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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2021-001520
Case No. 2016-CP-08-0131

Jeffrey Lance Cruce, ... Petitioner,

v.

Berkeley County School District, ... Respondent.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is an appeal from a defamation action brought against the Respondent Berkeley County School District ("School District") pursuant to the South Carolina Tort Claims Act. The Petitioner Jeffrey Cruce is the former head football coach and athletic director at Berkeley High School. Following the 2015 football season, Cruce was relieved of his duties in those two positions and was transferred to a counselor position at a middle school in the School District. Cruce later left the employment of the School District following the 2015-2016 school year.

During his tenure at head football coach at Berkeley High School, Cruce had only one winning season and several losing seasons capped by a 3-7 record during the 2015 football season. (R. 253-254). That season was notable for Cruce's use of a controversial and well-publicized no-punt strategy. Under that approach, Cruce vowed never to punt on fourth downs regardless of field position or the distance required for the offense to achieve a first down. He believed that the "analytics" supported such an unconventional strategy. (R. 254-259, 268-269, 362-366, 919). Cruce publicized his new approach prior to the season and spoke often to the media, both local and national, about that specific strategy. In doing so, Cruce developed notoriety for himself. He also created and fostered substantial controversy and public scrutiny for himself and his football program. (R. 538-544, 897, 901-903, 904-905, 908-909, 910, 912-914, 918, 919-920, 945, 948, 966, 970).

In 2016, Cruce brought a civil action against the School District for wrongful termination and defamation. Those causes of action proceeded to trial before Circuit Court Judge Kristi Lea Harrington and a jury on September 5, 2017. At the close of the plaintiff's case-in-chief and again at the close of all the evidence, the School District made motions for a directed verdict on

numerous grounds, including sovereign immunity under Section 15-78-60(17) of the Tort Claims Act. The School District also argued that Cruce failed to satisfy each of the elements of his defamation claims.

Ultimately, the trial court granted a directed verdict in the School District's favor on the wrongful termination claim. (R. 460). The trial court also granted a directed verdict in the School District's favor on the defamation claim which was based on the School District's silence when it removed Cruce as the head football coach and athletic director. (R. 468-469). No appeal was filed from those dispositive rulings.

The only claim that was submitted to the jury was the defamation claim arising from a single email dated January 7, 2016, sent by Chris Stevens, who was Berkeley High School's head athletic trainer. That email was sent to the athletic coaches, paid and volunteer, as well as select administrators at the school. (R. 532). There were no other recipients of that email. The email was entitled "Student Athlete Eligibility and Medical Files" and addressed Stevens' attempt to make certain that the student-athletes' eligibility files were complete and in order. In the email, Steven expressed uncertainty as to whether the files were complete, and he requested assistance from the coaches to provide rosters of their student-athletes so that he could make sure that files were complete for all competing student-athletes. (R. 532).

The trial court denied the School District's directed verdict motions as to the defamation claim pertaining to the January 7, 2016 email. (R. 469). In so doing, the trial court ruled as a matter of law that Cruce did not qualify as a "public official" or a "limited public figure" under prevailing defamation law. (R. 461-462). On that basis, the trial court ruled that the School District was not entitled to sovereign immunity under Section 15-78-60(17). The trial court also rejected other arguments with respect to the email. That claim was submitted to the jury, which

ultimately returned a verdict of $200,000 in actual damages in Cruce's favor. (R. 12-13, 509-510).

The School District then moved for a JNOV and new trial absolute on the same grounds previously raised. By order filed March 29, 2018, the trial court denied the School District's post-trial motions. (R. 1-9). The School District thereafter filed a timely appeal to the Court of Appeals.

On September 1, 2021, the Court of Appeals issued a published decision reversing the trial court's denial of the motions for directed verdict and JNOV on the remaining defamation claim. The Court of Appeals concluded that "the Tort Claims Act bars the action as Cruce was required to prove actual malice because he was a public official." *Cruce v. Berkeley County School District*, 435 S.C. 7, 865 S.E.2d 391, 399 (Ct. App. 2021). Cruce filed a petition for rehearing which was denied.

DISCUSSION

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. The School District submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is unwarranted in this case. Specifically, the decision of the Court of Appeals was unanimous. There was no dissenting opinion, nor even a concurring opinion filed. The Court of Appeals' decision was based on existing state and federal precedent, including the Court of Appeals' decision in *Garrard v. Charleston County School District*, 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019). The appeal does not, therefore, present a novel issue of law. Instead, the Court of Appeals' decision is consistent with prior precedent from this Court and the Court of Appeals, much of which is based on well-established federal jurisprudence. For these reasons alone, the issuance of a writ of certiorari is not warranted.

