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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
APPEAL FROM ORANGEBURG COUNTY
Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2024-001481
Appellate Case No. 2025-000207

Richard A. Butts, individually and on behalf of all others similarly situated, ... Respondent,

v.

Miriam Mace, in her official capacity as Treasurer of Georgetown County, and Georgetown County, South Carolina, ... Appellants.

AND

Carroll Brown, individually and on behalf of all others similarly situated, ... Respondent,

v.

Harold M. Young, in his official capacity as Orangeburg County Administrator; Matt Stokes, in his official capacity as Orangeburg County Treasurer; Orangeburg County; and Orangeburg County Council, ... Appellants.

JOINT REPLY BRIEF OF APPELLANTS

ANDREW F. LINDEMANN
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

Counsel for Appellants Harold M. Young, Matt Stokes, Orangeburg County, and Orangeburg County Council

H. THOMAS MORGAN, JR.
AUSTIN T. REED
FREDERICK N. HANNA, JR.
SMITH | ROBINSON
935 Broad Street
Post Office Drawer 39
Camden, South Carolina 29020
(803) 432-1992

Counsel for Appellants Miriam Mace and Georgetown County

BRADLEY T. FARRAR
AIKEN COUNTY ATTORNEY'S OFFICE
1930 University Parkway, Suite 3600
Aiken, South Carolina 29801
(803) 642-3628

Counsel for Appellants Harold M. Young, Matt Stokes, Orangeburg County, and Orangeburg County Council

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Other Authorities

ARGUMENTS

I. The circuit court erred in ruling that the retroactivity provision in Section 2(E) of Act No. 236 is unconstitutional as violative of the separation of powers doctrine.

The Appellants contend that the circuit court erred in ruling that the retroactivity provision in Section 2(E) of Act No. 236 is unconstitutional as violative of the separation of powers doctrine. Relying on Justice Costa Pleicones' well-reasoned dissent in *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 596, 614 S.E.2d 629 (2005), the Appellants argue that the current application of the "*Lindsay* rule," in such cases as *Steinke v. South Carolina Dept. of Labor, Licensing & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), and its progeny, does not comply with the separation of powers doctrine – but actually *violates* the doctrine. In effect, the judiciary has usurped the authority of the legislature to make or change the law – particularly where the legislature believes that the judiciary has interpreted the law in such a way that is counter to the legislative intent and counter to the public policy that the legislature sought to foster.

In response, the Respondents argue that the "*Lindsay* rule" remains "good law" and should not be overruled. The crux of the Respondents' position is that South Carolina has a "unique constitutional paradigm, which is characterized by a dominant General Assembly," and that accordingly, the "*Lindsay* rule" was adopted in 1974, in essence, to counteract the dominant legislature. The Respondents urge this Court to find that the "abandon[ment] [of] our *Lindsay* retroactivity jurisprudence," as Justice Pleicones urged twenty years ago in *JRS Builders,* will only serve to "relinquish the judiciary's exclusive power to interpret statutes and decide pending cases to the General Assembly." *See*, Respondents' Brief, p. 14. Suggesting that the "*Lindsay* rule" is part of some type of "turf war" between the judiciary and the legislature, the

Respondents urge this Court not "to cede judicial power to the General Assembly." *See*, Respondents' Brief, p. 15.

The Respondents' position is misplaced in numerous respects. First and foremost, the separation of powers doctrine, which is a distinctive and essential aspect of American democracy, is not a "turf war" or struggle to maintain as much power or control as possible by one branch of government over the other two. Chief Justice Kittredge acknowledged that very point in his concurrence in *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), which is the principal case relied on by the Respondents. Chief Justice Kittredge "commend[ed] Justice Hearn for her excellent recitation of the importance of the separation of powers doctrine in our country's founding" and observed that "[t]his Court's jurisprudence often recognizes, in glowing terms, the sanctity of the separation of powers doctrine in our democratic republic." 744 S.E.2d at 532 (Kittredge, J., concurring). He then proceeded to cite longstanding case law "holding that under separation of powers the legislative department makes the laws, the executive department carries the laws into effect, and the judicial department interprets and declares the laws." *Id*. *citing McLeod v. Yonce*, 274 S.C. 81, 261 S.E.2d 303 (1979). As Justice Pleicones explained in *JRS Builders*, the legislature's law-making power includes "the authority to amend statutes, and to determine whether the amended statute applies to matters occurring before its effective date." 614 S.E.2d at 632-33. (Pleicones, J., dissenting).

