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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 BRIEF OF APPELLANTS

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

II. Did the circuit court err in the *Butts* case in addressing the constitutionality of Section 2(E) of Act No. 236 in contravention of the doctrine of constitutional avoidance?

STATEMENT OF THE CASE

On November 2, 2021, the Respondent Carroll Brown filed a lawsuit captioned as a putative class action against the Appellants 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 (collectively referred to as "*Brown* Appellants") to challenge the alleged wrongful collection and retention of Orangeburg County's Road and Bridge Maintenance Service Charge which was imposed by ordinance in 1987 and has continued uninterrupted for each year since. That lawsuit was filed in the Orangeburg County Court of Common Pleas. (R. 267-278).

On November 5, 2021, the Respondent Richard A. Butts filed a similar lawsuit captioned as a putative class action against the Appellants Miriam Mace, in her official capacity as Georgetown County Treasurer, and Georgetown County (collectively referred to as "*Butts* Appellants") to challenge the alleged wrongful collection and retention of a "Road User Fee," which was first enacted in 2011. That lawsuit was filed in the Georgetown County Court of Common Pleas. (R. 39-49).

In both lawsuits, the Respondents rely on the 2021 decision of this Court in *Burns v. Greenville County Council,* 433 S.C. 583, 861 S.E.2d 31 (2021), in which the Court ruled that a "road maintenance fee" as implemented by Greenville County Council violates the requirements of S.C. Code Ann. § 6-1-300(6) and is actually an illegal tax. This Court thus "declare[d] the road maintenance taxes … are invalid under South Carolina law." 861 S.E.2d at 31.

I. *Brown v. Young* Procedural History

In his Complaint, the Respondent Carroll Brown seeks a declaratory judgment ruling that the Orangeburg County Road and Bridge Maintenance Service Charges are invalid under South Carolina law. He also seeks monetary relief in the form of a refund of the Road and Bridge Maintenance Service Charges previously paid. Brown asserts three causes of action seeking that monetary relief: (1) an equitable claim for quantum meruit/unjust enrichment against all *Brown* Appellants; (2) a claim for a violation of S.C. Code Ann. § 8-21-30 against the Appellant Stokes only; and (3) a claim for the violation of Article I, § 3 of the South Carolina Constitution against all *Brown* Appellants. (R. 267-278).

On June 30, 2022, Circuit Court Judge Edgar W. Dickson issued an Order Granting in Part Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings. (R. 246-261). The Respondent Brown subsequently filed a Rule 59(e) motion which remains pending. (R. 353-359). With his Order, Judge Dickson dismissed with prejudice the Respondent's First Cause of Action, Second Cause of Action, and Third Cause of Action as a matter of law, but he has allowed the Respondent's Fourth Cause of Action for declaratory relief to proceed forward. (R. 260).

Subsequent to that Order, the South Carolina General Assembly enacted 2022 Act No. 236, and it was signed into law by Governor Henry McMaster on June 22, 2022. Act No. 236 amends S.C. Code Ann. § 6-1-330(A), to provide in pertinent part as follows: "A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee. … A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this article." 2022 Act No. 236, § 2(B). Additionally,

S.C. Code Ann. § 6-1-300(6) was amended to define "service or user fee" to mean "a charge required to be paid in return for a particular government service or program. 'Service or user fee' also includes 'uniform service charges.' The revenue generated from the fee must: (a) be used to the benefit of the payers, even if the general public also benefits; (b) only be used for the specific improvement contemplated; (c) not exceed the cost of the improvement; and (d) be uniformly imposed on all payers." 2022 Act No. 236, § 2(A). Finally, Section 2(E) of Act No. 236 states that Section 2 "applies retroactively to any service or fee imposed after December 31, 1996." 2022 Act No. 236, § 2(E).

On May 17, 2023, the Chief Justice of the South Carolina Supreme Court issued an order assigning the *Brown* case and all other similar cases pending at the time of Act No. 236's effective date to Circuit Court Judge Roger M. Young, Sr. (R. 17-21). The order explicitly applied to "all cases that may arise out of the retroactivity provision in section 2(E) of Act No. 236." (R. 20). The Chief Justice recognized that his order "will promote the effective and expeditious disposition of this litigation by uniform rulings and will conserve the resources of the parties, their counsel, and the judiciary." (R. 20-21). The circuit court was thus "vested with exclusive jurisdiction to hear and dispose of the above cases … which have been or may be filed in South Carolina relating to Act No. 236" and empowered Judge Young to "decide all matters pertaining to these cases." (R. 21).

