THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

IN THE ORIGINAL JURISDICTION

Case Number: 2020-000970

JENNIFER PINCKNEY, HOWARD DUVALL, and
KAY PATTERSON……..…….……...……...Petitioners,

v.

HARVEY PEELER, in his official capacity as President of the South Carolina Senate; JAMES H. LUCAS, in his official capacity as Speaker of the South Carolina House of Representatives; and HENRY D. MCMASTER, in his official capacity as Governor of South Carolina…….…..….Respondents.

BRIEF OF GOVERNOR HENRY D. MCMASTER

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December 30, 2020
Columbia, South Carolina

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INTRODUCTION

Twenty years after the General Assembly passed the Heritage Act (the "Act") and Governor Hodges signed it into law, Petitioners filed this action challenging its constitutionality on several grounds. It is undisputed that the Act was the product of a bipartisan compromise during a tumultuous time in our State's history. This legislative compromise—which included not only removing the Confederate flag from atop the State House but also protecting monuments, memorials, and other means of honoring certain military history as well as African American and Native American history—yielded a framework that the General Assembly later utilized in removing the Confederate flag from the Capitol Complex.

Neither the Governor nor the Court were involved in that initial compromise, and respectfully, both must yield to the General Assembly's policy prerogatives and political

judgments on these and other controversial matters that are constitutionally committed to, or reserved for, the Legislative Department. Accordingly, the Governor is not a proper party to this action, and Petitioners have failed to cite any authority or allege any semblance of a plausible claim to the contrary. Although the Governor recognizes that this Court has a duty to interpret and apply the constitution when presented with a justiciable controversy, the fact that Petitioners have sought to include the Governor in this endeavor only underscores the hypothetical nature of the present challenge. The Governor has not been called upon to enforce the Act in any unspecified manner, and the General Assembly has not attempted to amend or repeal the Act but failed to overcome the prescribed two-thirds threshold. Just as the Governor is not an appropriate party to an abstract challenge to the General Assembly's authority, neither is the Court required to referee a debate over the Act's implicit policy judgments or pre-screen hypothetical scenarios about the Act's potential application.

Nevertheless, if the Court determines that Petitioners have demonstrated the existence of a justiciable controversy and raised a timely and ripe challenge to the Act's constitutionality, it should analyze Petitioners' claims with the degree of deference and respect that must be afforded to actions of a separate branch of government. To that end, recognizing that the presiding officers of the General Assembly are the proper parties to represent and defend the Legislative Department's actions and authority, the Governor will defer to the arguments and authorities relied upon by President Peeler and Speaker Lucas regarding the constitutionality of the Act. However, to the extent the Court finds that the General Assembly exceeded its constitutional authority in establishing—or, in the context of future legislation, *would* exceed such authority in imposing—a two-thirds threshold for votes to amend or repeal the Act, the Court should sever the offending provision. The Governor submits that such an approach would maintain the requisite legal

certainty and stability, while also giving appropriate deference to the General Assembly's plenary power and allowing the people, through their elected legislators, to address controversial issues regarding historic monuments and other similar matters through a representative and deliberative process.

STATEMENT OF THE CASE

On May 18, 2000, the General Assembly passed the Act, which was subsequently enrolled and duly ratified, and which Governor Hodges signed into law on May 23, 2000. *See* Act No. 292 of 2000. The Act was the product of a "legislative compromise to remove the Confederate battle flag from atop the Statehouse Dome." 2020 WL 3619620, at *2 (S.C.A.G. June 25, 2020). For purposes of the present action, the Act provides, in relevant part, as follows:

> (A) No Revolutionary War, War of 1812, Mexican War, War Between the States, Spanish–American War, World War I, World War II, Korean War, Vietnam War, Persian Gulf War, Native American, or African–American History monuments or memorials erected on public property of the State or any of its political subdivisions may be relocated, removed, disturbed, or altered. No street, bridge, structure, park, preserve, reserve, or other public area of the State or any of its political subdivisions dedicated in memory of or named for any historic figure or historic event may be renamed or rededicated. No person may prevent the public body responsible for the monument or memorial from taking proper measures and exercising proper means for the protection, preservation, and care of these monuments, memorials, or nameplates.
>
> (B) The provisions of this section may only be amended or repealed upon passage of an act which has received a two-thirds vote on the third reading of the bill in each branch of the General Assembly.

