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.

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INTRODUCTION

The General Assembly has plenary authority over legislative matters in South Carolina and is only limited by the state Constitution. Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control, 407 S.C. 583, 591, 757 S.E.2d 408, 412, (2014). The Heritage Act, and specifically § 10-1-165,[1] represents a constitutionally valid expression of the General Assembly's authority to set statewide policy on a matter of statewide concern.

Petitioners challenge the constitutionality of § 10-1-165 on five grounds:[2] (1) it places an unconstitutional constraint on the General Assembly's legislative authority; (2) it violates the constitutional prohibition on special laws naming people and places; (3) it violates the constitutional prohibition on special laws being enacted if a general law may be enacted in its place; (4) it violates the equal protection guarantees in the United States and South Carolina Constitutions; and (5) it violates the Home Rule provisions contained in the South Carolina Constitution. Petitioners are incorrect in each instance. An analysis of § 10-1-165 under each of the constitutional provisions cited by Petitioners will reveal that the General Assembly did not exceed its constitutional boundaries and that the challenged statute should remain undisturbed.

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[1]Act 292 of 2000, commonly referred to as the "Heritage Act," was a comprehensive act that encompassed more than the single statute being challenged in this case. Petitioners refer to the Heritage Act, but the constitutional challenge that they raise is against only § 10-1-165. Because the entire Heritage Act is not the subject of the declaratory judgment action, and for the purposes of accuracy, Respondent Peeler refers throughout his brief to § 10-1-165 rather than to the Heritage Act generally.

[2]Petitioners state in the Introduction of their brief that they are challenging the statute on four grounds; however, in a footnote on page 20, Petitioners also assert an equal protection challenge.

STATEMENT OF ISSUES

1. Does § 10-1-165(B) unconstitutionally restrain the General Assembly's legislative authority?

2. Is § 10-1-165 unconstitutional special legislation under South Carolina Constitution Article III, § 34(I)?

3. Is § 10-1-165 unconstitutional special legislation under South Carolina Constitution Article III, § 34(IX)?

4. Does § 10-1-165 violate Equal Protection guarantees in the United States and South Carolina Constitutions?

5. Does § 10-1-165 violate Article VIII of the South Carolina Constitution?

STATEMENT OF THE CASE

Act 292 of 2000, known as the "Heritage Act," was signed into law on May 23, 2000. The Heritage Act represented a compromise to remove the South Carolina Infantry Battle Flag of the Confederate States of America from flying on top of the State House dome. When the act was originally introduced as a bill,[3] it only addressed the Confederate Flag's placement at some location other than atop the State House. During the legislative process, the bill was amended to include related topics. By the time the bill reached Governor Hodges' desk for signature, the Heritage Act contained:

(1) the addition of § 1-1-10 to the 1976 Code to remove the Confederate Flag from atop the State House and from within the Senate and House of Representatives' chambers; codification of the appropriate placement of flags to be flown over the state capitol building and within the Senate and House of Representatives' chambers; and codification of where the Confederate Flag could be placed on the State House grounds;

(2) an amendment to § 10-1-160 to clarify which flags may be flown over the State House, in the capitol building, and in the Senate and House of Representatives' chambers;

(3) a provision later codified as § 10-1-165 to provide protections for monuments and memorials to certain named wars and conflicts, Native-American history, and African-American history, as well as to prevent roads, bridges, and other structures named or dedicated in honor of historic figures or events from being renamed or rededicated;

(4) an instruction to send the Confederate flags that had flown in the Senate and House of Representatives' chamber to the State History Museum; and

(5) other miscellaneous provisions, including a severability clause.

[3]Senate bill 1266: https://www.scstatehouse.gov/sess113_1999-2000/bills/1266.htm

Act No. 292, 2000 S.C. Acts 2072. Section 10-1-165 is the only provision contained in the Heritage Act that is challenged in this declaratory judgment action.

The Heritage Act remained untouched until 2015, in response to the Charleston Massacre. Act 90 amended § 1-1-10(A) to remove the Confederate flag from its location on the State House grounds and place it in the Confederate Relic Room. Act No. 90, 2015 S.C. Acts 425. Despite any perceived chilling effect that the statute's supermajority vote requirement may have had, the General Assembly successfully amended the law. In fact, vote totals in the Senate and House of Representatives far exceeded the supermajority required to enact the bill.[4]

Since 2015, there has been no vote in either chamber of the General Assembly on any provision in the Heritage Act, including § 10-1-165. In fact, there has never been a vote in either chamber on any bill to amend § 10-1-165.

On July 10, 2020, Petitioners filed a Petition for Original Jurisdiction and Complaint alleging that § 10-1-165 violates the South Carolina Constitution and should be declared unconstitutional. On July 22nd, the Court granted an extension to Respondents until August 19th for their Return to the Petition for Original Jurisdiction. The Court granted Petitioners' Petition for Original Jurisdiction on September 21st and set forth a briefing schedule. On October 21st, Petitioners filed their brief in support of their allegations. The Court granted an extension to Respondents until December 21st for their Reply to Petitioners' Brief. Respondent Peeler herein responds to Petitioners' allegations and asks this Court to dismiss this matter, as it is not yet justiciable for judicial determination, or, in the alternative, to rule on the merits that § 10-1-165 is constitutional.

[4]The vote on third reading in the Senate was 37-3, and in the House of Representatives, it was 94-20.

STANDARD OF REVIEW

Petitioners are challenging the constitutionality of § 10-1-165. The standard of review for constitutional challenges is well established:

> This Court has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. A possible constitutional construction must prevail over an unconstitutional interpretation.