Second, this is not a question of the judiciary "ceding power" to the General Assembly. By reconsidering and overruling the "*Lindsay* rule," this Court will not be "relinquish[ing] the judiciary's exclusive power to interpret statutes and decide pending cases to the General Assembly" as the Respondents claim. To the contrary, as Justice Pleicones explained so well in

JRS Builders, "[t]he separation of powers doctrine prevents one branch of government from usurping the power and authority of another. It is not the legislature's amendment of a statute in response to a judicial interpretation which offends the doctrine, but rather our limitation on the General Assembly's authority to decide whether that statutory change should be given retroactive effect." 614 S.E.2d at 633. (Pleicones, J., dissenting). That led Justice Pleicones to conclude that "this '*Lindsay* rule,' premised on the separation of powers doctrine, has in fact led to its violation." *Id*.

The Respondents try to justify the "*Lindsay* rule" as a type of "power fusion device" as discussed in *Transportation Infrastructure Bank, supra*. However, that case dealt with a very different subject matter, specifically the creation of the Transportation Infrastructure Bank and its composition which includes members of the General Assembly. In upholding the constitutionality of the Bank against a separation of powers challenge, this Court acknowledged "our rich and unique constitutional history has resulted in a system of government which does not lend itself to a neat, compartmentalized, or 'cookie-cutter' approach." *Transportation Infrastructure Bank,* 744 S.E.2d 527. "Rather, to counteract the destructive forces which can emanate from strictly defined and jealously guarded power bastions, certain 'power fusion devices' have developed to enable the branches to work together in a cooperative fashion," one of which is the State Budget and Control Board, which is today known as the State Fiscal Accountability Authority. *Id*. Thus, according to this Court, a "power fusion device" is a state agency created to specifically blend executive and legislative functions and personnel. However, contrary to the Respondents' premise, the "*Lindsay* rule" is not a "power fusion device" designed to allow the judiciary and the legislature to "work together in a cooperative fashion."

To the contrary, as Justice Pleicones aptly concluded, the "*Lindsay* rule" is incompatible

with the separation of powers doctrine in its classic sense and historical application. There was no precursor to the rule prior to the 1970s, and the rule was not really applied with earnest until the *Steinke* decision in 1999. Historically, this Court recognized the power of the General Assembly to enact curative or validating statutes which addressed, for example, judicial rulings that did not carry out the original legislative intent in enacting the legislation at issue. For example, in 1929, this Court addressed these principles in the case of *Green v. City of Rock Hill*, 149 S.C. 234, 147 S.E.2d 346 (1929). This Court recognized that "[i]t is a well-settled general rule that the Legislature, by a curative or validating statute which is necessarily retrospect in character and retroactive in effect, can validate any act which it might originally have authorized." 147 S.E.2d at 352. This Court found that the 1929 legislation at issue was "plainly curative and remedial in character, and [was] clearly applicable to the pending controversy, *in which no final judgment has been rendered*." *Id*. (Emphasis added). This Court ultimately concluded that "there can be no valid objection from any point of view to giving full force and effect to the validating statutes; that is, for the purpose of applying the controlling principle that a curative statute is valid, where the Legislature originally had authority to confer the power or to authorize the act confirmed." 147 S.E.2d at 353.

