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S.C. SUPREME COURT

**IN THE STATE OF SOUTH CAROLINA**
**IN THE SUPREME COURT**

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**IN ORIGINAL JURISDICTION**

**Appellate Case No: 2020-000970**

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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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# BRIEF OF PETITIONERS

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Columbia, SC
October 21, 2020

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## INTRODUCTION

The rule of law begins with the Constitution. By design, the South Carolina Constitution allows for disagreements while guarding against a tyranny of the majority and oppression. These protections include political power being vested in the people, separation of powers, individual rights, and judicial review. This effective and sometimes fragile structure only works when the constitutional design is followed. By ignoring key constitutional limits, the Heritage Act violates the structure and limits of our Constitution and should be struck down.

Specifically, the Heritage Act violates our Constitution in four ways. First, the Act improperly restricts the General Assembly's lawmaking function by placing unconstitutional limits on the ability to amend or repeal the law. Next, the Act violates two separate constitutional prohibitions against special laws. Finally, the Act disregards Home Rule for local government control over local matters. Each violation, and independent of the others, should not allow the Heritage Act to stand.

For each of these reasons, Petitioners[1] respectfully request the Court declare the Heritage Act unconstitutional.

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[1] Petitioners have standing for the great public importance and need for future guidance. *See, e.g.*, *Sloan v. Dep't of Transp.*, 365 S.C. 299, 304, 618 S.E.2d 876, 878 (2005); *see also, e.g.*, *Adams v. McMaster*, Op. No. 28000, at *7-8 (S.C. Sup. Ct. filed Oct. 7, 2020) (Shearouse Adv. Sh. No. 40, at 14-16).

Petitioners also have constitutional standing because of their personal stakes and interests in the constitutionality of the Act, and because they have suffered and will continue to suffer injury from the continued enforcement of the Act in preventing changes to certain monuments, markers, and public streets, structures, and places. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

## STATEMENT OF ISSUES

1. Does the Heritage Act in Code Section 10-1-165(B) unconstitutionally restrain the General Assembly's legislative authority?

2. Is the Heritage Act unconstitutional special legislation under South Carolina Constitution Article III, Section 34(I) by prohibiting changes to the names of places?

3. Is the Heritage Act unconstitutional special legislation under South Carolina Constitution Article III, Section 34(IX) by using unreasonable and arbitrary classifications?

4. Does the Heritage Act unconstitutionally prohibit local governments from deciding local issues, like changing the names of streets, parks, and other public places?

## STATEMENT OF THE CASE

On May 18, 2000, the 113th General Assembly passed the Heritage Act (the "Act"). 2000 S.C. Act No. 292. Section 10-1-165 of the South Carolina Code:

> (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.

S.C. Code Ann. § 10-1-165. The Act received only 60.5% percent of the House members voting and 82% of the Senators voting.[2] *See* Legis. history of 2000 S.C. Act 292 (Roll call votes on May 18, 2000) (found at https://www.scstatehouse.gov/billsearch.php?billnumbers=1266&session=113&summary=B).

[2] The House is composed of 124 members, and the Senate comprises 46 members. S.C. Const. art. III, §§ 3, 6 (establishing the numbers of both Houses). Based on this Court's prior ruling on quorum, the percentages were calculated by dividing the number of yeas by the number of members present. *See Bd. of Trs. of Sch. Dist. of Fairfield Cty. v. State*, 395 S.C. 276, 284, 718 S.E.2d 210, 214 (2011) (noting that, absent a more specific method mandated for a particular vote, the calculation is based on quorum present and not total membership).

Since enactment, there has been increasing public interest in making changes that are purportedly prohibited by the Act. Specifically, citizens, public institutions, and local governments have demanded action to change monuments and the names of public places. *See, e.g.*, *Waller v. State of S.C.*, Case No. 2015-CP-24-0514 (8th Cir. Ct. of Common Pleas) (May 18, 2018 order granting summary judgment, vacated as moot November 14, 2018)); S.C. Atty. Gen. Op., December 13, 2004 (noting that, to the Attorney General, it was "quite clear" under the Heritage Act that the City of North Augusta could not even relocate a monument from one side of the park to the center once it had been placed); *see also, e.g.*, Jeff Wilkinson, *'Embarrassed about the name,' Cottontown residents want this street renamed*, The State (Columbia, SC) (June 23, 2020) (found at https://www.thestate.com/news/local/article243732692.html).