Act No. 292 of 2000, § 3 (codified at S.C. Code Ann. § 10-1-165). In addition to the codified statutory language above, the Act also included a severability clause, which states as follows:

> If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses,

> phrases, or words thereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Act No. 292 of 2000, § 4.

Twenty years later, on July 10, 2020, Petitioners Jennifer Pinckney, Howard Duvall, and Kay Patterson (collectively, "Petitioners") filed a Petition for Original Jurisdiction and Declaratory Relief ("Petition"), accompanied by a proposed Complaint, seeking a declaratory judgment that the Act is unconstitutional, in its entirety, and asking this Court to permanently enjoin any future, unspecified enforcement of the Act. In doing so, Petitioners have presented a facial challenge to the constitutionality of the Act, asserting that the Act (1) unconstitutionally restricts the General Assembly's legislative authority, (2) represents unconstitutional special legislation, and (3) violates the principles of Home Rule and the General Assembly's delegation of authority to local governments.

Following an extension, Respondents filed separate Returns to the Petition on August 19, 2020, in which each Respondent either did not oppose the exercise of original jurisdiction or deferred to the Court regarding the propriety of the same. On September 21, 2020, the Court issued an Order granting the Petition, dispensing with the filing of answers or other responsive pleadings, and establishing an initial briefing schedule. In its Order, the Court also granted the Attorney General's August 13, 2020 request to file an amicus curiae brief on behalf of the State of South Carolina. Respondents subsequently moved for an extension of time to submit the requisite briefs, and the Court granted the same by Order dated November 9, 2020.

STANDARD OF REVIEW

It is axiomatic that the "Court has a very limited scope of review in cases involving a constitutional challenge to a statute." *S.C. Human Affairs Comm'n v. Zeyi Chen*, 430 S.C. 509, 528, 846 S.E.2d 861, 871 (2020) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C.

634, 640, 528 S.E.2d 647, 650 (1999)). When the General Assembly undertakes to exercise its plenary authority on a particular matter, the resulting "legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." *Id.* at 528–29, 846 S.E.2d at 871 (quoting *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 63, 467 S.E.2d 739, 741 (1995)). Therefore, "[a]ll statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *Id.* at 528, 846 S.E.2d at 871 (quoting *Joytime Distribs.*, 338 S.C. at 640, 528 S.E.2d at 650).

ARGUMENT

I. Petitioners have failed to state a plausible or justiciable claim against the Governor

As a threshold matter, Petitioners have failed to state a plausible or justiciable claim against the Governor. Short of naming the Governor and purporting to summarize his constitutional authority in a single sentence, Petitioners have neither alleged nor articulated any basis for maintaining the present action against him. In challenging the Act, Petitioners assert that it violates the South Carolina Constitution "in four ways"; yet, each of the cited constitutional provisions or principles relates either to the Legislative Department's power or to the legislative process. (Pet'rs' Br. at 1.) Petitioners have not demonstrated any identifiable nexus between the Governor or his authority and the Act. Presumably, Petitioners' basis for including the Governor as a party to this action is based on the assumption that, at some point, the State of South Carolina may be called upon to enforce the Act in some manner. However, this unalleged basis for naming the Governor as a Respondent reflects a misunderstanding of the Act's application and underscores the hypothetical, abstract nature of the present challenge.

A. Petitioners have not alleged or articulated any claim against the Governor

The entirety of Petitioners' allegations regarding the Governor are limited to the following sentence and forty-six words:

> Respondent Henry D. McMaster is the Chief Magistrate and head of the executive branch as the Governor of the State of South Carolina, and he is sued in his official capacity as the public official charged with enforcing the laws of the State of South Carolina.