Thus, long before *Lindsay* came along in 1974, this Court recognized in *Green* that the General Assembly has the authority to amend a statute retroactively where the amendment is intended to be curative or validating of the originally enacted statute, provided that the legislature had the power to enact the amendment when the original statute was enacted and provided that "no final judgment has been rendered." *Green*, 147 S.E.2d at 352. The legal reasoning underlying the *Green* decision and the validity of curative or validating statutes in general were well stated by the United States District Court in *Segars v. Gomez*, 360 F. Supp. 50

(D.S.C. 1972), which applied South Carolina law and explained as follows:

> The particular statute with which we are here concerned falls within the definition of a curative statute, legislation whose purpose is to cure past errors, omissions, and neglects, and thus to make valid what, before the enactment of the statute, was invalid. Such an act by nature is retrospective, for it intends to give legal effect to some past act or transaction which was ineffective because of neglect to comply with some requirement of law. Thus a legislature by retrospective statute may cure mere irregularities in prior proceedings; it may ratify and validate any past act which it could originally have authorized provided it still has the power to authorize it, and its authorization does not impair vested rights. There is authority that acts done in conformity with a statute which, although clearly within the legislature's power to enact, was invalid by reason of some defect in form or sufficiency, may be validated by curative statute, despite a prior judicial declaration of the unconstitutionality of the statute.

360 F. Supp. at 53. Notably, the federal district court relied on *Green* as the basis in state law for these principles.

Moreover, this Court and the Court of Appeals have historically acknowledged the prerogative of the General Assembly in making the laws. *See*, *Hampton v. Haley*, 403 S.C. 395, 743 S.E.2d 258, 262 (2013) ("the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision"); *Planned Parenthood South Atlantic v. State of South Carolina*, 440 S.C. 465, 892 S.E.2d 121, 127 (2023) (same). In fact, "[a] legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violated a provision of the constitution." *Joytime Distributors & Amusement Co. v. State of South Carolina*, 338 S.C. 634, 528 S.E.2d 647, 650 (1999). As this Court has held, particularly in the realm of economic and social welfare legislation, "great deference [is given] to legislative judgment." *R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763, 765 (2000).

Consequently, this Court is urged to reconsider and overrule the "*Lindsay* rule" and to

reaffirm the legislature's prerogative under the separation of powers doctrine to amend the law and to apply it retroactively to any cases that have not been brought or that have been brought but have not reached final judgment.

II. To the extent that this Court chooses to exercise its discretion and consider the due process and takings arguments made for the first time on appeal, those additional sustaining grounds lack any merit and should be rejected by the Court.

In their response brief, the Respondents have raised new constitutional challenges to the retroactivity provision in Section 2(E) of Act No. 236 which were never raised to or briefed in the circuit court. Likewise, these new constitutional challenges were never addressed by the circuit court. The Respondents acknowledge that the arguments are raised for the first time on appeal and offer these arguments as additional sustaining grounds.

In *I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court ruled that "a respondent -- the 'winner' in the lower court -- may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. This Court further explained that "[t]he appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id*. Ultimately, however, "[i]t is within the appellate court's discretion whether to address any additional sustaining grounds." *Id*. Importantly, this Court further cautioned that it is unlikely that an additional sustaining ground which was not raised in the court below would be the basis for the resolution of the case. This Court explained:

> While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional

> sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.

526 S.E.2d at 724. In effect, this judicial reluctance to address additional sustaining grounds that were not even presented to the lower court seems particularly appropriate in a case, such as this, where the issues present constitutional challenges to legislation. In that scenario, the Appellants respectfully submit it would be "unfair" and "unwise" to deal with the Respondents' Takings Clause and Due Process Clause arguments for the first time on appeal. Nonetheless, to the extent that the Court chooses to entertain these new constitutional challenges, the Appellants address those issues as follows:

A. Takings Challenge

The Respondents argue that the retroactivity provision in Section 2(E) of Act No. 236 is unconstitutional because it violates the Takings Clause in the South Carolina Constitution. The Respondents are suing for monetary relief in the form of a refund of the road maintenance fees previously paid to Georgetown County and Orangeburg County. The Respondents maintain that the money paid for those road maintenance fees constitutes "personal property" for which they have a vested property interest under South Carolina law. The Respondents' position is at odds with binding South Carolina precedent as well as well-established law from other jurisdictions as previously noted by this Court.