As discussed further below, in the Georgetown County case of *Butts v. Mace*, Respondent Richard A. Butts filed a Motion for Partial Summary Judgment requesting the issuance of a declaratory judgment ruling that the retroactivity language contained in Section 2(E) of Act No. 236 is unconstitutional. (R. 91-94). On June 25, 2024, an Order Granting Plaintiff's Motion for Partial Summary Judgment was issued by Judge Young in the *Butts* case granting partial summary judgment to Butts in that action finding that Section 2(E) of Act No. 236 is unconstitutional. (R. 22-

34). Judge Young also issued a subsequent order denying a Rule 59(e) motion. (R. 35-38).

Because the *Brown* Appellants are not parties to the *Butts* case, they filed a Motion for Summary Judgment and/or for Entry of Declaratory Judgment and for Rule 54(b) Certification seeking an order declaring that the retroactivity language contained in Section 2(E) of Act No. 236 is constitutional and granting summary judgment on their mootness defense. (R. 365-370).[1] The *Brown* Appellants argued that Brown's claims, including the Fourth Cause of Action for declaratory relief, are barred by the doctrine of mootness. Alternatively, if the circuit court ruled that the retroactivity language is unconstitutional as it did in *Butts*, the *Brown* Appellants asked the court to enter and certify final judgment on that constitutional question pursuant to Rule 54(b), SCRCP, so as to allow for an immediate appeal to be joined or consolidated with the pending appeal filed in *Butts*, consistent with the May 17, 2023 order issued by the Chief Justice. That request was made because, while defense counsel in the *Butts* case made a number of the pertinent arguments, there was no argument made that the authority on which the circuit court relied in *Butts*, namely *Lindsay v. National Old Line Ins. Co.*, 262 S.C. 621, 207 S.E.2d 75 (1974), and *Steinke v. South Carolina Dept. of Labor, Licensing & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), was wrongly decided or is otherwise no longer "good law" and should be overruled in light of authority from the United States Supreme Court addressing the application of the separation of powers doctrine under the same circumstances. The *Brown* Appellants also argued that the *Lindsay* decision was misapplied by this Court in *Steinke* and in subsequent cases decided since 1999, as was explained by former Justice Costa Pleicones in his dissent in *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 598,

[1] The *Brown* Appellants had also filed a Motion to Vacate Orders entered in *Butts v. Mace*, which was also heard during the January 3, 2025 hearing. (R. 360-364). The *Brown* Appellants agreed to withdraw that motion if the Respondent Brown agreed to Rule 54(b) certification. Because the circuit court granted certification as requested, the Motion to Vacate Orders was withdrawn as moot.

614 S.E.2d 629 (2005).

A hearing was held in the *Brown* case on January 3, 2025. (R. 404-429). Thereafter, on January 30, 2025, the circuit court issued an Order on Defendants' Motion for Summary Judgment and/or for Entry of Declaratory Judgment and for Rule 54(b) Certification. (R. 240-245). With that order, the circuit court ruled that "[b]oth *Lindsay* and *Steinke* remain the law in South Carolina, and the Court stands by its decision in *Butts* and incorporates that legal analysis herein." (R. 243). The circuit court thus ruled that the retroactivity provision in Section 2(E) of Act No. 236 is unconstitutional as violative of the separation of powers doctrine.

The *Brown* Appellants' motion for Rule 54(b) certification was unopposed by the Respondent Brown. Ultimately, the circuit court granted that relief and entered and certified final judgment on that constitutional question pursuant to Rule 54(b), SCRCP, so as to allow for an immediate appeal to be joined or consolidated with the pending appeal filed in *Butts*. The circuit court explained its reasoning as follows:

> In light of the unique posture of this case, the appeal already pending in the *Butts* case, the intent and spirit of the Chief Justice's Order, and the finality of this Court's ruling herein, this Court finds that there is no just reason for delay and that it is appropriate to enter direct entry of judgment and certify this Order and enter a declaratory judgment that the retroactivity provision of Act No. 236 is unconstitutional. That will allow for an immediate appeal to the Appellate Courts.