II. The Court of Appeals correctly ruled that Jeffrey Cruce, as the athletic director and head football coach, qualified as a public official, and as such, proof of "actual malice" is an element of his defamation claim, meaning that his claim was correctly found to be barred by sovereign immunity under Section 15-78-60(17).

As his first question presented for review, the Petitioner Cruce contends that the Court of Appeals' decision conflicts with prior decisions of this Court and the United States Supreme Court. That is not the case. In fact, a review of Cruce's discussion of prior precedents is riddled with errors. Cruce continually confuses the terms "public official" and "public figure." By way of

example, Cruce states that the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), differentiated between "two types of public officials, general and limited." *See*, Petition, p. 5. However, *Gertz* focuses on public *figures*. There is no such thing as a general or limited public official. Cruce makes the same error again when discussing *Time, Inc. v. Johnson*, 448 F.2d 378 (4th Cir. 1971). That case never addresses whether the former Boston Celtic great Bill Russell was a "public official." Instead, he was found to be a "public figure."

In short, the Court of Appeals correctly applied the precedents from this Court and the United States Supreme Court on identifying a public official. This Court has explained that "an important initial step to analyzing any defamation case is determining whether a particular plaintiff is a public official, public figure, or private figure." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653, 666 (2006). "This determination is a matter of law which must be decided by the court on a case by case basis after a careful examination of the facts and circumstances." *Id.* While recognizing there is no "all-encompassing definition of 'public official,'" this Court applies the general rule that "a public official is a person who, among the hierarchy of government employees, has or appears to the public to have substantial responsibility for or control over the conduct of governmental affairs." *Id., citing Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). "In considering the question of whether one is a public official, the employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id*. Importantly, "[t]he status of a public official may be deemed sufficient to warrant application of the *New York Times* privilege, *not because of the government employee's place on the totem pole, but because of the public interest in a government employee's activity in a particular contex*t." *Id*. (Emphasis added).

In this case, the Court of Appeals correctly held that Cruce, as the athletic director and head football coach, qualified as a public official. Cruce disputes this by downplaying or deliberately misstating the public interest, the public and media scrutiny, and the actual role that the athletic director and head football coach play, particularly under the facts of this case. He insists that high school football coaches and athletic directors "are not persons who have substantial responsibility for or control over governmental affairs." *See*, Petition, p. 7. However, as this Court establishes in *Erickson* and other cases, the real focus is on whether the employee's position is one which "would invite public scrutiny and discussion of the person holding it." *Erickson*, 629 S.E.2d at 666.[1]

As the record amply reflects, Cruce's position as coach and athletic director drew far more public attention than the average government employee's position. As a coach, his team's games were covered routinely by the local media, as were his efforts as the athletic director to create a hall of fame for Berkeley High School. (R. 552-973). This media attention reflected the public's interest in the Berkeley High School football team, which was as intense (according to Cruce's wife) as fans' interest in NFL teams. (R. 387-389). Moreover, as an athletic director,

[1] Notwithstanding Cruce's commentary to the contrary, it is well settled that high school and college sports can be and often are the subject of intense public controversy and scrutiny. In *Time, Inc. v. Johnson*, 448 F.2d 378 (4th Cir. 1971), the Fourth Circuit explained that "the *New York Times* privilege is not confined to 'political expression or comment upon public affairs,' nor even matters of social utility or educational value. It embraces the entire range of legitimate public interest." 448 F.2d at 382-383. The Fourth Circuit further recognized that "[s]uch a test clearly is sufficient to cover sports and sports figures, whose 'public interest' character is amply demonstrated by the elaborate sports section in every daily newspaper published in this nation and by the numerous periodicals, such as that involved here, exclusively devoted to sports." 448 F.2d at 383. That Fourth Circuit case, of course, pre-dates the existence of the internet as a source for sports news, cable sports networks such as ESPN, social media, fantasy leagues, and the like which make sports an even bigger subject of intense public interest today than in 1971. In short, sports is an important part of people's lives and very clearly is part of the public discourse, including intense public interest and scrutiny of its coaches even on the high school level.

Cruce oversaw all of the sports at Berkeley High School, which fielded at that time every sport offered in South Carolina except lacrosse. (R. 179). As the record clearly reflects, Cruce's level of public attention and scrutiny stands in stark contrast to the lack of public attention and scrutiny typically shown to other teachers at Berkeley High School.