(Pet'rs' Compl. ¶ 13; *see also* Pet'rs' Pet. for Orig. Juris. at 6 ("Respondent Henry D. McMaster is the Chief Magistrate and head of the executive branch as the Governor of the State of South Carolina, and he is sued in his official capacity as the public official charged with enforcing the laws of the State of South Carolina."); Pet'rs' Br. at 7 (same).) Although certainly "short," Petitioners' allegations as to the Governor hardly satisfy the requirement that "[a] complaint must contain a 'short and plain statement of the facts showing that the pleader is entitled to relief.'" *Clark v. Clark*, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987) (quoting Rule 8(a)(2), SCRCP). Needless to say, Petitioners' mere identification of the Governor would not "entitle the [Petitioners] to relief on any theory." *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009); *see* Rule 245(c), SCACR; Rule 12(b)(6), SCRCP. Accordingly, because Petitioners' Complaint simply names the Governor—and, along with Petitioners' other filings, lacks any substantive allegations or arguments as to the Governor's potential involvement in any hypothetical future enforcement or legislative amendment of the Act—the Court should dismiss the Governor as a party to this action.[1]

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1. As noted in his August 19, 2020 Return to the Petition for Original Jurisdiction, Governor McMaster did not oppose Petitioners' request that the Court entertain the present matter in its original jurisdiction; however, Governor McMaster expressly reserved his right to answer or otherwise respond to Petitioners' Complaint pursuant to Rule 245(c). (Gov. McMaster's Return at 3.) In granting the Petition for Original Jurisdiction, the Court dispensed with the filing of

B. The Governor is not the proper party to defend a hypothetical constitutional challenge to the General Assembly's powers or to the legislative process

Even if Rule 8, and its underlying principles, alone did not provide ample grounds for dismissal, this Court's precedent makes clear that the Governor is neither a necessary nor a proper defendant in an action challenging the constitutionality of a statute or legislative act absent a demonstrable nexus between the Governor and the subject law. *Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 561, 713 S.E.2d 604, 609 (2011). In *Harrell*, the plaintiff, Charleston County School District, filed a complaint against the Speaker of the House, the President of the Senate, the State of South Carolina, and the Governor seeking a declaratory judgment that an act pertaining to charter schools amounted to special legislation in violation of article III, section 34 and article VIII, section 7 of the South Carolina Constitution. *Id.* at 556, 713 S.E.2d at 606. After the circuit court dismissed the Governor as a defendant, this Court affirmed the same, emphasizing and explaining as follows:

> Nothing in School District's complaint demonstrates a nexus between Governor or his authority and Act 189. Instead, School District only alleges that the Governor's ample executive powers render him an appropriate defendant in any suit where the constitutionality of a statute is challenged. This is an insufficient reason to name the Governor as a party defendant. While School District cites to cases where the Governor was a proper party, those cases dealt with the specific powers and responsibilities of the Governor. That plainly is not the case here. Therefore, we affirm the circuit court's ruling that the Governor should be dismissed from this action.

Id. at 561, 713 S.E.2d at 609. The principles set forth by the Court in *Harrell* apply with equal, if not greater, force to the present case.

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answers or other responsive pleadings and established an initial briefing schedule. (Order at 1 (Sept. 21, 2020).) Accordingly, Governor McMaster is asserting herewith those arguments which otherwise would have been raised in a dispositive motion. *See* Rule 245(c), SCACR; Rule 12(b)(6), SCRCP.