(R. 244). The *Brown* Appellants subsequently filed a timely appeal to this Court, in which a motion was granted consolidating the two appeals.

II. *Butts v. Mace* Procedural History

In his Complaint, the Respondent Richard Butts seeks a declaratory judgment ruling that Georgetown County's "Road User Fee" is invalid under South Carolina law. He also seeks

monetary relief in the form of a refund of the "Road User Fees" previously paid. Butts asserts three causes of action seeking that monetary relief: (1) an equitable claim for quantum meruit/unjust enrichment against all *Butts* Appellants; (2) a claim for a violation of S.C. Code Ann. § 8-21-30 against the Appellant Mace only; and (3) a claim for the violation of Article I, § 3 of the South Carolina Constitution against all *Butts* Appellants. (R. 39-49).

On September 6, 2023, the Respondent Butts filed an Amended Complaint to include a request for a declaration that Section 2(E) of Act No. 236 is "unconstitutional and unlawful, as applied to this case." (R. 71, ¶ 52). Thereafter, on September 21, 2023, Butts filed a Motion for Partial Summary Judgment seeking a ruling that Act No. 236 is unconstitutional as applied to this case. (R. 91-94). The motion was directed at the *Butts* Appellants' thirteenth affirmative defense in their Answer to Amended Complaint, which asserted that "Plaintiff's action is barred in whole or in part by 2022 S.C. Acts No. 236."

A hearing was held in the *Butts* case on April 16, 2024. (R. 171-238). Thereafter, on June 25, 2024, the circuit court issued an Order Granting Plaintiff's Motion for Partial Summary Judgment wherein the court ruled that "the retroactivity provision in section 2(E) of Act 236 is unconstitutional because, if applied to this case, it would overturn the Supreme Court's interpretation of section 6-1-300(6) in *Burns*." (R. 30). The *Butts* Appellants subsequently filed a Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP. (R. 162-165). That motion was denied by the Order Denying Defendants' Motion to Alter and Amend filed August 8, 2024. (R. 35-38). The *Butts* Appellants subsequently filed a timely appeal to this Court, in which a motion was granted consolidating the two appeals.

STANDARD OF REVIEW

The standard of review for questions of law is *de novo*. The appellate courts "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id*.

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 Respondents allege that the Appellants wrongfully collected road maintenance fees, and in making that claim, they 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 is actually a tax that violates 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.

Subsequent to the *Burns* decision, the South Carolina General Assembly enacted 2022 Act No. 236, and it was signed into law by Governor Henry McMaster on June 22, 2022. Act No. 236 amends S.C. Code Ann. § 6-1-330(A), to provide in pertinent part as follows: "A local governing body, by ordinance approved by a positive majority, is authorized to charge and collect a service or user fee. … A fee adopted or imposed by a local governing body prior to December 31, 1996, remains in force and effect until repealed by the enacting local governing body, notwithstanding the provisions of this article." 2022 Act No. 236, § 2(B). Additionally, S.C. Code Ann. § 6-1-300(6) was amended to define "service or user fee" to mean "a charge required to be paid in return for a particular government service or program. 'Service or user fee' also includes 'uniform service charges.' The revenue generated from the fee must: (a) be used to the benefit of the payers, even if the general public also benefits; (b) only be used for the specific improvement contemplated; (c) not exceed the cost of the improvement; and (d) be uniformly imposed on all payers." 2022 Act No. 236, § 2(A). Finally, Section 2(E) of Act No. 236 states

that Section 2 "applies retroactively to any service or fee imposed after December 31, 1996." 2022 Act No. 236, § 2(E).

The Respondent in the *Butts* case moved for partial summary judgment arguing that the retroactivity provision in Section 2(E) of Act No. 236 is unconstitutional as a violation of the separation of powers doctrine. The circuit court agreed with the Respondent's position, and on June 25, 2024, issued an order declaring that "the retroactivity provision in section 2(E) of Act 236 is unconstitutional because, if applied to this case, it would overturn the Supreme Court's interpretation of section 6-1-300(6) in *Burns*." (R. 30). In reaching its decision, the circuit court relied exclusively on prior precedent from this Court including *Lindsay v. National Old Line Ins. Co.*, 262 S.C. 621, 207 S.E.2d 75 (1974), and *Steinke v. South Carolina Dept. of Labor, Licensing & Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999).