Weaver v. Recreation District, 431 S.C. 357, 362-363, 848 S.E.2d 760, 762 (2020) (citations and quotations omitted)

ARGUMENT

I. The Compromise Underpinning the Heritage Act Should Remain Undisturbed

"Compromise is the oil that makes governments go."[5] When then-Representative Gerald Ford proclaimed this to the United States House of Representatives Judiciary Committee, he was stating a maxim that is deeply rooted in our representative democracy across all levels of government. Lawmaking in South Carolina is no exception. Indeed, the Heritage Act is the product of compromise. In 2000, two sides that were deeply entrenched in differing ideologies came to an agreement that included a two-thirds voting requirement for amending or repealing the key components of the legislation. The supermajority voting requirement was a key component of the Heritage Act because it provided some assurance to all interested parties that the deal could not be undone without broad support among the members of the General Assembly. To cement the compromise, the General Assembly included a severability clause so that the substantive provisions contained in the bill would survive a successful constitutional challenge.

The two-thirds requirement has not stopped the General Assembly from taking action to amend components of the Heritage Act. There are three statutes contained in the Heritage Act that require a two-thirds majority to amend or repeal: §§ 10-1-165, 10-1-160, and 1-10-10. Most notably, the supermajority requirement did not block the General Assembly from amending § 1-10-10, to remove the Confederate Flag from the State House grounds altogether. The General Assembly has demonstrated that the supermajority requirement in the Heritage Act does not bar it from enacting legislation amending the statutes in the act.

[5]Gerald Ford, remarks during hearings in the United States House of Representatives Committee on the Judiciary (November 15, 1973) *Nomination of Gerald R. Ford to Be the Vice President of the United States*, hearings before the Committee on the Judiciary, House of Representatives (1973), 93rd Congress, 1st session.

Eliminating the supermajority requirement from one statute will eliminate it from the other two statutes, thus removing a key component holding together the entire compromise. The compromise falling apart is not good for our State. The Court should keep the supermajority requirement in place, thus preserving the compromise and allowing the General Assembly to keep its focus on solving other pressing problems that the State is facing.

II. Section 10-1-165 Does Not Unconstitutionally Constrain the General Assembly's Legislative Authority

A. Petitioners' Challenge to § 10-1-165(B) Is Not Justiciable

Petitioners seek a declaration from the Court that § 10-1-165 is unconstitutional pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, et. seq. (2005). To fall within the intended purpose and scope of the Declaratory Judgments Act, the parties must seek adjudication of a justiciable controversy. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) ("Despite the [Declaratory Judgments] Act's broad language, it has its limits."); *see also* Southern Bank & Trust Co. v. Harrison Sales Co., 285 S.C. 50, 328 S.E.2d 66 (1985) ("A declaratory judgment action must involve an actual, justiciable controversy.") *see also* J.W. Power v. McNair, 255 S.C. 150, 154-55, 177 S.E.2d 551, 553 (1970) (noting that if adjudication of a question "would settle no legal rights of the parties," then the adjudication would be "only advisory and, therefore, beyond the intended purpose and scope of a declaratory judgment"). "'Questions of statutory interpretation, by themselves, do not rise to the level of actual controversy.'" Entergy Nuclear Generation Co. v. Dep't of Envtl. Prot., 944 N.E.2d 1027, 1034 (Mass. 2011) (quoting Woods Hole, Martha's Vineyard & Nantucket S.S. Auth. v. Martha's Vineyard Comm'n, 405 N.E.2d 961, 966 (Mass. 1980)). "A justiciable controversy is a real and substantial controversy that is ripe and appropriate for judicial determination, as distinguished

from a contingent, hypothetical, or abstract dispute." Southern Bank & Trust Co. v. Harrison Sales Co., 285 S.C. 50, 328 S.E.2d 66 (1985) More recently, this Court "explained ripeness by defining what is not ripe, stating 'an issue that is contingent, hypothetical, or abstract is not ripe for judicial review.'" Jowers v. South Carolina Department of Health and Environmental Control, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018) (citing Colleton Cty. Taxpayers Ass'n. v. Sch. Dist. of Colleton Cty., 371 S.C. 224, 638 S.E.2d 685 (2006))"The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy." S.C. Lottery Comm'n v. Glassmeyer, 428 S.C. 423, 432, 835 S.E.2d 524, 527 (Ct. App. 2019), reh'g denied (Dec. 16, 2019), cert. granted (July 8, 2020) (quoting Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004)).

Petitioners have not brought a justiciable controversy before the Court for two reasons. First, Petitioners' grievance seeks nothing more from the Court than a statutory construction of § 10-1-165, so the outcome will not settle any rights among the parties.[6] Consequently, Petitioners are merely seeking an advisory opinion from this Court as to whether the statute is constitutionally infirm. This outcome exceeds the purpose and scope of the Declaratory Judgments Act. The Court should dismiss this matter on those grounds and to discourage future similar cases in which the intent of the case is to circumvent the political process rather than to settle rights among parties.

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[6]Petitioners' Petition for Original Jurisdiction asserts that each Petitioner suffers a particularized harm due to the existence of § 10-1-165. In their Petition for Original Jurisdiction, Petitioners assert that § 10-1-165 prohibits making changes to monuments or memorials, in the case of Petitioner Pinckney, to her loved one and, in the case of Petitioner Patterson, to himself and further limits the authority of Petitioner Duvall to change street names in Columbia. Petitioners Pinckney and Patterson do not own the memorials referred to in their Petition. Therefore, they do not have an ownership or property right in those memorials. Although Petitioners Pinckney and Patterson have a personal or emotional interest in the appearance of those memorials, that interest is not a legally enforceable interest. Consequently, Petitioners suffer no particularized harm resulting from § 10-1-165's prohibitions. Likewise, Petitioner Duvall is but one member of the Columbia City Council, and he appears in this case individually, not representing the city council. He cannot alone change the name of a street. That act would require action by the entire council. He cannot therefore claim a particularized harm either. This lack of particularized harm means that Petitioners have no particularized rights to settle *vis a vis* Respondents in this case.

