THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. THOMAS COOPER, JR., Circuit Court Judge

Case No.: 2017-CP-40-4534

Moe Baddourah as Member
of the City Council of the
City of Columbia, Appellant,

v.

Henry McMaster, in his
capacity as Governor for the
State of South Carolina, Respondent,

APPELLANT'S INITIAL REPLY BRIEF

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The Appellant hereby submits the following Reply Brief pursuant to Rule 208(b)(3) SCACR.

1. THE APPELLANT IS NOT ASKING THE COURT TO SECOND-GUESS THE GOVERNOR'S DISCRETIONARY AUTHORITY BUT RATHER TO INTERPRET THE SOUTH CAROLINA CONSTITUTION WHICH PROVIDES LIMITS IN WHICH SUCH AUTHORITY CAN BE EXERCISED.

The Respondent and the trial court create an artificial subject matter jurisdiction issue where one does not exist. The Appellant does not dispute that the Governor has some discretionary authority under S.C. Const. art. VI, § 8; however that does not end the inquiry as the South Carolina Constitution places express limits on that power by providing an exception for members of the judicial and legislative branches and by requiring the officer to be indicted by a grand jury for "a crime involving moral turpitude", a legal term of art, not a matter of executive discretion.

As stated by the United States Supreme Court, "...our determination of the limits on state executive power contained in the Constitution is in proper keeping with our primary responsibility of interpreting that document. " Elrod v. Burns, 427 U.S. 347, 352–53, 96 S. Ct. 2673, 2679, 49 L. Ed. 2d 547 (1976.) However, the Governor would have this Court abdicate this responsibility under the guise of "executive discretion." As stated in Respondent's brief, "The governor, in the exercise of the supreme executive power of the State, may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power .

. ." Resp. Brief, p. 7, quoting State ex rel. Whiteman v. Chase, 5 Ohio St. 528, 535 (1856) (emphasis added by Appellant).

Other artificial barriers erected in the Respondent's brief are that the Governor's actions were not ministerial and not arbitrary. Again, while that may be true, that is not the basis for the relief sought by the Appellant in the Complaint which was for the court to fulfill its responsibility to interpret the constitutionally mandated limitations set forth in under S.C. Const. art. VI, § 8.

2. THE PHRASE 'CRIME OF MORAL TURPITUDE' IS A LEGAL TERM OF ART AND NOT SUBJECT TO THE GOVERNOR'S DISCRETIONARY INTERPRETATION.

The Respondent wrongly accuses the Appellant of "attempting to litigate the underlying charge against him." The Appellant is merely asking this court to interpret the phrase "crime of moral turpitude" which is a legal term of art. The Respondent argues that since the phrase "crime of moral turpitude" is not defined in the text, its application must be left up to the determination of the Governor in the exercise of his discretion. (Resp. Brief, pp. 7-8) The Respondent cites McConnell v. Haley, 393 S.C. 136, 711 S.E.2d 886 (2011) in support of this position; however, that case is distinguishable. In McConnell, the issue was what constitutes an 'extraordinary occasion' to justify an extra session of the General Assembly. The court held that since the constitution did not define the term, 'extraordinary occasion' this matter must be

left to the discretion of the Governor and this Court may not review that decision.[1] However, unlike "extraordinary occasion" the phrase "crime of moral turpitude" is a legal term of art which has been used for centuries in English common law, and its selection and use by the drafters of the Constitution cannot be ignored or replaced by the discretionary interpretations of the current Governor in office.

"Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them. " Ibarra v. Holder, 736 F.3d 903, 914 (10th Cir. 2013).

As further noted in Appellant's Brief, it would be strange indeed if the Governor and the Attorney General can review and interpret the case law on what constitutes a crime of moral turpitude, but the court whose primary job is to interpret the law cannot. This court should find that "crimes of moral turpitude" is a legal term of art and not subject to the Governor's discretionary determination.