In *Steinke*, *supra*, this Court addressed the constitutionality of the General Assembly's retroactive re-enactment of the statutory caps under the Tort Claims Act in response to this Court's decision in *Southeastern Freight Lines v. City of Hartsville*, 313 S.C. 466, 443 S.E.2d 395 (1994).[2] Relying exclusively on the decision in *Lindsay*, *supra*, this Court ruled that "[t]he Legislature may not retroactively overrule this Court's interpretation of the statutes in *Southeastern Freight Lines*." 443 S.E.2d at 157-158. This Court summarized its ruling as follows: "May the Legislature by a retroactive amendment overrule this Court's prior interpretation of a statute? We conclude the Legislature may not." 443 S.E.2d at 157.

[2] This Court in *Steinke* addressed the constitutional issue despite the fact that it was not raised by the parties nor adjudicated in the court below. *See*, *Steinke*, 520 S.E.2d at 158 ("We may resolve the issue on this ground even though the parties and trial judge did not."). The Court cited its authority under Rule 220(c), SCACR, in *sua sponte* addressing the constitutional issue. *Id*. Notably, the issue was never briefed by the parties nor was the issue raised at oral argument.

The circuit court in the cases at bar was constrained by this Court's decisions in *Lindsay* and *Steinke*, and accordingly, ruled that the retroactivity provision in section 2(E) of Act No. 236 is unconstitutional under that precedent. In its order in the *Brown* case, the circuit court aptly recognized that it was bound by this Court's decisions in *Lindsay* and *Steinke*. *See*, *Carson v. Southern Railway*, 68 S.C. 55, 46 S.E. 525, 529 (1903) (circuit court is bound by decisions of the Supreme Court). As a result, the circuit court in *Brown* ruled that "[b]oth *Lindsay* and *Steinke* remain the law in South Carolina, and the Court stands by its decision in *Butts* and incorporates that legal analysis herein." (R. 243).

In *Brown*, the Appellants argued that *Lindsay* and *Steinke* were wrongly decided or are otherwise no longer "good law" and should be overruled in light of authority from the United States Supreme Court addressing the application of the separation of powers doctrine under the same circumstances. The Appellants also argued that the *Lindsay* decision was misapplied by this Court in *Steinke* and in subsequent cases decided since 1999 relying on *Steinke*, as was explained by former Justice Costa Pleicones in his dissent in *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 598, 614 S.E.2d 629 (2005). The Appellants in *Brown* argued that *Lindsay* and *Steinke* deserve a fresh look. The Appellants in *Butts* join that position.

As indicated, the circuit court ruled that the retroactivity provision in Section 2(E) of Act No. 236 is unconstitutional and in violation of the separation of powers doctrine. The separation of powers doctrine is codified in Article I, § 8 of the South Carolina Constitution, which provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

See, S.C. Const., art. I, § 8. To reiterate, in *Steinke, supra*, this Court relied on the 1974 case of *Lindsay*, *supra*, to rule that the re-enacted Tort Claims Act monetary caps only applied prospectively to "future cases." This Court found that the issue of retroactivity is "controlled by the principles outlined in *Lindsay*" and that "[t]he Legislature may not retroactively overrule this Court's interpretation of the statutes in *Southeastern Freight Lines*." 520 S.E.2d at 157-158.

However, this Court misread and misapplied the *Lindsay* decision in *Steinke* and also in subsequent cases since then relying on *Steinke*.[3] In *Lindsay*, this Court agreed with the trial court that a statutory amendment enacted by the General Assembly in 1972 could not be used to reverse the decision by this Court in the 1972 case of *Lindsay v. Southern Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 188 S.E.2d 374 (1972). This Court explained that "a judicial interpreting of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary can only be effective from the date of its enactment and cannot be applied retroactively." *Lindsay*, 207 S.E.2d at 78. Critically, this Court was not addressing whether a legislative amendment could or could not be applied retroactively to cases not already brought to final judgment. Yet, in *Steinke* and later cases relying on *Steinke*, *Lindsay* has been read much broader than it was intended – specifically to bar the retroactive application of any statutory enactment or amendment which conflicts with any appellate decision.[4]

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[3] For these same reasons, this Court's decision in *Simmons v. Greenville Hospital System*, 355 S.C. 581, 586 S.E.2d 569 (2003), was also incorrectly decided based on the reading of *Lindsay* in the *Steinke* decision.