Second, if the Court determines that this case is appropriately taken up under the Declaratory Judgments Act, then Petitioners' complaint is non-justiciable because it is not yet ripe. Petitioners fail to identify any legislation to amend or repeal § 10-1-165 that has been voted on by either the Senate or the House of Representatives and that has received a majority vote in favor but failed to achieve a two-thirds majority. Over the past two decades, there have been a handful of bills to repeal or amend § 10-1-165, including two during the last legislative session,[7] but there has never been a vote in either chamber to amend § 10-1-165. In fact, § 10-1-165 has remained untouched since its enactment.

Furthermore, the mere introduction of a bill should not constitute "ripening seeds of a controversy." While proposed legislation may be considered "seeds," without further consideration, those seeds have not rooted or "ripened" in any respect. Therefore, any decision regarding the constitutionality of the supermajority requirement in § 10-1-165 would require the Court to rule based on a hypothetical scenario: the Court would have to imagine that a bill to either amend or repeal § 10-1-165 is introduced, is then considered and given a favorable vote at the subcommittee and full committee levels, and is voted on by either the Senate or the House of Representatives and would have to then assume that the bill would receive the vote of a majority, but not a supermajority, of at least one chamber in the General Assembly. Such a far-reaching hypothetical assumption should not be sufficient to determine that Petitioners' challenge is justiciable. As the Jowers court concluded, "claims that depend on contingent future harm are not justiciable." Accordingly, the Court should dismiss this case because the matter before the Court is not ripe for judicial determination.

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[7]Senator John Scott, Senate District 19, introduced Senate Bill 151 and Senate Bill 152. S. 151 proposes to repeal § 10-1-165, and S. 152 proposes to amend § 10-1-165. Upon introduction, both bills were referred to the Senate Finance Committee and have received no further action. *See* S. 151 (https://www.scstatehouse.gov/sess123_2019-2020/bills/151.htm) *See also* S. 152 (https://www.scstatehouse.gov/sess123_2019-2020/bills/152.htm)

B. The Supermajority Requirement Does Not Bind a Future General Assembly

Section 10-1-165(B) states that "[t]he 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." Petitioners contend that a two-thirds supermajority vote of each house of the General Assembly is an unconstitutional vote requirement because it impermissibly binds a future General Assembly and imposes a vote threshold above that of a simple majority. Petitioners misunderstand the supermajority requirement's role and meaning within the statute.

Section 10-1-165(B) provides the General Assembly with a procedure to handle changes to subsection (A). Since it only affects the General Assembly, subsection (B) acts like the General Assembly's procedural rules. Consequently, a constitutional challenge to subsection (B) should be analyzed through the rubric established for reviewing constitutional challenges to the General Assembly's rules of procedure rather than statutory construction.

Article III, § 12 of the South Carolina Constitution vests the Senate and House of Representatives with the authority to establish rules of procedure for their respective bodies. Once established, the rules of procedure adopted by the houses of the General Assembly are "within the limitations suggested, absolute and beyond the challenge of any other body or tribunal." State ex rel. Coleman v. Lewis, et. al., 181 S.C. 10, 12, 186 S.E. 625, 630 (1936) (citing United States v. Ballin, 144 U.S. 1, 5, 12 S.Ct. 507, 36 L.Ed. 321 (1892)). This Court previously described those limitations in the following manner:

> Neither House may by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of procedure established by the rule and the result which is sought to be obtained, but within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just.

Id. at 12. (*see also* Common Cause v. Biden, 909 F.Supp.2d 9 (2012) (In a constitutional challenge to the United States Senate's 'cloture' rule, the Court held that absent explicit constitutional restraints on the challenged rule, and absent the violation of fundamental rights, the court was presented with a non-justiciable political question.) An examination of subsection (B) reveals that the General Assembly did not exceed the prescribed limitations. Instead, subsection (B) is a reasonable and constitutional procedural method for considering legislation affecting subsection (A).

In order to alter or eliminate the provisions contained in § 10-1-165(A), a bill proposing changes to the statute, or eliminating the statute altogether, must have three readings on three separate days in each house, be signed by the Speaker of the House of Representatives and the President of the Senate, and have the Great Seal of the State affixed to it. S.C. Const. art. III, § 18. This Court has recognized that majority voting is the default operating procedure for the legislature unless the Constitution provides an alternative vote total requirement. Bd. of Trustees of School Dist. of Fairfield County v. State, 395 S.C. 276, 279, 718 S.E. 2d 210, 211 (2011). ("Absent a constitutional provision to the contrary, the legislature acts and conducts business through majority vote.") Subsection (B) alters the General Assembly's default operating procedure as described in Fairfield County, but it does not violate any specific provision of the Constitution setting vote thresholds for action. Subsection (B) also does not implicate the fundamental rights protected by the Constitution. In fact, subsection (B) is a reasonable method of procedure to ensure that the protections in subsection (A) are safeguarded from the shifting sands of public opinion.[8] Enacting

[8]Petitioners spend a lot of time in their brief delving into the vote totals enacting the Heritage Act. Their argument is that enacting a supermajority voting requirement by a majority vote is improper. Imposing a supermajority requirement on procedural matters through a majority vote is not uncommon. For example, Senate Rules are adopted by a majority vote but contain supermajority requirements for a number of procedural matters, like cloture under Rule 15, amending a bill on 3rd Reading under Rule 26, varying the order of business under Rule 32, and setting bills for special order under Rule 33. Even amending the Rules of the Senate during the quadrennium during which they are

such a procedural component in a statute is well within the General Assembly's constitutional authority and does not "ignore constitutional restraints" on its actions.