To recap, the Respondents rely on the holding in *Burns v. Greenville County Council*, 433 S.C. 583, 861 S.E.2d 31 (2021), in which this Court ruled that a "road

maintenance fee" as implemented by Greenville County Council was actually a tax that violated S.C. Code Ann. § 6-1-300(6). This Court thus "declare[d] the road maintenance taxes ... are invalid under South Carolina law." 861 S.E.2d at 31.

Thus, the Respondents are suing to obtain a refund of an alleged illegal tax. In the case of *Anonymous Taxpayer v. South Carolina Dept. of Revenue*, 377 S.C. 425, 661 S.E.2d 73 (2008), this Court explained as follows: "Because both a Takings Clause cause of action and substantive due process cause of action focus on a party's ability to protect their property from capricious state action, parties claiming both must first show that they had a legitimate property interest." 661 S.E.2d at 79. This Court further opined that "[e]ven though taxes amount to taking money from taxpayers or business, those kinds of assessments are not treated as per se takings under the Fifth Amendment." *Id*. This Court cited to the case of *Rivers v. State*, 327 S.C. 271, 490 S.E.2d 261 (1997), in which it observed that "case law from the United States Supreme Court and courts throughout the country makes clear that taxpayers have no vested interest in tax laws remaining unchanged." 490 S.E.2d at 263. The Court reiterated that taxes and other assessments "are not treated as per se takings under the Fifth Amendment." *Id*. This Court's decision is not limited to taxes but also applies to other governmental assessments or fees. In fact, this Court cited favorably to the case of *Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995), where the federal appeals court held that "even though taxes or special municipal assessments indisputably 'take' money from individuals or businesses, assessments of that kind are not treated as *per se* takings under the Fifth Amendment." 69 F.3d at 1576. Clearly, the payment of road maintenance fees, whether a tax per *Burns* or some other form of assessment, does not constitute a "taking" under the Fifth Amendment or the South Carolina Constitution.

Additionally, as this Court further explained, "[i]n determining whether a governmental action violates the Takings Clause, the courts consider: (1) the economic impact of the state action; (2) its interference with distinct investment-backed expectations; and (3) the character of the state action." *Anonymous Taxpayer*, 661 S.E.2d at 79. In their brief, the Respondents' sole argument is that the payment of the road maintenance fees constitutes a taking because "money is a recognized property interest." *See*, Respondents' Brief, p. 25. That is not the case as shown above based on the *Anonymous Taxpayer* and *Rivers* decisions. However, even if the Respondents were correct, they have offered no evidence nor even any argument that the payment of the road maintenance fees satisfies the aforementioned factors, including whether there is any interference with distinct investment-backed expectations. The same was true in *Anonymous Taxpayers*, where this Court found that the "[a]ppellant has failed to show he had any reasonable investment-backed expectations." *Id.* Ultimately, this Court concluded as follows: "Because there is not a vested interest in tax laws remaining unchanged, Appellant failed to prove a Takings Claim." *Id*. The same is true in this case.

B. Due Process Challenge

The Respondents also argue that the retroactivity provision in Section 2(E) of Act No. 236 is unconstitutional because it violates due process. The Respondents do not specify whether their argument is based on procedural due process or substantive due process or both. On that basis alone, the arguments should be rejected as an additional sustaining ground.