[4] This Court in *Lindsay* cited favorably to the Georgia case of *McCutcheon v. Smith*, 199 Ga. 685, 35 S.E.2d 144 (1945). The facts of *McCutcheon* show that in 1943, the Georgia Supreme Court had previously decided the case of *McCutcheon v. MacNeill*, 197 Ga. 72, 28 S.E.2d 469 (1943), which determined that Evelyn McCutcheon was not an employee of Fulton County on June 1, 1943, which was the effective date of the Civil Service Act of 1943. Subsequently, the Georgia legislature amended the Act by the inclusion of a provision that explicitly declared McCutcheon to be an employee of Fulton County at least six months prior to

In his dissent in *JRS Builders, Inc. v. Neunsinger*, 364 S.C. 598, 614 S.E.2d 629 (2005), Justice Costa Pleicones recognized that *Lindsay* has been misapplied by this Court in *Steinke* and later cases. Justice Pleicones wrote:

> Over the past several years, *Lindsay* has been construed as a limitation on the General Assembly's authority to amend a statute, and to have that amendment apply retroactively. While I have joined several of these decisions, I have come to believe that this reading of *Lindsay*, which held only that the General Assembly could not legislatively reverse the Court's decision, is overly broad.

614 S.E.2d at 632. (Pleicones, J., dissenting). Justice Pleicones pointed out that "[t]he General Assembly has 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). Justice Pleicones further explained:

> Through a series of cases citing *Lindsay* we have created two different rules regarding statutory retroactivity: If the Court never interpreted the prior statute, then the general rule recited above applies. If, however, the Court has issued an opinion interpreting a statute, any legislative change to that statute is deemed prospective only, lest the legislature invade the province of the Court. In my opinion, this "*Lindsay* rule," premised on the separation of powers doctrine, has in fact led to its violation.
>
> The 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). (Citations omitted). Accordingly, Justice

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the enactment of the Act. Thus, the legislative action was designed to overrule and change the 1943 decision which had reached final judgment. Not surprisingly, the Georgia Supreme Court found the legislation to be unconstitutional in violation of the separation of powers doctrine. The scenario in *McCutcheon* is entirely inapposite to what the Appellants are arguing in the case at bar and the prevailing federal jurisprudence as discussed below.

Pleicones encouraged his brethren to "use this opportunity to abandon our *Lindsay* retroactivity jurisprudence and return to the general rules of statutory construction." *Id*.

Justice Pleicones' analysis of *Lindsay* and how it has been misread and misapplied in *Steinke* and subsequent cases is correct and deserves a closer examination and acceptance. In fact, that analysis is on point with United States Supreme Court jurisprudence which also supports a re-examination of *Lindsay*, *Steinke*, *JRS Builders, Simmons*, and other such cases that hold that the legislature is barred by the separation of powers doctrine from enacting a statutory amendment in response to a judicial decision and from applying it retroactively to all cases that had not reached final judgment when the statute was enacted.

As Justice Pleicones cited, the analysis of the United States Supreme Court case law starts with the decision in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), where the Court wrote:

> Congress, of course, has the power to amend a statute that it believes we have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product.

511 U.S. at 313. Later, in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the United States Supreme Court differentiated between legislation that applies retroactively to a case that reached final judgment vis-à-vis legislation that applies retroactively to cases not yet brought or cases which had not reached final judgment. As to the latter, the Supreme Court explained that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted and must alter the outcome accordingly." 514 U.S. at 226. In contrast, as to the former, the Supreme Court further explained that "[w]hen retroactive legislation requires its own application in a case

already finally adjudicated, it does no more and no less than reverse a determination once made in a particular case." 514 U.S. at 225. In effect, the Supreme Court in *Plaut* held that the Constitution prohibits legislation from operating retroactively to require courts to reopen "final judgments." Applying the separation of powers doctrine, the Supreme Court found that the Constitution charged the judicial branch with the duty of declaring the law in a particular case, and once the judiciary speaks, the legislature "may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." 514 U.S. at 227. (Emphasis in original). Yet, that is limited to that "very case" and does not preclude the retroactive legislation from applying to any other case which has not reached final judgment.