Here, despite themselves relying on the Court's opinion in *Harrell*, (Pet'rs' Br. at 18–19), Petitioners have neither alleged nor argued, much less demonstrated, the existence of "a nexus between the Governor or his authority" and the Act. *Id.* at 561, 713 S.E.2d at 609. Petitioners' sole allegation regarding the Governor simply identifies him by name and his office by description and purports to summarize his executive authority in general terms. However, "the Governor's general executive power, standing alone, does not render him a proper defendant in a challenge to the constitutionality of a self-executing statute." *Scott v. Francati*, 214 So. 3d 742, 747 (Dist. Ct. App. 2017) (citing *Harris v. Bush*, 106 F. Supp. 2d 1272, 1276–77 (N.D. Fla. 2000)) (granting writ of prohibition to bar further proceedings in the trial court because Governor of Florida was not a proper defendant to action seeking a declaratory judgment regarding constitutionality of state statute and because no justiciable case or controversy existed). Rather, as a Florida appellate court succinctly stated when confronted with a similar assertion, "[i]t is absurd to conclude that the Governor's general executive power . . . is sufficient to make him a proper defendant whenever a party seeks a declaration regarding the constitutionality of a state law." *Id.* (citing *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003)).[2] Moreover, as a practical

2. *See generally Fitts v. McGhee*, 172 U.S. 516, 530 (1899) ("In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons.); *People First of Alabama v. Merrill*, 467 F. Supp. 3d 1179, 1204 (N.D. Ala. 2020) ("A governor's 'general executive power is not a basis for jurisdiction in most

matter, "there is no relief the [C]ourt could order Governor [McMaster] to provide to remedy the constitutional violation alleged in the complaint." *Id.*

The Act does not so much as mention the Governor and does not include, or expressly state, a specific mechanism for enforcing most of its provisions outside of the Capitol Complex.[3] Presumably, the General Assembly opted not to include enforcement language because it viewed the Act as a limitation on its own authority and on other government action. *See* S.C. Code Ann. § 10-1-165(A), (B). At bottom, the Act's framework is essentially self-executing in terms of its limitations on, and prohibition of, certain government actions.

In sum, this Court's conclusion in *Harrell*—namely, that the Governor's general executive powers, standing alone, are not sufficient to make him an appropriate defendant in any suit where the constitutionality of a statute is challenged—applies with equal force to the present action. Like *Harrell*, this case does not involve "the specific powers and responsibilities of the Governor." 393 S.C. at 561, 713 S.E.2d at 609; *cf. Cent. Realty Corp. v. Allison*, 218 S.C. 435, 450–51, 63 S.E.2d 153, 160 (1951). Since Petitioners have failed to identify or demonstrate any current or future

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circumstances. If a governor's general executive power provided a sufficient connection to a state law to permit jurisdiction over [her], any state statute could be challenged simply by naming the governor as a defendant.'" (quoting *Women's Emergency Network*, 323 F.3d at 949), *appeal dismissed*, No. 20-12184-GG, 2020 WL 5543717 (11th Cir. July 17, 2020).

3. *See* Act No. 292 of 2000, § 6 (codified at S.C. Code Ann. § 10-11-315) ("It is unlawful for a person to *wilfully and maliciously* deface, vandalize, damage, or destroy or attempt to deface, vandalize, damage, or destroy any monument, flag, flag support, memorial, fence, or structure located *on the capitol grounds* and a person convicted of a violation of this section shall be punished pursuant to the provisions of Section 10-11-360." (emphasis added)); *cf.* S.C. Code Ann. § 16-17-600(B)(2) ("It is unlawful for a person wilfully and knowingly, and without proper legal authority to: . . . deface, vandalize, injure, or remove a gravestone or other memorial monument or marker commemorating a deceased person or group of persons, whether located within or outside of a recognized cemetery, Native American burial ground or burial mound, memorial park, or battlefield . . . .").

nexus between the Governor and the Act or any other reason for naming him as a party, the Court should similarly dismiss Petitioners' challenge as to the Governor.[4]