Nonetheless, to the extent the Respondents are asserting a substantive due process position, their arguments fail for the same reason as discussed above with respect to the takings challenge. In *Anonymous Taypayer*, *supra*, this Court rejected a substantive due process

argument which requires a party to show "he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Anonymous Taypayer*, 661 S.E.2d at 79. As this Court previously ruled in *Rivers*, *supra*, "taxpayers have no vested interest in tax laws remaining unchanged." *Rivers*, 490 S.E.2d at 263. Hence, the Respondents cannot demonstrate a vested property right for either the takings or due process challenges to Section 2(E) of Act No. 236. Moreover, even assuming the Respondents could demonstrate a vested property right, they neglect to undertake the analysis for determining whether a statute such as Act No. 236 violates substantive due process. *R.L. Jordan Co.*, 527 S.E.2d at 765 (describing the standard for reviewing substantive due process challenges and stating that legislation is not to be overturned unless the law bears no "reasonable relationship to any legitimate interest of government"). Once again, the Respondents' failure to address how Act No. 236 supposedly falls short of this deferential standard is fatal to their claim.

Furthermore, to the extent the Respondents are asserting a procedural due process position, it is well settled in constitutional law that where a litigant challenges a legislative enactment as violative of procedural due process, it is the legislative process itself that provides all of the process that is due. The United States Supreme Court explained this principle in *Atkins v. Parker*, 472 U.S. 115 (1985), which addressed a procedural due process challenge to a congressional reduction in food stamps benefits. The Supreme Court explained that "[t]he procedural component of the Due Process Clause does not impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." 472 U.S. at 129. Accordingly, "a welfare recipient is not deprived of due process when the legislature adjusts benefit levels. The legislative determination provides all the process that is due." 472 U.S. at 129-130.

The Eleventh Circuit has explained the rationale for this rule of law in *75 Acres, LLC v. Miami-Dade County, Fla.*, 338 F.3d 1288 (11th Cir. 2003). The court explained:

> [I]f government action is viewed as legislative in nature, property owners generally are not entitled to procedural due process. Or, as one set of commentators has summarized, "When the legislature passes a law which affects a general class of persons, those persons have all received procedural due process - the legislative process. The challenges to such laws must be based on their substantive compatibility with constitutional guarantees." By contrast, if government conduct is viewed as adjudicative in nature, property owners may be entitled to procedural due process above and beyond that which already has been provided by the legislative process. When an adjudicative act deprives an individual of a constitutionally-protected interest, procedural due process is implicated, and a court would apply the familiar three-part balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), to determine the dictates of due process in that particular situation.

338 F.3d at 1294. (Citation omitted). Similarly, in *Bauer v. Summey*, 568 F. Supp. 3d 573 (D.S.C. 2021), Judge David C. Norton, Jr. recognized that "[a]n essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. However, an individual's due process rights are not violated by a law of general applicability since 'the legislative determination provides all the process that is due.'" 568 F. Supp. 3d at 588, *citing Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). Hence, any procedural due process challenge is misplaced.

In their discussion of due process, the Respondents rely almost exclusively on the 1947 case of *United States Rubber Co. v. McManus*, 211 S.C. 342, 45 S.E.2d 335 (1947), which addressed the ability of a judgment debtor to sue on an enrolled judgment after a change in the law regarding the procedures for bringing an action on a judgment. This Court spoke generally of a "vested right to sue," which is not a concept that this Court nor the Court of Appeals has addressed since the *McManus* decision. At any rate, to the extent a party has a "vested right to

sue," there is no vested right of a recovery until the case is fully litigated on the merits and a judgment is entered. In *McManus*, the plaintiff already had an enrolled judgment which led the lower court to conclude that there was a vested property right in that judgment. In the cases at bar, however, the Respondents have merely filed suit; they have not received any judgments against the Appellants.[1] Accordingly, there are no "vested property rights" that Section 2(E) of Act No. 236 is impacting.

Moreover, it is important to distinguish *McManus* from the cases at bar because *McManus* does not involve an action against the government for a refund of taxes or other assessments. Thus, *McManus* is not binding, or even persuasive, authority in the present case. The Respondents' additional sustaining grounds are controlled by such cases as *Anonymous Taxpayer* and *Rivers* which establish that a taxpayer enjoys no vested property right in the tax law remaining unchanged until they have received a binding judgment.