C. If the Court Determines that § 10-1-165(B) Is Unconstitutional, Then The Court Should Sever It From the Remainder of § 10-1-165

Section 5 of Act 292 of 2000 contains a severability clause that states:

> 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 unconstitutional, invalid, or otherwise ineffective.

Act No. 292, 2000 S.C. Acts 2072 (emphasis added). If the Court determines that § 10-1-165(B) is unconstitutional, then the severability clause should be used to sever only subsection (B) and leave the remainder of the statute intact. "The 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." Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 648, 528 S.E.2d 647, 655 (1999). "When the residue of an Act, *sans* that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision." Id. (quoting Dean v. Timmerman, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959)).

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effective requires a supermajority vote. Enacting a supermajority threshold for procedural matters by majority vote is a common, constitutional act of the General Assembly. (Rules of the Senate of South Carolina, 123rd General Assembly)

Severing unconstitutional provisions from otherwise constitutional legislation is not new for the Court. Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001) (Unconstitutional provision of statute criminalizing the sale of urine with the intent to defraud a drug screening test that created a presumption of intent that was severable from remainder of statute.), Joytime Distributors and Amusement Co. Inc., 338 S.C. 634, 528 S.E.2d 647 (1999) (The unconstitutional part of the act related to a referendum on the question of video poker could be severed from the rest of the act without affecting the remaining provisions.), Thomas v. Cooper River Park, 322 S.C. 32, 471 S.E.2d 170 (1996) (Legislative delegation oversight of budgetary matters of political subdivision severed from remainder of the act thereby permitting political subdivision to function), Thayer v. South Carolina Tax Com'n, 307 S.C. 6, 413 S.E.2d 810, (1992) (Provision of sales and use tax statute which violated establishment clause of First Amendment by exempting religious publications from use tax was severable from remainder of statute.) Severance is the appropriate remedy in this case if the Court finds that the supermajority requirement in subsection (B) of § 10-1-165 is unconstitutional.

Subsection (A) is the substantive portion of § 10-1-165. That subsection provides protection to monuments, memorials, roads, bridges, and other structures. Subsection (B) is purely procedural, with limited application to the General Assembly's consideration of bills to amend or repeal § 10-1-165. While subsection (B) would not make sense without (A), there is no question that subsection (A) could stand alone without (B) as an independent provision of law. Stated differently, the protections in subsection (A) are complete in and of themselves and wholly independent of the General Assembly's procedure to amend or repeal those protections. Finally, the text of the severability clause itself satisfies the remaining part of the test for severability because the General Assembly would have enacted § 10-1-165 without subsection (B). The

General Assembly affirmatively asserts so in the text of the severance clause. There is no better indicator of legislative intent than the actual text contained in an act of the General Assembly. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.") (quoting Singer, Norman J., Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1991))

If the Court determines that the procedural provisions in subsection (B) are unconstitutional, then the Court should sever subsection (B) and allow subsection (A) to remain in effect.

III. Section 10-1-165 Does Not Violate Constitutional Prohibitions Against Special Laws, the Equal Protection Guarantees in the United States and South Carolina Constitutions, or Home Rule Restrictions on Legislative Action

Petitioners are asking this Court to strike down § 10-1-165 on four additional grounds: (1) Article III, § 34(I) of the South Carolina Constitution, which relates to a prohibition on special laws that name a person or place; (2) Article III, § 34(IX) of the South Carolina Constitution, which relates to a prohibition on special laws where a general law is applicable; (3) the equal protection clauses of the United States and South Carolina Constitutions; and (4) Article VIII of the South Carolina Constitution relating to what is commonly referred to as "Home Rule." For the reasons detailed below, the Court should hold that § 10-1-165 is constitutional.

Before analyzing each of Petitioners' arguments, several common threads running through the constitutional provisions at issue need to be identified and defined. "General law" and "political subdivision" are used throughout Petitioners' constitutional analysis of § 10-1-165. Consequently, the constitutional analysis of each of the four challenged provisions is intertwined and should be understood as a threshold matter.

The outcome of the analysis on whether § 10-1-165 is constitutionally infirm under Article III, § 34(I) and (IX) and Article VIII largely hinges on whether § 10-1-165 is a general law or a special law. The Court has recently addressed this specific issue in Weaver v. Recreation District. In Weaver, the Court ruled on a declaratory judgment action challenging the constitutionality of S.C. Code Ann. § 6-11-271 (2004), holding that the Appellant failed to meet his burden of establishing any constitutional infirmity. Weaver v. Recreation District, 431 S.C. 357, 848 S.E.2d 760 (2020). In reaching its decision, this Court explained:

> A general law is one that applies to the entire State and operates wherever the specified conduct takes place. A law is general when it applies uniformly to all persons or things within a proper class, and special when it applies only to one or more individuals or things belonging to the same class.

Id. at 369, 766 (citations and quotations omitted). Under this definition, § 10-1-165 is clearly a general law because it applies to all memorials and monuments identified in the first sentence of § 10-1-165(A) and applies to all streets, bridges, and other structures identified in the second sentence, no matter where they are located in the State, and affords all of them the same protections.

The second thread that runs through Petitioners' challenge concerns the relationship of the State to its political subdivisions. Properly understanding this relationship explains why § 10-1-165 does not violate the equal protection guarantees in the United States and the South Carolina Constitutions and why there is also no violation of Article VIII of the South Carolina Constitution.