These principles were reinforced in two more recent decisions of the United States Supreme Court – *Bank Markazi v. Peterson*, 578 U.S. 212 (2016), and *Patchak v. Zinke*, 583 U.S. 244 (2018). In particular, in *Patchak*, the Supreme Court begins with a discussion of the federal separation of powers doctrine, which is identical to the state doctrine:

> The Constitution creates three branches of Government and vests each branch with a different type of power. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. By vesting each branch with an exclusive form of power, the Framers kept those powers separate. Each branch exercises the powers appropriate to its own department, and no branch can encroach upon the powers confided to the others.

583 U.S. at 249-50. (Citations omitted). The Supreme Court further explained that "[t]he separation of powers … prevents Congress from exercising the judicial power." 583 U.S. at 250. But "[a]t the same time, the legislative power is the power to make law, and Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins." *Id*. As the Supreme Court further held, "[t]o distinguish between permissible exercises of

the legislative power and impermissible infringements of the judicial power, this Court's precedents establish the following rule: Congress violates [separation of powers] when it compels findings or results under old law. But Congress does not violate [separation of powers] when it changes the law." *Id*. (Citations omitted). Most critically, the Supreme Court held that "[u]nder this Court's precedents, Congress has the power to apply newly enacted outcome-altering legislation in pending civil cases." 583 U.S. at 258.

In sum, these cases from the United States Supreme Court, in applying the very same separation of powers principles as are applicable under state law, fully support Justice Pleicones' thoughtful dissent in *JRS Builders* and demonstrate the fallacy of what Justice Pleicones called "our *Lindsay* retroactivity jurisprudence." The rule actually enunciated in *Lindsay* is supported by *Plaut*, *Bank Markazi*, and *Patchak* – namely that retroactive legislation may not reverse or undo a final judicial decision or judgment, but *Lindsay* has been construed too broadly. In effect, the judiciary is not beyond reproach, criticism, or even error in how it interprets statutory law. If the legislature believes that the judiciary made an error or that the law requires clarification, it is 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. The aforementioned United States Supreme Court case law makes that abundantly clear. Additionally, a majority of other states that have addressed this issue have adopted a similar separation of powers test as the United States Supreme Court, thereby applying explicit retroactive legislation to all cases that have not been brought or reached final judgment when the legislation is enacted.[5]

[5] **Alabama:** *Ex Parte Jenkins*, 723 So.2d 649, 655-658 (Ala. 1998) (adopting the separation of powers doctrine as articulated by the Supreme Court in *Plaut*, *supra*); **Arizona:** *State v. Rios*, 225 Ariz. 292, 237 P.3d 1052, 1066 (Ct. App. 2010) (holding that the legislature