In sum, to the extent that this Court chooses to exercise its discretion and consider the due process and takings arguments made for the first time on appeal, those additional sustaining grounds lack any merit and should be rejected by the Court.

[1] Notably, in *Brown* and several other lawsuits challenging road maintenance fees, *see, e.g.*, *Thompson v. Killian* (Appellate Case No. 2023-000442), the circuit courts dismissed various causes of action seeking a refund of previously paid fees. (R. 246-261). The circuit courts' rulings confirm that the Respondents do not have a vested property right as they claim.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants in both the *Butts* and *Brown* cases respectfully renew their request that the Court reverse the orders on appeal issued by Circuit Court Judge Roger M. Young, Sr. and enter a ruling that the retroactivity provision in Section 2(E) of Act No. 236 is constitutional. The *Brown* Appellants further seek a remand with instructions that the circuit court adjudicate their mootness defense in light of the General Assembly's enactment of Act No. 236. In the alternative, the *Butts* Appellants request the Court to vacate the circuit court's orders finding Section 2(E) unconstitutional as premature under the doctrine of constitutional avoidance.

Respectfully submitted,

s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

s/ Bradley T. Farrar
BRADLEY T. FARRAR #66381
AIKEN COUNTY ATTORNEY'S OFFICE
1930 University Parkway, Suite 3600
Aiken, South Carolina 29801
(803) 642-3628
Email: bfarrar@aikencountysc.gov

Counsel for Appellants Harold M. Young, Matt Stokes, Orangeburg County, and Orangeburg County Council

s/ Frederick N. Hanna, Jr.
H. THOMAS MORGAN, JR. #73585
AUSTIN T. REED #102808
FREDERICK N. HANNA, JR. #104659
SMITH | ROBINSON
935 Broad Street
Post Office Drawer 39
Camden, South Carolina 29020
(803) 432-1992

Counsel for Appellants Miriam Mace and Georgetown County

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants certifies that the Final Joint Reply Brief of Appellants complies with Rule 211(b), SCACR.

s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

s/ Bradley T. Farrar
BRADLEY T. FARRAR #66381
AIKEN COUNTY ATTORNEY'S OFFICE
1930 University Parkway, Suite 3600
Aiken, South Carolina 29801
(803) 642-3628
Email: bfarrar@aikencountysc.gov

Counsel for Appellants Harold M. Young, Matt Stokes, Orangeburg County, and Orangeburg County Council

s/ Frederick N. Hanna, Jr.
H. THOMAS MORGAN, JR. #73585
AUSTIN T. REED #102808
FREDERICK N. HANNA, JR. #104659
SMITH | ROBINSON
935 Broad Street
Post Office Drawer 39
Camden, South Carolina 29020
(803) 432-1992

Counsel for Appellants Miriam Mace and Georgetown County

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellants certifies that the Final Joint Reply Brief of Appellants complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

s/ Andrew F. Lindemann
ANDREW F. LINDEMANN #13030
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920
Email: andrew@ldlawsc.com

s/ Bradley T. Farrar
BRADLEY T. FARRAR #66381
AIKEN COUNTY ATTORNEY'S OFFICE
1930 University Parkway, Suite 3600
Aiken, South Carolina 29801
(803) 642-3628
Email: bfarrar@aikencountysc.gov

Counsel for Appellants Harold M. Young, Matt Stokes, Orangeburg County, and Orangeburg County Council

s/ Frederick N. Hanna, Jr.
H. THOMAS MORGAN, JR. #73585
AUSTIN T. REED #102808
FREDERICK N. HANNA, JR. #104659
SMITH | ROBINSON
935 Broad Street
Post Office Drawer 39
Camden, South Carolina 29020
(803) 432-1992

Counsel for Appellants Miriam Mace and Georgetown County

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