Counties and municipalities are not independent entities. They are political subdivisions of the State. Hibernian Society v. W.O. Thomas, 282 S.C. 465, 472, 319 S.E.2d 339, 343 (S.C. App. 1984). As it relates to counties and municipalities, the term 'political subdivision' means a statutorily created area within the State that has been given the authority to exercise a portion of the State's sovereignty within a defined area. (1982 W.L. 189264 (S.C.A.G.)) "A political

subdivision is a division of the State invested with governmental functions." Willis Const. Co., Inc. v. Sumter Airport Com'n., 308 S.C. 505, 508, 419 S.E.2d 240, 241 (SC App. 1992) (emphasis added) The General Assembly, through the general laws of the State, vests counties and municipalities with the statutory authority by which they govern within their jurisdictional boundaries. S.C. Const. art. VIII, §§ 7 and 8. Article VIII of the South Carolina Constitution is the only limitation on the General Assembly's power to enact general laws prescribing the powers and duties of counties and municipalities.

Stated differently, all counties and municipalities are creatures of statute and would not exist independent of the General Assembly. Georgetown County v. Davis & Floyd, Inc., 426 S.C. 52, 59, 824 S.E.2d 471, 475 (Ct. App. 2019) ("The county is a creature of the State. Political subdivisions of the State have no ancestor other than the state and its citizens, nor do they possess a separate sovereignty.")(emphasis added) Title 4 of the 1976 Code establishes the counties, sets their boundaries, contains procedures for consolidating counties, and provides for many other issues, including taxation, bonds, and other fiscal matters. Title 5 contains similar provisions for municipalities. As creatures of statute, the General Assembly has the authority to add to or scale back the governing authority that the counties and municipalities may exercise within their boundaries. The only limitation on the General Assembly's authority in this regard is Article VIII. Petitioners would have this Court believe that Article VIII's existence completely divorces the General Assembly from asserting any authority over counties or municipalities. By extension, they would completely remove the state legislative branch of government from exercising any influence over the governance of citizens of this State on the local level, since every citizen resides within a county. While this may be a policy discussion for the legislature, the General Assembly was not

forced to cede its authority to govern counties and municipalities, or their citizens, when Article VIII was amended.

A. Section 10-1-165 Does Not Violate Article III, § 34 of the South Carolina Constitution

The prohibitions on special or local laws contained in Article III, § 34 are not intended to limit legislation like § 10-1-165. Historically, Article III, § 34, like its counterparts in almost every other state,[9] was included in the Constitution to deal with local, personal matters that bogged down the legislative branch or allowed legislatively created favoritism.[10] More importantly, the legislation dealt with the minutiae of governing and blurred the lines of the separation of powers. In other words, special law prohibitions remove the legislature from day-to-day governing in support of the separation of powers doctrine, with the business of governing being left for the executive branch, the adjudication of rights and other disputes being left for the judicial branch, and setting state policy through general laws being left for the legislative branch.

Section 10-1-165 falls neatly within the intended boundaries of Article III, § 34 because the statute sets a statewide policy for the subjects of that law. Consequently, § 10-1-165 does not violate Article III, §§ 34(I) or (IX).

1. Section 10-1-165 Does Not Violate Article III, § 34(I) of the South Carolina Constitution

Article III, § 34(I) of the South Carolina Constitution states:

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[9]Schutz, Anthony (2014) "State Constitutional Restrictions on Special Legislation as Structural Restraints," Journal of Legislation: Vol. 40: Iss. 1, Article 2

[10]In the "early to mid-nineteenth century legislatures busied themselves with essentially adjudicatory adjustments of private needs such as granting divorces" or "changing names, or other now-judicial functions" through large volumes of piecemeal legislation. Justin R. Long, State Constitutional Prohibitions on Special Laws, 60 Clev. St. L. Rev. 719, (2012). Special laws also drew the attention of constitutional drafters because they often were used to benefit wealthy business interests, regardless of their effect on the public good. (Id.) In response to these problems, nineteenth century state constitutional drafters included special laws clauses in their documents to "bar the granting of public benefit for private purposes." (Id.)

> The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit:
> (I) To change the names of persons or places.

S.C. Const. art. III, § 34(I) (1976). Section 10-1-165 does not change the name of a single person or place. In fact, the second sentence of § 10-1-165(A) states that: "No street, bridge, structure, park, preserve, reserve, or other public area of the State or its political subdivisions dedicated in memory of or named for any historic figure or historic event may be renamed or rededicated." S.C. Code Ann. § 10-1-165(A) (2011) (emphasis added). This statute not only echoes the constitutional prohibition in subdivision (I) relating to renaming a person or place, but also does not name a single person or place at all. Clearly, the contested provisions contained in § 10-1-165 do not violate the prohibition in subdivision (I), and any further analysis is unnecessary.

In order to sustain their argument, Petitioners unnecessarily apply rules of construction. When construing the constitution, the Court applies rules similar to those relating to the construction of statutes. Davis v. County of Greenville, 313 S.C. 459, 463, 414 S.E.2d 383, 385 (1994). "If a statute's language is plain,[11] unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and court has no right to impose another meaning.' Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581(2000)) The Court does "not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly." Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996).

[11]On page 17 of their brief, Petitioners concede that the language in § 34(I) is "plain." Respondent Peeler agrees that the language is "plain," and it therefore follows that the rules of constitutional construction are unnecessary. The only question then is whether § 10-1-165 actually changes the name of a person or place in violation of the constitutional prohibition – it does not. Petitioners' arguments thus fail, and no further inquiry is needed.

By using the rules of statutory construction, Petitioners attempt to add the word "affect" to Article III, § 34(I) because it is necessary to sustain their argument. Adding this word to subdivision (I) would mean that special laws that "affect" changing the names of persons or places are prohibited. Clearly, this would completely and inappropriately change the plain, unambiguous meaning of Article III, § 34(I).[12] For this reason, the Court should refuse to entertain Petitioners attempt at rewriting the Constitution to suit their policy goals. A simple reading of the constitutional provision and statute in question demonstrates that § 10-1-165 does not violate Article III, § 34(I), and in the alternative, the statute affirms the constitutional provision.