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4. The Court has disposed of numerous original jurisdiction matters and appeals involving constitutional challenges related to special legislation and Home Rule in which governors were not named parties. *See, e.g.*, *Weaver v. Recreation Dist.*, 431 S.C. 357, 360, 848 S.E.2d 760, 761 (2020) (affirming circuit court's determination that plaintiff failed to meet his burden of establishing any constitutional infirmity in action challenging statute related to the millage levied in certain special purpose districts); *Cty. of Florence v. W. Florence Fire Dist.*, 422 S.C. 316, 318, 811 S.E.2d 770, 772 (2018) (affirming declaratory judgment in favor of plaintiff county challenging validity of special purpose district as violative of constitutional provisions concerning special legislation and Home Rule); *Bd. of Trustees for Fairfield Cty. Sch. Dist. v. State*, 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014) (affirming the grant of summary judgment to defendants where plaintiff failed to present any evidence that the General Assembly had neither a logical basis nor sound reason for enacting special legislation related to education financing and inter-district transfers); *Home Builders Ass'n of S.C. v. Sch. Dist. No. 2 of Dorchester Cty.*, 405 S.C. 458, 459, 748 S.E.2d 230, 231 (2013) (reversing preliminary dismissal of special-legislation challenge to constitutionality of Act No. 99 of 2009, which authorized school district to impose an impact fee on new developments); *Bodman v. State*, 403 S.C. 60, 64, 742 S.E.2d 363, 365 (2013) (disposing of original jurisdiction action where plaintiff argued that sales and use tax "exemption and cap scheme violate[d] our State constitution's equal protection guarantee and prohibition against special legislation"); *Bd. of Trustees of Sch. Dist. of Fairfield Cty. v. State*, 395 S.C. 276, 718 S.E.2d 210, 274 (2011) (holding that veto override votes in the House of Representatives and the Senate fell short of constitutionally mandated two-thirds requirement); *Kizer v. Clark*, 360 S.C. 86, 89, 600 S.E.2d 529, 531 (2004) (affirming circuit court's determination that statute pursuant to which the Town of James Island established the contiguity necessary for incorporation was unconstitutional as special legislation); *Med. Soc. of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 280, 513 S.E.2d 352, 358 (1999) (reversing circuit court's injunction and holding that act at issue did not violate S.C. Const. art. III, §§ 17, 34(IX)); *Martin v. Condon*, 324 S.C. 183, 478 S.E.2d 272 (1996) (holding that statutes providing counties with local option to determine legality of nonmachine cash payouts from coin-operated video game machines were unconstitutional special legislation). In the limited instances in which a governor has been named as a defendant in similar or analogous challenges, the cases can be readily distinguished and typically involved underlying legislation altering gubernatorial appointment authority or otherwise implicating specific gubernatorial powers. *See, e.g.*, *Davis v. Richland Cty. Council*, 372 S.C. 497, 499, 642 S.E.2d 740, 741 (2007) (holding that act devolving appointment authority for members of county's recreation commission from county's legislative delegation to the governing body of the county was unconstitutional special legislation); *Hamm v. Cromer*, 305 S.C. 305, 307 & n.1, 408 S.E.2d 227, 228 & n.1(1991) (affirming circuit court's determination that an act changing the method of appointment for the members of the governing body of the Newberry County Water and Sewer Authority, was prohibited special legislation and noting that "Defendant Governor Carroll A. Campbell, Jr. took no position other than as a stakeholder.").

II. Petitioners have failed to demonstrate the existence of an actual, justiciable controversy

Although the Governor is not a proper party to this action, Petitioners' insistence upon including him serves to underscore the abstract nature of the present challenge, and thus, raises threshold justiciability concerns. Prior to reaching the constitutional questions related to the General Assembly's authority, the Court has an obligation to ensure the existence of a justiciable controversy. As illustrated by their efforts to include the Governor as a Respondent, Petitioners have failed as a matter of law to carry their threshold burden of demonstrating the existence of an actual dispute among the parties and a ripe controversy that requires a judicial determination.

Before any action may be maintained, a justiciable controversy must exist. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). Otherwise, the Court "will dismiss any case that does not present a justiciable controversy." *Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 273, 844 S.E.2d 390, 392 (2020). Of course, "an issue that is contingent, hypothetical, or abstract is not ripe for judicial review." *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 353–54, 815 S.E.2d 446, 451 (2018) (quoting *Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006)).