More recently, the Act's deficiencies have been illuminated as citizens and local governing bodies have attempted to make changes to monuments and other historical landmarks. The South Carolina Attorney General has recently weighed in and conceded that at least one aspect of the Heritage Act is unconstitutional. S.C.A.G. Op., June 25, 2020 (concluding that one legislature cannot bind a future legislature or require a two-thirds vote to change the law without a constitutional provision); *see also* S.C.A.G. Op., July 14, 2020. The Attorney General's office also addressed the uncertainty of the Act's protection of the infamous Meriwether Monument memorializing the admittedly historic Hamburg Massacre in the City of North Augusta by simply stating "[w]e cannot imagine that the General Assembly

intended to protect such a racist symbol when it enacted the Heritage Act" and urging the repeal of the underlying statutes that erected the monument in 1914-15. S.C.A.G. Op., July 21, 2020. Such a repeal would not resolve the dispute that the Heritage Act is unconstitutional or its independent purported preservation of the monument. Despite having issued at least "four formal opinions this year concerning application of the Heritage Act and in numerous other instances has rendered informal legal advice regarding the Act," the Attorney General's office recognizes that "only this Court could make a determination as to whether the Heritage Act violates the State Constitution." S.C.A.G. Ltr. to the Court, Aug. 13, 2020.

Petitioner Jennifer Pinckney is a citizen and resident of Lexington County. She is the widow of the late Reverend and Senator Clementa Pinckney, who was murdered along with eight parishioners participating in Bible study at Mother Emanuel African Methodist Episcopal Church in Charleston on June 17, 2015. In response, the General Assembly took its only action under the Act to relocate the Confederate Battle Flag from the State House grounds to a museum where it could be viewed in proper historical context and then hung Senator Pinckney's portrait in the Senate Chamber. Monuments, markers, and places memorializing Senator Pinckney and others are in Charleston at the Mother Emanuel Church, and in Marion[3] and Jasper Counties.[4]

[3] *See Marion County officials planning memorial park in honor of the late residents pay tribute to Sen. Pinckney*, The Morning News (Oct. 28. 2019) (found at

Petitioner Howard Duvall is a citizen and resident of the City of Columbia, Richland County. He is an elected member of City Council of Columbia and serves as a member of its Arts & Historic Preservation Committee.

Petitioner Kay Patterson was a long-time educator before being elected to the South Carolina House of Representatives in 1974 and then to the Senate in 1985. He retired in 2008. A historical marker about his birthplace and his impact was unveiled in 2018 by the South Carolina African-American Heritage Commission.[5]

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https://www.scnow.com/starandenterprise/news/marion-county-officials-planning-memorial-park-in-honor-of-the-late-residents-pay-tribute-to/article_caa218ab-3ae7-5f13-a03f-d50313ef6487.html).

[4] The Jasper County memorial marker for Clementa Carlos Pinckney is located at 2740 Tillman Road, Ridgeland, South Carolina and reads:

> (Front) Clementa Carlos Pinckney (1973-2015) answered the call to preach at the age of 13 here at St. John AME Church and received his first appointment to pastor at the age of 18. As a pastor, he served innumerable parishioners in many S.C. churches, including Youngs Chapel AME, Mt. Horr AME, and Campbell Chapel AME. His last appointment was as pastor at Mother Emanuel AME Church in Charleston.
>
> (Reverse) Pinckney was elected to the S.C. House of Representatives in 1996 at the age of 23, becoming the youngest African American elected to the S.C. legislature. In 2000 he was elected to the S.C. Senate. Sen. Pinckney was killed on June 17, 2015 along with 8 of his parishioners at Emanuel AME. A public viewing was held here at St. John AME. President Barack Obama delivered the eulogy at his funeral. Sponsored by the Jasper County Historical Society and Those He Loved and Served, 2019.

South Carolina Historical Markers: A Guidebook 326 (Winter 2019 S.C. Department of Archives & History) (found at https://scdah.sc.gov/sites/default/files/Documents/Historic%20Preservation%20(SHPO)/Programs/Programs/Historical%20Markers/SC%20Historical%20Marker%20Program%20Guidebook%20-%20Winter%202019%20(12-9-19).pdf).

[5] South Carolina Historical Markers: A Guidebook 198 (Winter 2019 S.C. Department of Archives & History) (found at

Respondent Harvey Peeler is the elected President of the South Carolina Senate and is sued in his official capacity as the representative of that legislative body. Respondent James H. Lucas is the elected Speaker of the South Carolina House of Representatives and is sued in his official capacity as the representative of that legislative body. 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.