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[1] Ultimately, the court decided the case based on the word "extra" and not "extraordinary occasions" because the General Assembly was only in recess and thus the Governor could not call an "extra" session. Therefore, the language about "extraordinary occasions" is dicta.

3. REASONABLE LIMITATIONS ON THE GOVERNOR'S SUSPENSION POWER DO NOT RENDER IT MEANINGLESS.

The Respondent and the trial court give way to hyperbole when they argue that "if Appellant was considered a member or officer of the Legislative Branch, his status as such would effectively render meaningless the Governor's suspension and removal authority by withdrawing a significant category of public officials from the ambit of article VI, section 8." (Order 9.) Resp. Brief, p. 11. First, the drafters of the constitution already removed a significant category of public officials by including the legislative exception from the Governor's suspension powers without rendering that power meaningless. Second, in a democratic republic, reasonable checks on executive power help prevent the unbridled use of the Governor's suspension authority but do not render it meaningless.

4. THE ATTORNEY GENERAL OPINION IS NOT BINDING PRECEDENT ON THIS COURT AND THE PRIOR, UNCHALLENGED EXECUTIVE ORDERS ARE NOT RELEVANT.

The Respondent argues that the opinion of the Attorney General confirms that his decision was not arbitrary[2]. However, the opinion of the Attorney General is not binding on this court. Anders v. S.C. Parole & Cmty. Corr. Bd., 279 S.C. 206, 305 S.E.2d 229 (1983).

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[2] This is another red herring argument not raised by the Appellant. Appellant does not contend the Governor's action was arbitrary but rather that it is was not permitted under the constitutional limitations of S.C. Const. art. VI, § 8.

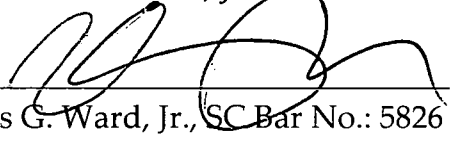
Also, when the Respondent argues there is a long-standing precedent of governors suspending municipal councils in this state under similar circumstances, the court should view this claim with a healthy skepticism. First, there is no evidence cited which shows the issues raised in this appeal were ever raised or considered in those cases or considered. Second, a few isolated cases of suspension do not support a claim of long-standing precedent. Moreover, none of these cases are based on the same allegations as this case. Finally, the repetition of invalid conduct in the past does not justify continued error.

CONCLUSION

For all these reasons, and the argument set forth in the court below and Appellant's Brief, this court should reverse the trial court and enter a declaratory judgment in favor of the Appellant.

Respectfully submitted,

TOBIAS G. WARD, JR., PA



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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G. THOMAS COOPER, JR., Circuit Court Judge

Case No. 2017-CP-40-4534

Henry McMaster, in his capacity as Governor for the State of South Carolina, Respondent,

v.

Moe Baddourah, as Member of The City Council of The City of Columbia, Appellant.

PROOF OF SERVICE

I J. Derrick Jackson, attorney for TOBIAS G. WARD, JR., PA hereby certify that a copy of the Reply Brief was served on the Respondent Governor Henry McMaster by depositing a copy in the United States Mail, postage prepaid, on May 17, 2018 to the address' listed below:

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May 17, 2018

The Honorable Jenny Abbott Kitchings
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Re: Mohsen A. Baddourah, as member of the City Council of the City of Columbia v Henry McMaster, in his capacity as Governor for the State of South Carolina
Case No.: 2017-CP-40-4534

Dear Mr. Kitchings:

Enclosed for filing are the original and one copy each of a **Reply Brief** along with proof of service upon the Respondent.

Please file stamp the extra copy and return it in the provided envelope.

Along with a copy of this correspondence I am serving a copy on counsel for the Respondent.

Sincerely,

TOBIAS G. WARD, JR., PA

J. Derrick Jackson

JDJ: wrc
Enclosure
cc: Thomas Ashley Limehouse, Jr., Legal Counsel (with enclosures)

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