This was particularly true during the 2015 football season given Cruce's use of a controversial and well-publicized no-punt strategy. Prior to that season, Cruce vowed never to punt on fourth down, which was unconventional, and thus commanded substantial public attention and scrutiny. Cruce's no-punt strategy and his team's performance were the subject of numerous local media articles. (R. 897, 901-903, 904-905, 908-909, 910, 912-914, 918, 919-920, 945, 948, 966, 970). The no-punt strategy was even the subject of an article in the September 21, 2015 edition of the *Kansas City Star*, in which Cruce was frequently quoted as a proponent of that strategy. (R. 538-544). In employing such an unconventional approach and then defending it in numerous media opportunities, Cruce brought greater than normal attention to himself and his football team. In effect, Cruce's no-punt strategy commanded greater public attention and scrutiny than a more conventional football coach would receive. The record further reflects that Cruce's strategy was the subject of tremendous public discussion and displeasure. Principal Steven Steele, in fact, testified about a planned fan protest and also the need to provide the coach with police protection at games. (R. 364-365, 546-547).

The Court of Appeals' determination that Cruce qualified as a public official is also fully supported by the Court's earlier decision in *Garrard v. Charleston County School District*, 429 S.C. 170, 838 S.E.2d 698 (Ct. App. 2019). In that case, the Court of Appeals found that the head football coach at Academic Magnet High School in the Charleston area qualified as a public official. In addition to holding several coaching position, Coach Walpole in *Garrard* was found to

"interact[] with the parents of the athletes after each game and he participates in newspaper and television interviews. Furthermore, as head coach, he is responsible for the oversight of the teams' activities." 838 S.E.2d at 719. The public interest in Cruce and his team, and the public notoriety that arose from Cruce's unconventional approach to football, clearly made Cruce a public official under the *Erickson* analysis.

As the Court of Appeals also noted in *Garrard* and this case, there are numerous cases from other jurisdictions that support the conclusion that a high school athletic director and head football coach qualifies as a "public official." In *Johnson v. Southwestern Newspapers Corp.*, 855 S.W.2d 182 (Tex. App. 1993), the Texas Court of Appeals concluded that a high school athletic director and head football coach qualifies as a "public official." The Texas court first explained that "[t]he 'public official' designation does not apply to all government employees, but applies where 'a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees.'" 855 S.W.2d at 186, *citing Rosenblatt*, 383 U.S. at 86. In applying that test, the Texas court explained as follows:

> This dual position [as head football coach and athletic director] was, so the record reveals, of such apparent importance that the public had an independent interest in the qualifications and performance of the person who occupied the positions, beyond the general public interest in the qualifications and performance of all government employees.
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> * * * * *
>
> Johnson's position of and activities as athletic director ... show that he was vested with and exercised significant governmental responsibility on behalf of the school district in his sole operation of the athletic department. As head football coach, Johnson filled a position of such importance that the public not only had, but

> exhibited, an independent interest in his qualifications and performance, transcending any interest shown in other employees of the school system.

855 S.W.2d at 186-187.

Likewise, the Oklahoma Supreme Court held that a wrestling coach was a public official because his position "was of apparent importance in that public school's athletic program for the public to have an independent interest in [the coach's] performance." *Johnston v. Corinthian TV Corp.*, 583 P.2d 1101, 1103 (Okla. 1978).

A New Jersey court has similarly reasoned that a public-school athletic director is a public official. In *Standridge v. Ramey,* 733 A.2d 1197 (N.J. Super. Ct. App. Div. 1999), that court explained:

> As athletic director, plaintiff was responsible for managing and supervising all the athletic programs in the Roxbury school district, including twenty-four athletic teams. In performing these responsibilities, plaintiff administered a substantial budget and supervised approximately sixty coaches and other employees. He also spoke at booster club meetings and various other community functions. Moreover, we take note of the fact that the performance of high school athletic teams is often a matter of substantial public interest within a community. Therefore, we conclude that plaintiff was a "public official" and must show actual malice to establish his defamation claims.

733 A.2d at 1201-02.

Moreover, the seminal Supreme Court decision in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), is instructive. The plaintiff was Wally Butts, who, as the athletic director and head football coach at the University of Georgia, was accused in a newspaper article of "fixing" the outcome of a football game. The Supreme Court ultimately treated Butts as a "public figure" rather than a "public official" only because he was "not technically a state employee" in holding those positions. Butts was, in actuality, employed by the Georgia Athletic Association, a private

corporation. Nonetheless, the Supreme Court acknowledged that "the public interest in education in general, and in the conduct of athletic affairs of educational institutions in particular, justifies constitutional protection of discussion of persons involved in it equivalent to the protection afforded discussion of public officials." 388 U.S. at 146. The Supreme Court further recognized the "public interest in the materials here involved" and that Butts, as the head football coach, commanded a "substantial amount of public interest." 388 U.S. at 154. Given the Court's analysis, it is clear that, had Butts been employed by the State of Georgia rather than a private corporation, the Supreme Court would have clearly concluded that Butts qualified as a "public official" in his roles as athletic director and head football coach.