On July 10, 2020, Petitioners filed the Petition for Original Jurisdiction with a direct, facial challenge to the constitutionality of the Heritage Act. The Attorney General responded on August 13, 2020, urging the Court to grant the petition because the "Act touches virtually every community in the State," agreeing with Petitioners' first argument that a substantive part the Act is "likely unconstitutional," and conceding "[t]he issues of special legislation and Home Rule

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https://scdah.sc.gov/sites/default/files/Documents/Historic%20Preservation%20(SHPO)/Programs/Programs/Historical%20Markers/SC%20Historical%20Marker%20Program%20Guidebook%20-%20Winter%202019%20(12-9-19).pdf):

> 16-75 ROUND O 1901 SOCIETY HILL ROAD, DARLINGTON
> Much of the land in this vicinity was once part of Thomas Smith's Round O Plantation. The name derives from a large Carolina Bay in the area known as "The Round Owe." Round O was birthplace of former S.C. Representative (Dist. 73) and Senator (Dist. 19) Kay Patterson, who was among the first African Americans elected to the S.C. legislature since 1902 when he won election in 1974. Sponsored by South Carolina African American Heritage Foundation, 2016.

The South Carolina African American Heritage Commission was created by the South Carolina General Assembly for the identification and preservation of Africa American history and cultural in South Carolina.

raised by Petitioners are serious." *Id.* After an extension, Respondents filed returns on August 19, 2020 not objecting to the petition. The Court then granted the petition and set a briefing schedule.

## STANDARD OF REVIEW

A legislative act is generally presumed valid and will not be declared unconstitutional without a clear showing the act violates some provision of the constitution. *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999); *see also In re Stephen W.*, 409 S.C. 73, 76, 761 S.E.2d 231, 232 (2014).

## ARGUMENT

### I. The Heritage Act Unconstitutionally Restrains the General Assembly's Legislative Authority.

The current General Assembly's legislative power has been restricted by the Heritage Act in violation of the Constitution. By requiring a two-thirds vote to make changes or to amend or repeal the Heritage Act, the General Assembly's power to legislate on behalf of the people has been usurped. In so doing, the prior legislative body commandeered control of this subject. The Heritage Act seeks to undermine the Constitution's structures and limitations and to prevent further legislative changes through the control of a past majority.

The South Carolina Constitution is the source of all State power, which is derived from the people of South Carolina. S.C. Const. art. I, § 1 ("All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government."). Article III of the Constitution vests with the General Assembly the power to legislate on behalf of the people. S.C. Const. art. III, § 1 (establishing the legislative branch of government). This power includes amending and repealing legislation as well as enacting legislation. *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) ("[T]he General Assembly has plenary power over all legislative matters unless limited by some constitutional provision.").

Implicit is the principle that one legislature cannot restrict or limit a future legislature's same authority or rights, which includes prohibiting the placement of procedural bars restricting the legislature's ability to amend or repeal laws. *See,*

*e.g.*, *Manigault v. Springs*, 199 U.S. 473, 497 (1905) (holding that as "a general law enacted by the legislature, it may be repealed, amended, or disregarded by the legislature which enacted it[, and] . . . it is not binding upon any subsequent legislature, nor does a noncompliance with it impair or nullify the provisions of an act passed without the requirement of such notice"); *Boyd v. Alabama*, 94 U.S. 645, 650 (1876) (holding that no legislature can "restrain the power of a subsequent legislature to legislate for the public welfare"); *Metro. Bd. of Excise v. Barrie*, 34 N.Y. 657, 668 (1866) ("[N]o one legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."); *see also, e.g.*, *McKee Family I, LLC v. City of Fitchburg*, 893 N.W.2d 12, ¶ 52 (Wis. 2017) ("It is a well-established principle that '[o]ne legislature may not bind a future legislature's flexibility to address changing needs.'" (quoting *Flynn v. Dep't of Admin.*, 576 N.W.2d 245 (Wis. 1998))). Simply put, one legislature cannot restrict a future legislature's ability to enact, amend, and repeal legislation. That is precisely what the Heritage Act seeks to do.