To be sure, seeking a declaratory judgement does not set aside this threshold inquiry. As the Court explained in *Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970):

> While it has been held that the declaratory judgment statute should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships without awaiting a violation of the rights or a disturbance of the relationships, it is uniformly held that the Declaratory Judgments Act does not require the court to give a purely advisory opinion as to the issues sought to be raised.

Id. at 154, 177 S.E.2d at 553. When the adjudication of a question would not settle the legal rights of the parties, any opinion would be purely "advisory and, therefore, beyond the intended purpose and scope of a declaratory judgment." *Id.* at 154–55, 177 S.E.2d at 553.

Indeed, the Declaratory Judgments Act "'does not require the Court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when the occasion might arise,' or 'license litigants to fish in judicial ponds for legal advice.'" *City of Columbia v. Sanders*, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957). "Despite the Act's broad language, it has its limits." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). The Act "is remedial and procedural in nature and does not create substantive rights or duties." *Felts v. Richland Cty.*, 299 S.C. 214, 216, 383 S.E.2d 261, 262–63 (Ct. App. 1989).

Here, Petitioners have failed to carry their initial burden of alleging and establishing the existence of a justiciable controversy. Instead, Petitioners have raised the very sort of abstract or hypothetical claim that courts do not consider. The General Assembly has not voted on any proposed legislation yet failed to ratify and present the same to the Governor because the bill or joint resolution did not satisfy the Act's two-thirds threshold. S.C. Code Ann. § 10-1-165(B); *cf. Bd. of Trustees of Sch. Dist. of Fairfield Cty. v. State*, 395 S.C. 276, 718 S.E.2d 210, 274 (2011) (holding that veto override votes in the House of Representatives and the Senate fell short of constitutionally mandated two-thirds requirement). In fact, by all indications, the General Assembly has not voted on any proposed legislation related to the Act since 2015. At least absent the General Assembly undertaking to modify, amend, or repeal the Act and failing to do so in the manner prescribed, Petitioners' challenge is not ripe for judicial review.

Moreover, neither the Governor nor any agency or officer of the Executive Department have been forced to enforce the provisions of the Act. Although Petitioners' allegations and arguments offer little insight into the reason they named the Governor as a Respondent, one can infer from the single sentence above that Petitioners were suggesting the State of South Carolina could, at some point and in some unspecified manner, be called upon to enforce the Act. However, that has not occurred to date, which is less than surprising given that the Act is essentially self-executing in nature and principally governs the Legislative Department and, by extension, the political subdivisions of the State.

Given the lack of any legislative or executive action related to the Act, "[u]nder these circumstances, an adjudication of the present question would settle no legal rights of the parties." *Power*, 255 S.C. at 154–55, 177 S.E.2d at 553. Therefore, in the absence of a current controversy, or any ripening seeds thereof, the Court need not issue an advisory opinion. *See id.*; *see also S.C. Elec. & Gas Co. v. S.C. Pub. Serv. Auth.*, 215 S.C. 193, 215, 54 S.E.2d 777, 787 (1949) ("The existence of an actual controversy is essential to jurisdiction to render a declaratory judgment . . ."). The foregoing threshold deficiencies render Petitioners' challenge nonjusticiable.

III. The General Assembly's authority and policy judgements are entitled to deference

Petitioners assert, on several grounds, that the General Assembly exceeded the scope of its constitutional authority in passing the Act. In doing so, Petitioners ask the Court to interfere with another branch of government's policy judgments and decisions. *See Edwards v. State*, 383 S.C. 82, 86, 678 S.E.2d 412, 415 (2009) ("This Court has no role to play in the policy considerations at issue . . . ."). Such a request should give the Court great pause. *See* S.C. Const. art. I, § 8. Yet, the Governor understands that "it is always and essentially the province of the [C]ourt to construe the Constitution and laws." *State v. Ansel*, 76 S.C. 395, 57 S.E. 185, 186 (1907).