Thus, there is ample support for the Court of Appeals' ruling as a matter of law that Jeffrey Cruce, as the athletic director and head football coach, qualifies as a public official. Notably, Cruce does not contest the Court of Appeals' ruling that, as a public official, he had the burden of proving actual malice. *See, Erickson,* 629 S.E.2d at 665 ("to prove fault in a defamation action, a plaintiff who is a public official or public figure must prove by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff"). Likewise, Cruce does not contest that Section 15-78-60(17) of the Tort Claims Act provides that the School District enjoys absolute sovereign immunity for any employee conduct constituting actual malice, and as a result, Cruce's defamation claim against the School District is barred as a matter of law to the extent he qualifies as a public official (or, for that matter, as a limited public figure). *See*, *Gause v. Doe*, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994).

In his petition, however, Cruce does take liberties in an attempt to broaden the Court of Appeals' ruling so as to curry favor or support for a writ of certiorari to be issued. On several

occasions, Cruce argues that, based on the Court of Appeals' decision, "now all teachers in South Carolina are public officials." *See*, Petition, p. 11.[2] That, of course, is not the Court's holding – the Court of Appeals addressed Cruce's status as the athletic director and head football coach, including the public interest and notoriety he fostered in those roles. The Court of Appeals did not hold that every teacher is a public official.

Cruce is also critical that the Court of Appeals did not engage in the five factor test that this Court (and the Fourth Circuit) employs to determine whether a plaintiff qualifies as a limited public figure. That test, however, has no applicability to determining whether a plaintiff qualifies as a public official. Hence, because the Court of Appeals found Cruce to be a public official, the Court did not find it necessary to address that five factor test and ultimately did not rule whether or not Cruce met the test to be a limited public figure. That was an alternative position asserted by the School District, but, as indicated, it was not necessary for the Court to reach that issue. However, as argued below, should this Court grant a writ of certiorari and ultimately reverse on the public official determination, that alternative theory would need to be addressed, as potentially would other grounds for reversal on the defamation verdict that the Court of Appeals did not find it necessary to reach.

In sum, as aptly observed by the New Jersey court in the *Standridge* case, "the performance of high school athletic teams is often a matter of substantial public interest within a community." *Standridge*, 733 A.2d at 1202. To a even more heightened degree, that is the case in South Carolina where high school athletics does garner tremendous public interest and media

[2] As another example, Cruce incorrectly writes: "The Court of Appeals erred by holding that because both individuals were high school athletic directors, coaches *and teachers*, they were both public officials." *See*, Petition, p. 8. (Emphasis added). However, in both this case and *Garrard*, the Court of Appeals never suggested that a teacher – with no other role or other unique facts – is to be treated as a public official.

attention. And that is certainly the case in Berkeley County during the 2015-2016 school year – even more so given Cruce's no-punt strategy and its media coverage and notoriety.[3] In short, the Court of Appeals correctly applied the prevailing precedents and held that Cruce qualifies as a "public official" under *New York Times*, *Rosenblatt*, and their progeny. A writ of certiorari on this issue is not warranted.[4]

III. The Court of Appeals correctly ruled that the School District's argument that Cruce qualified as a public official was raised at the directed verdict stage and was an appropriate issue to be adjudged on appeal.

As an initial argument, the Petitioner Jeffrey Cruce continues to argue that the School District did not raise the public official argument in its directed verdict motion. The Court of Appeals correctly rejected that preservation argument. The Court carefully review the directed

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[3] Notably, Wendy Cruce, the coach's wife, testified that her husband's position as the head football coach at Berkeley High School was "sort of like being a coach for the Philadelphia Eagles or something like that." (R. 387).

[4] On the public official issue, Cruce does raise a new issue that was not raised in the court below or, more importantly, in his petition for rehearing. Rule 242(d)(2), SCACR, provides: Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2), SCACR. Cruce writes: "After Respondent was terminated as athletic director and football coach, he was not a public official as a public official is a person who retains notoriety." *See*, Petition, p. 11. Here is another example where Cruce cites *Gertz* and confuses "public official" with "public figure." Nonetheless, any suggestion that Cruce was not correctly treated as a public official because he had been terminated as athletic director and head football coach when the allegedly defamatory email was sent is clearly invalid. Without dispute, the email addressed Cruce's job performance as athletic director and not his job performance as a middle school counselor. Cruce, in fact, acknowledges just that: the email "concerned Respondent's actions as athletic director." *See,* Petition, p. 12. As the athletic director, Cruce was a public official, and therefore, any statement or critique of his job as athletic director is one for which he was properly treated as a public official. Moreover, a public official does not instantaneously lose that status for defamation purposes the minute he leaves that position. Cruce, in fact, remained a subject of media attention after his job reassignment. Nonetheless, Cruce never raised this issue in the Court of Appeals nor in his petition for rehearing. It is a new issue raised for the first time in his petition for writ of certiorari, which is improper under Rule 242(d)(2).