Any limitation of legislative power must be derived from the Constitution. This requirement is one of the many checks and balances designed by the framers. *State ex rel. McLeod v. McInnis,* 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982) (recognizing the checks and balances of the State Constitution). By reserving on behalf of the people all authority not specifically delegated, the Constitution provides the present-day General Assembly the necessary flexibility to address issues of the day. *See State v. Moorer*, 152 S.C. 455, 479, 150 S.E. 269, 277 (1929)

(recognizing legislative power is the power to make policy decisions and to exercise discretion as to what the law will be); *Sutton v. Catawba Power Co.*, 101 S.C. 154, 157, 85 S.E. 409, 410 (1915) (same).

In the event the General Assembly determines different constitutional authority is warranted in a specific area, the Constitution provides the mechanism to amend. S.C. Const. art. XVI, § 1. Under such circumstances, the transfer of authority is not determined solely by the General Assembly but must be ratified by the people. *See* S.C. Const. art. XVI, § 1 (outlining the process of amending the Constitution, which requires a majority vote of the electors); *see also* S.C. Const. art. I, § 1. For these reasons, it is improper for one legislature to attempt to bind another by prohibiting a future change in the law or requiring a supermajority vote without the consent of the people.

To permit otherwise would vest one legislature heightened authority, akin to constitutional authority, to bind future legislatures. This control directly contradicts the delicate balance created by the Constitution. Moreover, this type of legislative action invites a tyranny of a past majority.[6] This undermines the very essence of democracy.

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[6] *Cf.* James Madison, The Federalist Papers, No. 51 (1788) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure."); Thomas Paine, Rights of Man (1791) ("[A] body of men, holding themselves accountable to nobody, ought not to be trusted by anybody.").

As this Court has previously held, "absent a constitutional provision to the contrary, *the legislature acts* and conducts business through *majority vote*." *Bd. of Trs. of Sch. Dist. of Fairfield Cty. v. State*, 395 S.C. 276, 279, 718 S.E.2d 210, 211 (2011) (emphasis added). The people of South Carolina have established six constitutional areas that require a "supermajority of the legislature to act." *Id.* The first three areas are in Article III, which requires a two-thirds vote to end session for more than thirty days (*sine die*), expel a member, and address capital reserve funds, including cash, interest, principal, and bonds held over different fiscal years. S.C. Const. art. III, §§ 9, 12, & 36. The fourth area requiring a two-thirds vote of both houses of the General Assembly is to overcome a gubernatorial veto.[7] S.C. Const. art. IV, § 21. Fifth, state appropriations in several instances require a two-thirds vote. *See* S.C. Const. art. X, §§ 2, 3, 7 & 13. Finally, amendments to the Constitution require a two-thirds vote to ask the people of South Carolina to ratify a

[7] Section 12 of Article III also provides both chambers with the authority to make their own rules. S.C. Const. art. III, § 12; *Sch. Dist. of Fairfield County*, 395 S.C. at 279, 718 S.E.2d at 211. In following this constitutional authority to adopt rules that preserve checks and balances with the executive branch, the House and the Senate respectively require the supermajority vote to override a Governor's veto. Rules of the Senate of South Carolina Rule 50 (found at https://www.scstatehouse.gov/senatepage/senrule.php); Rules of the South Carolina House of Representatives Rule 10.3.4 (found at https://www.scstatehouse.gov/housepage/hourule.php); *see also Sch. Dist. of Fairfield County*, 395 S.C. at 279, 718 S.E.2d at 211. While empowered to make their own rules, which are adopted at the start of each session, these rules do not authorize the General Assembly to bind a future body. Not only would such action violate well settled rules of authority, it would invite unlimited manipulation. *See generally* Robert A. Caro, Master of the Senate (2002) (detailing then-Senator Lyndon B. Johnson's ability to use procedural rules to filibuster and earn his title as Master of the Senate).

constitutional amendment or to call a constitutional convention. S.C. Const. art. XVI, §§ 1 & 3.