Simply put, Article III, § 34(I) means what it says: The General Assembly cannot enact a law that changes the name of a person or place within the text of the legislation. There is no need to look further than the plain language of subdivision (I) to understand what it means. Section 10-1-165 does not change the name of a single person or place in its text, so there is no violation of subdivision (I)'s prohibition.

2. Section 10-1-165 Does Not Violate Article III, § 34(IX) of the South Carolina Constitution

Petitioners contend that § 10-1-165 violates Article III, § 34(IX) of the South Carolina Constitution, which provides, in pertinent part:

> The General Assembly of this State shall not enact local or special laws concerning any of the following subjects or for any of the following purposes, to wit:
> …
> (IX) In all other cases, where a general law can be made applicable, no special laws shall be enacted…

[12]Ironically, if the word "affect" was in the Constitution, then this Court would need to apply statutory construction to determine what actions constitute "affecting" a name change. Would a special law have to directly affect a name change, or would indirectly affecting one be sufficient to trigger the prohibition?

S.C. Const. art. III, § 34(IX) (1976). (omitting a sentence related to the permissibility of enacting local or special laws fixing the amount and manner of compensation to be paid to County Officers) Petitioners are asking this Court to hold that § 10-1-165 violates § 34(IX) because the statute "creates classifications that are arbitrary and without any rational basis or compelling interests," thus violating the equal protection principles embedded in § 34(IX). (Pet. Br. at 19)

As previously discussed, the Court noted in Weaver that there are instances in which a special law is constitutionally permissible. The Court stated that:

> The language of the Constitution which prohibits a special law where a general law can be made applicable [] plainly implies that there are or may be cases where a special Act will best meet the exigencies of a particular case, and in no wise be promotive of those evils which result from a general and indiscriminate resort to local and special legislation. In other words, the General Assembly must have a logical basis and sound reason for resorting to special legislation.

Weaver v. Recreation District, 431 S.C. 357, 369 848 S.E.2d 760, 766 (2020). (citations and quotations omitted) Petitioners' fail to establish that § 10-1-165 is an unconstitutional special law under S.C. Const. art. III, § 34(IX) because the provisions in the statute apply to class members wherever they exist in the State and are applied evenly to each member of the separate classes. Furthermore, the classifications subject to the protections in § 10-1-165 are well-reasoned, logical classifications that do not violate the constitutional prohibitions in § 34(IX).

The classifications in § 10-1-165 are not arbitrary or irrational. The General Assembly carefully considered each classification and grouped them with intention. First, the list of military conflicts in § 10-1-165 was selected because they are the principal wars or conflicts in which the United States, and South Carolinians, participated in as of the date the statute was enacted. (CRS Report RL 32492, *American War and Military Operations Casualties: Lists and Statistics*, pg. 1-2, by David A. Blum and Nese F. DeBruyne (2020)) The list is also consistent with the list of wars and conflicts recognized by the United States Department of Veterans Affairs in its *America's*

Wars fact sheet. (https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf) The General Assembly intended for the monuments and memorials erected in honor of those wars and conflicts, and the sacrifices made by our citizens, to remain unchanged.

Similarly, the General Assembly recognized that African Americans and Native Americans have suffered well-documented discrimination within our country and our State. No other minority group has been mistreated in this State more than these two groups. It is therefore entirely rational and not arbitrary for the General Assembly to include monuments and memorials to these two groups within § 10-1-165. To exclude them would minimize the sacrifices and horrors that fellow South Carolinians have endured throughout our history.

The final classification contained in § 10-1-165 is that of any "street, bridge, structure, park, preserve, reserve or other public area of the State or its political subdivisions dedicated to the memory of or named for any historic figure or historic event." None of the things that comprise this class can be "renamed or rededicated." The General Assembly protected these particular streets, bridges, and other structures for the purpose of historic preservation. There are so many different things throughout the State named in honor of historic figures and events that it was impractical to name each one as it was able to do with the other two classifications. This classification is broader than the other two but is a rational, non-arbitrary way to achieve the goal of historic preservation.

Thus, even if this Court determines that § 10-1-165 is a special law, the Court should nonetheless uphold the challenged statute because the General Assembly had a logical basis and sound reasoning for enacting § 10-1-165.

3. Section 10-1-165 Does Not Limit the General Assembly's Legislative Authority

Petitioners appear to assert indirectly that action by the General Assembly to provide political subdivisions with an avenue for making name changes to roads, buildings, bridges, or other structures, or permitting the movement or alteration of a monument or memorial, would be unconstitutional because such legislative action would be a local or special law in violation of Article III, § 34(I) or (IX). If that is the position that Petitioners are taking, then Petitioners are wrong in that regard as well.

The General Assembly could enact a law of statewide application that allows any political subdivision to rename roads or other structures within its jurisdiction that are currently named after a historic figure that the political subdivision's residents find objectionable. For example, the Boards of Trustees for the University of South Carolina and Clemson University have both adopted resolutions asking the General Assembly to authorize a name change for a building located on the respective university's campus.[13] The General Assembly could enact a law that would allow any university in the State to make changes to names of buildings on its respective campus. Such a law would be general in application in that it would apply to all universities in the State. Additionally, the law would not name anything. Therefore, were the General Assembly to take that course of action, the General Assembly would not violate Article III, § 34(I) by enacting the law, and the universities would be able to rename the buildings. There are other variants to this example: The law passed could allow political subdivisions to do the same thing, or the General Assembly could allow streets to be renamed or specify that names involving Confederate leaders or names inspired by the Confederacy may be renamed.