did not violate the separation of powers clause in retroactively granting rights to criminal defendants); **California:** *People v. Bunn*, 27 Cal.4th 1, 37 P.3d 380, 115 Cal.Rptr.2d. 192, 206 (2002) (noting that it found "*Plaut* persuasive for purposes of interpreting California's separation of powers clause," particularly because "*Plaut* acknowledges the paramount legislative power to 'make' law by statute [and] to apply new laws to all cases still pending either at the trial or the appellate level."); **Colorado:** *Vitetta v. Corrigan*, 240 P.3d 322, 326 (Colo. Ct. App. 2009) (favorably citing *Plaut* that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly."); **Connecticut:** *Bhinder v. Sun Co., Inc.*, 263 Conn. 358, 819 A.2d 822, 831 (2003) ("'[w]e have often held ... that it is as much within the legislative power as the judicial power -- subject, of course, to constitutional limits other than the separation of powers -- for the legislature to declare what its intent was in enacting previous legislation.' Implicit in our decisions allowing the legislature to clarify its intent in prior legislation was the recognition that pending cases, even those that eventually spawned the clarifying legislation, could be affected."); **District of Columbia:** *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 172-173 (D.C. Ct. App. 2008) (citing *Plaut* for the proposition that "[w]hatever the precise scope of *Klein,* however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law." Thus, the court held that that the statute at issue "raises no separation of powers issue."); **Indiana:** *Rokita v. Tully*, 235 N.E.3d 189, 197 (Ind. Ct. App. 2024) (citing favorable to *Plaut* and holding that "[t]here is no general prohibition on applying retroactive laws to cases pending on appeal"); **Iowa:** *Wuebker v. Heenan Agency, Inc.,* 814 N.W.2d 622, *4 (Iowa Ct. App. 2012) (table) ("The legislature may not use retroactive legislation to control cases already finally adjudicated by the courts. However, '[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.' Since this case had not reached a final judgment within the courts, there is no separation of powers violation."); **Kansas:** *Gleason v. Samaritan Home*, 260 Kan. 970, 926 P.3d 1349, 1360 (1996) ("As noted in *Plaut*, at every level, the court must decide according to the law in existence at the time the decision is rendered."); **Kentucky:** *King v. Campbell County.*, 217 S.W.3d 862, 871 (2006) (Cited favorably to *Plaut* and recognized that the separation of powers doctrine "does not, however, prevent [the legislature] from affecting pending cases by retroactively 'amending its applicable law. King has suggested no reason to construe Kentucky's separation-of-powers provisions differently."); *Cates v. Kroger*, 627 S.W.3d 864, 871 (2021) (noting that "[t]he legislature 'may amend the law and make the change applicable to pending cases, even when the amendment is outcome determinative'"); **Maine:** *Bernier v. Data General Corp.*, 787 A.2d 144, 150, n.7 (Maine 2002) (citing favorably to *Plaut* which "proscribes the enactment of legislation that affects final judgments; it does not prohibit legislation that affects cases that are pending in the judicial system"); **Missouri:** *Savannah R-III School Dist. v. Public School Retirement Sys. of Missouri.*, 950 S.W.2d 854, 858 (Mo. 1997) (holding that the amendment did "not contravene any final adjudication of a court of this state and, therefore, the amendment does not violate the doctrine of separation of powers"); **New York:** *Wilmington Trust, National Assoc. v. Farkas*, 232 A.D.3d 524, 223 N.Y.S.3d 623 (N.Y. App. Div. 2024) (noting that "[i]t is not a violation of the separation of powers doctrine for this Court to apply a new law in reviewing judgments still on appeal"); **North Carolina:** *Doe 1k v. Roman Catholic Diocese of Charlotte*, 387 N.C. 12, 911

In fact, as Justice Pleicones commented in his dissent, the current application of the "*Lindsay* rule" in such cases as *Steinke* 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 sum, if the "*Lindsay* rule" is properly applied consistently with the separation of powers doctrine in the cases at bar, it is clear that the enactment and retroactive application of Section 2 of Act No. 236 is constitutional. The retroactive application of Act No. 236 to these cases and others, which had not reached final judgment when Act No. 236 was enacted, fully complies with the separation of powers doctrine. To the extent that such cases as *Lindsay*, *Steinke, JRS Builders, Simmons*, and others hold otherwise, they should be overruled to "abandon our *Lindsay* retroactivity jurisprudence," as Justice Pleicones urged almost twenty years ago. On this basis, the Appellants respectfully request that the Court find that the retroactivity provision in Section 2(E) of Act No. 236 is constitutional and remand with instructions that the circuit court adjudicate the *Brown* Appellants' mootness defense in light of the General Assembly's enactment of Act No. 236.

S.E.2d 38, 42 (2025) ("We agree with the separation of powers discussion in *Plaut*, which reflects the same principles embedded in our state constitutional doctrine. Indeed, our state's separation of powers principles are, if anything, stronger than those in the federal constitution. After all, the federal doctrine is implied based on the structure of the United States Constitution."); **North Dakota:** *Wilkinson v. Bd. of Univ. and School Lands*, 903 N.W.2d 51, 57 (N.D. 2017) (citing favorably to *Plaut* and explaining that "when a law is enacted or amended while an appeal is pending and it applies retroactively, courts generally apply the new law even if it affects the outcome of the case").

II. Alternatively, in the *Butts* case, the circuit court should not have addressed the constitutionality of Section 2(E) of Act No. 236 based on the doctrine of constitutional avoidance.