verdict colloquy and concluded that "the issue was sufficiently argued to the circuit court to address it on appeal." *Cruce*, 865 S.E.2d at 398.

Issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, S.E.2d 282, 285 (2012). The Supreme Court has explained: "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved." 730 S.E.2d at 285. (Emphasis added). "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." 730 S.E.2d at 287. (Toal, C.J., concurring in result in part and dissenting in part). "At the very least, the matter must have definitely been called to the attention of the trial court sufficiently to obtain a ruling thereon." *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543, 546 (2000).

In the present case, the School District raised to the trial court the alternative theories that Cruce was a public official or a limited public figure. The record shows that counsel for the School District addressed whether Cruce was a public official. (R. 429, 441-442). The trial judge even asked Cruce's counsel whether she agreed that Cruce was a public official. (R. 441-442). In addition, there were numerous comments by Cruce's counsel and the trial judge as to whether Cruce was a "limited public official." (R. 434-436, 438, 441, 443). Cruce's counsel even discussed limited public figure as being "a subset of public official." (R. 436). Thus, the colloquy at directed verdict demonstrates that the "public official" issue was raised.

That is certainly supported by the post-trial proceedings where the parties discussed in detail the public official issue. Cruce's counsel never objected to the trial court's consideration of that issue, and in fact, she made the same argument that "[a] limited public official is a subset

of a public official." (R. 100). She also argued that "[i]f he's not a limited public official, he's not a public official." (R. 100). In addition, in its written order, the trial court clearly addresses the "public official" issue and even acknowledges that "[t]he Defendant makes excellent arguments in support of its position that Plaintiff should be classified as a public official." (R. 4). In sum, the public official issue was certainly raised, argued, and adjudicated in the court below, and, as the Court of Appeals concluded, that issue is sufficiently preserved for appellate review.

IV. If the Court grants the Petitioner's petition for writ of certiorari, the Court must also consider the other issues for reversal as raised by the School District on appeal but which the Court of Appeals did not find it necessary to reach.

A. Whether Cruce was a Limited Public Figure

As an alternative position, the School District argued that Cruce, even if not a public official, qualified at the very least as a "limited public figure." The trial court erred in rejecting that argument. A limited public figure "is an individual who 'voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.'" *Erickson,* 629 S.E.2d at 668, *citing Gertz v. Robert Welch,* 418 U.S. 323, 351 (1974). In the lower court and again in its briefs filed in the Court of Appeals, the School District analyzed that issue by applying the five factor test from *Erickson*. The evidence supports a finding that Cruce, as the athletic director and head football coach, at the very least, qualified as a limited public figure. The School District also cited numerous cases from other jurisdictions supporting a finding that a high school football coach and athletic director qualifies as a "limited public figure." Therefore, if a writ of certiorari is granted, the School District

requests that the Court address, in the alternative, whether Cruce was a limited public figure. That is an issue raised by the School District in the Court of Appeals, but the Court did not need to reach that issue.

B. Whether Cruce Proved all Elements of his Defamation Claim

In addition to its sovereign immunity defense, the School District also moved for a directed verdict and JNOV on the basis that Jeffrey Cruce failed to prove each element of his defamation claim. The School District contends that the January 7, 2016 email that that was sent by Chris Stevens, the head trainer at Berkeley High School, was not false and defamatory. In addition, the School District argues that Cruce presented no evidence that Stevens acted with common law malice as well as no evidence that the January 7, 2016 email proximately caused any damages. In footnote 5 of its opinion, the Court of Appeals acknowledged that these issues were raised but were not necessary to reach because sovereign immunity under Section 15-78-60(17) disposed of the defamation claim. *Cruce*, 865 S.E.2d at 399, n.5. The trial court's rulings on these issues were in error and will need to be addressed if a writ of certiorari is issued.[5]

[5] In accordance with Rule 208(b)(6), SCRCP, the School District incorporates herein the discussion on pages 21-30 from its Opening Brief filed in the Court of Appeals.

CONCLUSION

Based on the foregoing discussion, the Respondent Berkeley County School District respectfully requests that this Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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