[13]On June 12, 2020, the Clemson University Board of Trustees adopted a resolution requesting that the General Assembly enact legislation to authorize the university to rename Tillman Hall. On June 19, 2020, the University of South Carolina Board of Trustees adopted a resolution requesting that the General Assembly enact legislation to authorize the university to rename Simms Residence Hall.

Similarly, the General Assembly could enact a law of statewide application allowing political subdivisions to move, or even remove, monuments or memorials falling within a certain classification. As with the examples above, such a course of action would not violate Article III, § 34(IX) because the law would be applicable to all of the monuments and memorials within the classification no matter where they are located in the State.

The long list of possible legislation that the General Assembly could enact without crossing the line established by Article III, § 34 illustrates the fact that, to the extent that Petitioners are making this argument, the General Assembly can take constitutional action to facilitate certain actions that § 10-1-165 would otherwise prevent.

B. Section 10-1-165 Does Not Violate Article VIII of the South Carolina Constitution

It is well settled that "[i]n our division of powers, the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision. Included within the legislative power is the sole prerogative to make policy decisions; to exercise discretion as to what the law will be." Hampton v. Haley, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) (citations omitted) When revisions to Article VIII were ratified in 1973, the General Assembly granted renewed autonomy to local governments and placed limits on the General Assembly's legislative authority over counties and municipalities. "Article VIII was intended to return county government to a local level." Terpin v. Darlington County Council, 286 S.C. 112, 113 332 S.E.2d 771, 772 (1985) (citing Duncan v. York, 267 S.C. 327, 228 S.E.2d 92 (1976)). Article VIII and the subsequently enacted legislation that implemented constitutional provisions (the "Home Rule Act") established that counties and municipalities have "the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of [the local government] or for preserving health, peace, order and good

government." Williams v. Town of Hilton Head Island, 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993).

Petitioners argue that Article VIII restores autonomy to local governments and provides counties and municipalities with broad grants of authority and that any attempt to enact legislation affecting local government authority – limiting or expanding it – is unconstitutional.[14] They essentially remove any state-level legislative governance. The analysis upon which Petitioners base their conclusion is incomplete, and their conclusion is incorrect.

Although the Article VIII provisions create boundaries for legislative action, they are not a total prohibition. The General Assembly may still expand or restrict the authority under which local governments act, so long as it is via a general law with statewide application. Town of Hilton Head Island v. Morris, 324 S.C. 30, 34, 484 S.E.2d 104, 106 (1997) (The General Assembly is constitutionally empowered to determine the parameters of local government authority.) Id. (*See also* Weaver v. Recreation District, 431 S.C. 357, 848 S.E.2d 760 (2020) (Legislation was upheld against a Home Rule challenge because it was general legislation that affects all special purpose districts with unelected governing bodies throughout the state, so the legislation applied uniformly to a valid class of entities.) Thus, the General Assembly maintains a very important, limited role in the statewide governance of counties and municipalities as the general policy-setter for statewide issues that impact governance on the local level. This is precisely what the General Assembly did when it enacted § 10-1-165.

[14]Petitioners are asking the Court to turn its back on nearly fifty years of precedent and adopt a reading of Article VIII that would completely remove the General Assembly from the equation when it comes to counties and municipalities – alleging that somehow Article VIII provides the local governments in this State with some semblance of sovereignty or complete autonomy. That interpretation of Article VIII is patently wrong. Article VIII places some restrictions on the legislature, but it does not put the legislature out of the business of enacting general laws affecting counties and municipalities. Article VIII also does not establish counties and municipalities as sovereigns or grant complete autonomy.

Put another way, Article VIII prevents the General Assembly from enacting local laws affecting the governance of single counties or municipalities. Therefore, the analysis of whether § 10-1-165 violates Home Rule hinges on whether it is a general law. As previously discussed, § 10-1-165 is a general law that exists to establish a statewide policy to preserve our State's history. The monuments, memorials, and named streets or structures protected under § 10-1-165 are located in every county and many, many municipalities throughout the State.[15] Every publicly owned monument or memorial to one of the named military conflicts, Native-American history, or African-American history located on public property is subject to the provisions of § 10-1-165. Likewise, all streets, bridges, and other identified structures named for any historic figure or historic event around the State are also subject to the provisions of § 10-1-165. Since 10-1-165 is a general law like Respondent Peeler asserts, there is no Article VIII violation.

C. Section 10-1-165 Does Not Violate the Equal Protection Clauses of the United States and South Carolina Constitutions

Petitioners assert that § 10-1-165 violates the equal protection guarantees embedded in the United States and South Carolina Constitutions because not all military engagements and ethnic minority groups are included in the statute's protections. This means that Petitioners are asserting their equal protection arguments on behalf of inanimate monuments or memorials,[16] or on behalf of the political subdivisions in which the monuments and memorials reside. In either case,

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[15]Petitioners argue that local officials alone are best suited to address local issues. First, it is important to note that members of the General Assembly are part-time legislators, which means that they are still active participants in their local communities. To suggest that they are somehow removed from local civic life, or that they do not understand the issues facing their local communities is divorced from reality. Second, because of the prevalence of memorials, monuments, and named streets and other structures that fall under § 10-1-165 – and the existence of organized, well-funded movements to remove or rename them – protecting them in the name of historic preservation is a statewide concern, thus one that is perfectly suited for general legislation enacted by the General Assembly.

[16] In a footnote in their brief, Petitioners assert that "the disparate treatments of the military engagements and the ethnic heritages" identified for protection in § 10-1-165 are the basis for their equal protection argument. (Footnote 13, Brief pg 20) Military engagements and ethnic heritage are not people for whom equal protection under the law is guaranteed.

Petitioners fail to overcome the most basic threshold equal protection issue: equal protections exist to protect people, not places or things. Consequently, the Court should disregard their equal protection arguments altogether.