"The general statement of the rule is that the powers of the General Assembly are plenary as to all matters of legislation unless limited by some provision of the Constitution." *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, 181 S.E. 481, 486 (1935). Consequently, questions or "considerations involving the wisdom, policy, or expediency of an act are addressed exclusively to the General Assembly." *Elliott v. Sligh*, 233 S.C. 161, 165, 103 S.E.2d 923, 925 (1958) (citing *Thomas v. Macklen*, 186 S.C. 290, 195 S.E. 539 (1938)). Therefore, courts presented with justiciable controversies related to actions of the General Assembly "are only concerned with the power of that body to enact a law" and "[e]very presumption will be made in favor of the constitutionality of a legislative enactment." *Id.*

In furtherance of the foregoing separation-of-powers principles, it necessarily follows that the presiding officers of the General Assembly are the appropriate parties to represent and defend the Legislative Department's actions and authority. Therefore, while the Governor will briefly address Petitioners' arguments *seriatim*, he defers to—and to the extent necessary and applicable, incorporates by reference—the arguments raised and authorities relied upon by President Peeler and Speaker Lucas regarding the constitutionality of the Act.

A. The Act's severability clause would resolve any identified constitutional infirmity associated with the two-thirds threshold

In attacking the Act, Petitioners first take aim at the procedural provision now codified at section 10-1-165(B), which articulates a two-thirds, or "supermajority" vote of both bodies, to amend or repeal the Act. According to Petitioners, this portion of the Act improperly restricts the General Assembly's lawmaking function. However, absent from Petitioners' Petition, Complaint, and Brief is any reference to the Act's severability clause. This Court has recognized that a statute may be unconstitutional only "in part." *Curtis v. State*, 345 S.C. 557, 571, 549 S.E.2d 591, 598 (2001). In such instances, the Court may sever the offending provision and leave the rest of the

statute in place. As articulated by this Court, "[t]he test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent of that which conflicts with the constitution." *Id.* When present, a severability clause "evidences strong legislative intent that the several parts of [an act] be treated independently." *Joytime Distribs. & Amusement Co.*, 338 S.C. at 649, 528 S.E.2d at 654. Here, section 4 of the Act contains a severability clause, which like the provision at issue in *Joytime*, reflects the General Assembly's legislative intent that if a court were to deem one provision of the Act unconstitutional, the rest of the Act should survive. Therefore, if the Court determines that the two-thirds threshold set forth in the Act is clearly unconstitutional, the Act's severability clause would resolve any identified infirmity.

B. The Act does not represent impermissible special legislation

Petitioners next contend that the Act violates the constitutional prohibition of special legislation that changes the names of persons or places, S.C. Const. art. III, § 34(I), and that creates unreasonable and arbitrary classifications, S.C. Const. art. III, § 34(IX). This Court has consistently emphasized that the burden for invalidating a statute in response to a special-legislation challenge is significant and that it will not declare a statue unconstitutional as a special law unless its repugnance to the Constitution is clear beyond a reasonable doubt. *See Med. Soc. of S.C. v. Med. Univ. of S.C.*, 334 S.C. 270, 279, 513 S.E.2d 352, 357 (1999). In doing so, the Court has recognized that not all special legislation is violative of the constitution, *e.g.*, *Harrell*, 393 S.C. at 558–59, 713 S.E.2d at 608, and "repeatedly acknowledged . . . that there are cases where a special law will best meet the exigencies of a particular situation," *Med. Soc. of S.C.*, 334 S.C. at 279, 513 S.E.2d at 357 (citations omitted).

The Governor takes seriously the commands of the constitution regarding local and special legislation. *See* S.C. Const. art. VIII, § 7; S.C. Const. art. III, § 34(IX); S.C. Const. art. VIII, § 10. To this end, like several of his predecessors, the Governor has consistently vetoed legislation he deems violative of these constitutional provisions based on the plain text of the constitution and consistent with this Court's precedent related to the same. As noted above, the Act was signed into law by Governor Hodges, and the General Assembly has not presented a single piece of legislation to the Governor for his approval related to the Act since he assumed office. Therefore, the Governor has never been asked to evaluate the constitutionality of any such measure. However, while it is not the province of the Governor to defend the General Assembly's legislative process or powers in the abstract or otherwise, where, as here, the Act applies statewide, does not create arbitrary classifications, and is codified in, and consistent with, general law, the Governor is persuaded that the Act's substantive provision, now set forth in S.C. Code Ann. § 10-1-165(A), does not represent unconstitutional special legislation. *See Harrell*, 393 S.C. at 558–59, 713 S.E.2d at 608.

