed views and petitions for redress to his local governments, instead of commenting solely on the merits of issues.

For all of these reasons, the nature of the actions by the Defendants complained about by Plaintiff Messinger is not "legitimate legislative activity" and, therefore, those Defendants do not have legislative immunity preventing them from being held accountable under § 1983 for violations of Messinger's constitutional rights.

E. The South Carolina Tort Claims Act does not provide a basis to dismiss Messinger's causes of action.

The South Carolina Tort Claims Act "grant[s] the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter." S.C. Code Ann. § 15-78-20(b) (Supp.1997). Section 15-78-70(b) of the South Carolina Tort Claims Act provides:

> Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

See *O'Laughlin v. Windham*, 330 S.C. 379, 383, 498 S.E.2d 689, 673 (S.C. App., 1998).

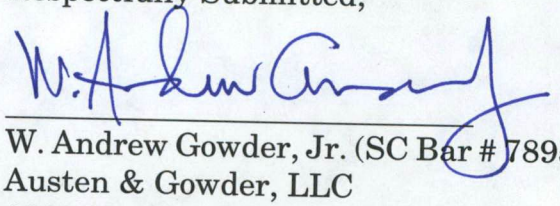
The allegations in the Second Amended Complaint allege facts that support the conclusion that Defendants Phinney, McIntosh and Chinnis were acting outside the scope of their duties, with actual malice and with intent to harm when they

contacted Messinger's and Turner's employer, threatened to contact Messinger's employer, caused Messinger to be removed as administrator of a website advocating private political speech, published defamatory words attacking Messinger personally, and engaged in other alleged activities for the purpose and with the effect of harming and deterring the free speech of Messinger.

CONCLUSION

This Court has jurisdiction to decide this case. It is not a tax collection appeal requiring decision by the Administrative Law Court but is a challenge to Dorchester County and the Town of Summerville's practice of funding SROs in the schools in Dorchester Districts 2 and 4 using property taxes on owner occupied homes in violation of Act 388. Mr. Messinger has stated valid causes of action under the state and federal constitutions and Section 1983 in the complaint. Appellants respectfully request that the Court reverse the orders of the trial court and remand this case to the Circuit Court for further proceedings.

Respectfully Submitted,



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March 20, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Kristi Lea Harrington, Circuit Court Judge

RECEIVED
MAR 22 2019
SC Court of Appeals

Appellate Case No: 2018-001262

Dorchester County Taxpayers Association, individually and on behalf of all others similarly situated, Weatherstone Property Owners Association, individually and on behalf of all others similarly situated, George Resnick, William A. Harbeson, James Stephen Greene, Jr., Homer P. Gonzalez, Gerald E. Ziegler and South Carolina Public Interest Foundation, ... Appellants,

v.

Dorchester County, Dorchester County Council, David Chinnis, George Bailey, Jay Byars, Willie Davis, Carroll S. Duncan, Larry Hargett and William R. Hearn, Jr., in their official capacities as members of Dorchester County Council, Town of Summerville, Summerville Town Council, William E. McIntosh, III, in his official capacity, Dorchester County Sheriff, Luther C. Knight, in his official capacity, Dorchester School District Two, Dorchester School District Two Board of Trustees, Joseph R. Pye, Justin Farnsworth, Gail Hughes, Brian Mitchum, Tanya Robinson, Sam Clark, Barbara Crosby and Lisa Tupper, in the official capacities, Dorchester School District Four, Dorchester School District Four Board of Trustees, Dorchester County Career and Technology Center, and Dorchester County Career and Technology Center Board of Trustees,.....Respondents.

Certificate of Counsel

The undersigned hereby certifies that the Brief of Appellant complies with Rule 211(b) SCACR.

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