"The equal protection clause is not an independent limit on the action of the State." Hibernian Society v. W.O. Thomas, 282 S.C. 465, 472, 319 S.E.2d 339, 343 (S.C. App 1984). The equal protection clause "only forbids legislative enactments which transgress the equal protection rights of 'persons'" Id. Petitioners' equal protection arguments fail at this point. Neither the monuments and memorials nor the political subdivisions in which the monuments and memorials are located are people who are afforded equal protection rights. To that point, in Hibernian Society, the City of Charleston unsuccessfully argued that the city was a person. The South Carolina Court of Appeals reasoned that the City was not a person for equal protection purposes because "equal protection functions to protect the citizen from the state…not [to] protect the state, in the form of a political subdivision, from the state." Id. While the current issue before the Court is distinguishable because a group of citizens is asserting equal protection arguments on behalf of counties and municipalities, the outcome should be the same. Petitioners in this case cannot assert a right on behalf of a political subdivision that the political subdivision cannot assert on its own. The equal protection analysis should end here, and Petitioners' claims should be dismissed.[17]

Even if the Court were to disagree with Respondent Peeler's argument and allow an equal protections claim to move forward in favor of inanimate objects and political subdivisions, Petitioners' arguments would fail constitutional scrutiny. When reviewing an act of the General Assembly on equal protection grounds, this Court's standard of review is well settled:

[17]To underscore this point, even the cases cited by Petitioners in support of their equal protection arguments (Arnold v. Association of Citadel Men, 337 S.C. 265, 523 S.E.2d 757 (1999) and Seabrook v. Knox, 369 S.C. 191, 631 S.E.2d 907 (2006)) involve the treatment of people and whether the challenged government action treats all people affected equally.

> Unless some suspect criteria, such as race, is involved, it is elementary that the equal protection provisions are satisfied if the classification bears a reasonable relationship to a legitimate state interest which the Legislature seeks to effect and the constituents of each class are treated alike under similar circumstances and conditions…

Duke Power Company v. South Carolina Public Service Com'n., 284 S.C. 81, 93-94, 326 S.E.2d 395, 402 (1995) (citations and quotations omitted). In determining whether a statute violates equal protection, this Court accords "great deference to a legislatively created classification, and the classification will be sustained if it is not plainly arbitrary and there is any reasonable hypothesis to support it." Davis v. County of Greenville, 313 S.C. 459, 465, 443 S.E.2d 383, 387 (1994) (quoting *Cerny v. Salter,* 311 S.C. 430, 429 S.E.2d 809 (1993)) As a threshold matter, there are no suspect criteria involved because the challenged statute governs legislative action relating to monuments, memorials, streets, and other government infrastructure. If a rational basis test is applied to § 10-1-165, then it is clear that the statute is rationally related to a legitimate state interest and that all of the classifications established within its text are treated alike under similar circumstances and conditions.

The State has a legitimate interest in preserving its history. The protections afforded to monuments, memorials, and other structures named in honor of historically significant people and events in § 10-1-165 are rationally related to advancing a legitimate interest. Movements to remove, replace, alter, or otherwise change monuments and memorials on the public square are nothing new, which is why § 10-1-165 was written the way that it is. The General Assembly determined that such movements posed a threat to historic preservation in our State and enacted provisions to protect historic markers that serve as important, tangible representations of the State's history. These protections are logical, rational, and legitimate and are applied evenly to all classes.

CONCLUSION

Notwithstanding Petitioners' arguments to the contrary, § 10-1-165 is constitutional. Petitioners' challenge to § 10-1-165(B) is not justiciable because it impermissibly asks this Court to provide an advisory opinion. Furthermore, Petitioners' complaint about § 10-1-165(B) is not ripe for judicial determination because there has never been a vote invoking the supermajority requirement in the challenged statute. If the Court determines that Petitioners' challenge to § 10-1-165(B) is justiciable, then the Court should uphold the supermajority requirement because subsection (B) is a reasonable procedure to protect the provisions of subsection (A). If the Court finds that subsection (B) is unconstitutional, then the Court should sever subsection (B).

The Court should also rule in favor of Respondents on the other constitutional claims. Section 10-1-165 does not violate Article III, § 34(I) because the challenged statute does not name any people or places as provided in subdivision (I), nor does § 10-1-165 violate Article III, § 34(IX) because the statute is a general law not prohibited by the Constitution. Even if the Court determines that § 10-1-165 is a special law, there is still no violation of Article III, § 34(IX) because the General Assembly had a logical basis and sound reasoning for enacting the statute. Finally, § 10-1-165 does not impermissibly bind future General Assemblies, because legislative avenues, other than amending or repealing § 10-1-165, are available to the legislature if there is interest in addressing the protections contained in the statute.

Respondents' allegations that § 10-1-165 violates Home Rule also fail. The protections contained in § 10-1-165 are nothing more than a general law that sets parameters within which the affected political subdivisions must operate. General laws of this nature are allowed under the provisions of Article VIII of the South Carolina Constitution.

Finally, § 10-1-165 does not violate the equal protection guarantees in the United States and South Carolina Constitutions because the provisions in the statute are applied to political subdivisions and cover statues. In order to implicate the equal protection clauses, the state action must be against people and not inanimate objects or political subdivisions. Nevertheless, if the Court were to undertake an equal protection analysis of § 10-1-165, then it would find that there is no equal protection violation because the provisions in the statute are rationally related to the State's legitimate interest in historic preservation.

For these reasons, the Court should hold that § 10-1-165 is constitutional.

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December 21, 2020

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
Dec 21 2020
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.

RULE 211(b) CERTIFICATE

I certify, as counsel for Respondent Harvey Peeler in this matter, that the Reply Brief of Respondent Harvey Peeler 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).

BY: __/s/___________________________________

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