This Court has long recognized the "firm policy" against deciding constitutional issues that are not necessary to the resolution of the case. *Morris v. Anderson Cnty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002); *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001); *Fairway Ford, Inc. v. Cnty. of Greenville*, 324 S.C. 84, 86, 476 S.E.2d 490, 491 (1996); *Trs. of Wofford Coll. v. City of Spartanburg*, 201 S.C. 315, 23 S.E.2d 9, 14 (1942); *Sanders v. Anderson Cnty.*, 195 S.C. 171, 10 S.E.2d 364, 364 (1940). In other words, this so-called doctrine of constitutional avoidance requires that courts not address a constitutional question unless it is required. In *Riverwoods, LLC v. County of Charleston*, 349 S.C. 378, 563 S.E.2d 651 (2002), this Court explained that "[i]t is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required." 563 S.E.2d at 652. Because of the myriad dispositive issues presented in these cases, the circuit court erred in prematurely passing upon the constitutionality of Section 2(E).

There are numerous grounds for dismissal of the cases on appeal and all road maintenance fee litigation throughout the state. Indeed, currently before the Court is *Thompson v. Killian*, Appellate Case No. 2023-000442, an appeal from various orders dismissing claims challenging road maintenance fees imposed by Aiken County and the City of Aiken. In that case, the circuit court properly determined, *inter alia*, (i) the claims involved the alleged wrongful collection of taxes and could only be heard pursuant to the South Carolina Revenue Procedures Act, S.C. Code Ann. § 12-60-10, *et seq.*; (ii) the plaintiffs' class action lawsuit was barred by S.C. Code Ann. § 12-60-80(C); (iii) the plaintiffs' claims under S.C. Code Ann. §§ 8-21-10 and 8-21-30 failed as a matter of law; (iv) the plaintiffs' unjust enrichment cause of action

was barred by sovereign immunity; and (v) the plaintiffs could not maintain a claim for violation of procedural due process under the South Carolina Constitution.

The Court's decision in the *Thompson* appeal will strongly influence all road maintenance fee cases in the state. Indeed, as the Appellants in *Butts* argued below, a decision affirming the circuit court's orders in *Thompson* would make Section 2(E) of Act No. 236 wholly irrelevant in these cases. (R. 110) ("If our appellate courts affirm the *Thompson* decision and hold class action road fee cases like Plaintiff's are not viable, there will be no need for any County defendant to raise Act 236 as a defense."). Accordingly, the circuit court should have allowed the litigation to develop and confirmed the necessity of ruling upon Section 2(E) prior to striking down state law as unconstitutional. It did not. In fact, in the *Butts* case, the circuit court determined Section 2(E) was unconstitutional prior to ruling on Appellants' motion to dismiss. That motion to dismiss, which remains pending, raises the same arguments before the Court in the *Thompson* appeal. (R. 87-90).[6]

In hastening to decide a constitutional issue that may never be of any consequence, the circuit court broke with binding precedent. The Court's decision in *Morris* is instructive. There, in an interlocutory appeal, the appellants encouraged the Court to consider whether the two-tiered money damages caps in the South Carolina Tort Claims Act were "violative of equal protection and therefore unconstitutional." 564 S.E.2d at 651. The Court refused to do so, noting the "liability cap differential would affect appellants only were a jury to return a verdict in excess of the $500,000 cap." 564 S.E.2d at 651, n.3. The Court concluded that a decision on the

[6] Notably, the circuit court granted the Appellants' motion to dismiss in part in the *Brown* case. (R. 246-261). The Respondent's motion for reconsideration of that order remains pending. As noted above, despite this ruling, the Appellants in *Brown* moved for summary judgment on Act. No. 236 so they could be heard on the constitutionality of Section 2(E) with respect to the remaining claim for declaratory relief (assuming reconsideration is denied).

requested issue would amount to an improper advisory opinion: "an advisory ruling at this juncture, on a constitutional issue which may never arise, would violate our firm policy of declining to reach constitutional issues unless necessary to the resolution of the appeal before us." 564 S.E.2d at 651.

The same situation exists here. Because Section 2(E) of Act No. 236 will only be relevant to these cases if Respondents surpass various other dispositive issues, the circuit court should not have considered its constitutionality. Thus, Appellants in *Butts* alternatively request the Court to vacate the circuit court's orders finding Section 2(E) unconstitutional.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellants in both the *Butts* and *Brown* cases respectfully 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.

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

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellants certifies that the Final Joint 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.

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