C. The Act is consistent with the authority retained by the General Assembly under Home Rule

Finally, Petitioners argue that the Act violates the principles of Home Rule by limiting or preventing "local governments from acting on the names of local streets, structures, and other public places and from changing some types of monuments an memorials." (Pet'rs' Br. at 23–24.) It is well-established that counties and municipalities "are subdivisions of the State, subordinate and subject to legislative control, created and with the policy of the State and serving as its agencies." *Parker v. Bates*, 216 S.C. 52, 59–60, 56 S.E.2d 725, 726 (1949). Although the Home Rule Amendment to the South Carolina Constitution directed and required the General Assembly to implement the concept of Home Rule "by establishing the structure, organization, powers,

duties, functions[,] and responsibilities of local governments by general law," it also "necessarily left it up to the General Assembly to decide what powers local governments should have." *Hosp. Ass'n of S.C., Inc. v. City of Charleston*, 320 S.C. 219, 225–26, 464 S.E.2d 113, 118 (1995).

This Court has acknowledged that the construction, preservation, and protection of monuments and memorials represent a valid public purpose. *See Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 393–94, 175 S.E.2d 805, 813 (1970); *Mims v. McNair*, 252 S.C. 64, 80, 165 S.E.2d 355, 363 (1969); *Powell v. Thomas*, 214 S.C. 376, 382, 52 S.E.2d 782, 784 (1949). And although the General Assembly may delegate to political subdivisions the power of control over public places, the Legislative Department possesses the ultimate and "paramount authority over all public ways and public places." *Chapman v. Greenville Chamber of Commerce*, 127 S.C. 173, 120 S.E. 584, 587 (1923). Therefore, the General Assembly possesses—and, unless delegated, retains—the authority pursuant to its general police powers to establish what can be described as a statewide historic-preservation policy.

To be sure, there is room for debate and legitimate disagreements over the degree of control that counties and municipalities should be able to exercise over those matters addressed by the Act; however, those debates are properly had in—and have occurred in—the very deliberative bodies represented by the remaining Respondents. While there may be legitimate disagreements over the policy determinations embodied in the Act, "[i]f it is desirable public policy to [alter an existing statute], that public policy must emanate from the legislature." *State v. Leopard*, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002). Accordingly, the Governor will defer to President Peeler and Speaker Lucas regarding the specific exercise of General Assembly's authority in this regard.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' request for declaratory and injunctive relief. Because Petitioners' challenge is principally directed to the Legislative Department, in keeping with the separation-of-powers principles discussed above, the Governor will defer to any different or additional arguments raised by President Peeler and Speaker Lucas.

Respectfully submitted,

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December 30, 2020
Columbia, South Carolina

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Dec 30 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION

Case Number: 2020-000970

JENNIFER PINCKNEY, HOWARD DUVALL, and
KAY PATTERSON……...……...…...……...Petitioners,

v.

HARVEY PEELER, in his official capacity as President of the South Carolina Senate; JAMES H. LUCAS, in his official capacity as Speaker of the South Carolina House of Representatives; and HENRY D. MCMASTER, in his official capacity as Governor of South Carolina……..……..….Respondents.

CERTIFICATE OF COMPLIANCE

I certify that the Brief of Governor Henry D. McMaster was filed and served according to the South Carolina Appellate Court Rules and that, to the extent it applies, this brief complies with Rule 211(b), SCACR.

s/Thomas A. Limehouse, Jr.
Thomas A. Limehouse, Jr.
OFFICE OF THE GOVERNOR

December 30, 2020
Columbia, South Carolina