In addition to these constitutional provisions, the Code of Laws has a limited number of other circumstances requiring a two-thirds vote.[8] Significantly, these laws can be summarized into two main groups: (1) laws dealing with fiscal authority and (2) those addressing monuments, flags, and names of public places.[9]

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[8] S.C. Code Ann. § 1-10-10 (outlining that the flags authorized to be flown atop the State House dome may only be amended or repealed of an act which has received a two-thirds vote in the General Assembly); S.C. Code Ann. § 4-29-67 (explaining an affirmative vote for development projects requiring a fee in lieu of property taxes means it has two thirds of the members present and voting, but not less than three-fifths of the total membership in each branch); S.C. Code Ann. § 8-13-310(F)(2) & (3) (providing each chambers to remove an appointed commissioner if certain conditions are met and two-thirds of the membership approve); S.C. Code Ann. § 10-1-160 (noting the display of certain flags on State House grounds may only be amended or repealed by two-thirds vote of the General Assembly); S.C. Code Ann. § 11-51-20(2) (referencing the Constitution and requiring two-thirds vote of total membership of the Senate and House to modify the general obligation bond debt); S.C. Code Ann. § 11-51-20(6) (noting the Constitution's authorizing the General Assembly to authorize general obligation debt by two thirds vote of the members of each body); S.C. Code Ann. § 12-36-2630 (noting that a two percent local accommodations tax may not be increased except for approval of two-thirds of both Houses of the General Assembly); S.C. Code Ann. § 12-37-220(A)(47)(c) (noting that changes to the general exemption from taxes may not be deleted or reduced except by a legislative enactment received a recorded roll call vote of at least two-thirds majority of the membership of each House of the General Assembly); S.C. Code Ann. § 16-13-210(C) (allowing the General Assembly by a two-thirds vote to remove the disqualification to hold public office for someone convicted of embezzlement of public funds); S.C. Code Ann. § 59-26-50 (providing the Educational Improvement Task Force may only be extended by two-thirds of the members of the House and Senate present and voting).

[9] Petitioners acknowledge there is at least one statutory law that does not fit into either group but contend this law mirrors the constitutional authority for each house of the General Assembly to judge and expel a member of the body by a two-thirds vote. This authority has been recently applied when either the House or Senate want to remove for cause any member appointed by that body to the State

As to the first group, the supermajority requirement is supported by authority delegated in Articles X and XVI of the South Carolina Constitution. The second group of statutory laws requiring a two-thirds supermajority has no traceable authority to the Constitution.

The Heritage Act violates the Constitution by requiring two-thirds of both chambers to amend or repeal the law. S.C. Code Ann. § 10-1-165(B). A supermajority vote dilutes the democratic system that the Constitution was designed to protect. The people of South Carolina have not approved or provided any constitutional basis for a supermajority requirement for changing monuments, flags, or the names of public places.

By allowing a past majority—from twenty years ago—to control future legislatures, neither the people nor their elected representatives can be fully heard. The gravity of this circumstance is amplified by the fact that the Act itself failed to receive two-thirds vote at the time of passage. *See supra* note 2. It is impossible to reconcile that less than two-thirds of the 113th General Assembly attempted to bind all citizens and all future legislatures to a supermajority vote in the Act when that body could not meet its own purported procedural hurdle.

For these reasons, Petitioners request this Court find and declare the Act violates the Constitution.

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Ethics Commission. *See* S.C. Code Ann. § 8-13-310(F)(2) & (3); *cf.* S.C. Const. art. III, § 12.

## II. The Heritage Act is Unconstitutional Special Legislation.

The Act's prohibition on changing monuments and the names of public streets, structures, and other places violates the constitutional limit on special legislation for two independent reasons. First, Article III, Section 34(I) expressly prohibits the General Assembly from enacting special laws that are based on changing the name of persons or places. The Act directly violates this absolute constitutional prohibition. Second, the Act arbitrarily creates classifications that violate the equal protection guarantee.

The Constitution states, in the relevant 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:
>
> I. To change the names of persons or places.
>
> . . .
>
> IX. In all other cases, where a general law can be made applicable, no special law shall be enacted . . . .

S.C. Const. art. III, § 34(I) & (IX).

When interpreting 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, 443 S.E.2d 383, 385 (1994). In construing laws, courts must give the language its plain and ordinary meaning. *Id.* When confronted with an undefined term, courts must interpret it in accordance with its usual and customary meaning. *Branch v. City of Myrtle Beach,* 340 S.C. 405, 409–10, 532 S.E.2d 289, 292 (2000); *State v. Hudson,* 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). Notably,

courts consider the language of the particular clause in which the term appears and also the meaning in conjunction with the purpose of the law as a whole. *See Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.,* 357 S.C. 327, 332–33, 592 S.E.2d 335, 338 (Ct. App. 2004) ("[T]erms must be construed in context and their meaning determined by looking at the other terms used in the statute."). Furthermore, "[a] constitution is not to be construed item by item, but must be harmonized." *Knight v. Salisbury*, 262 S.C. 565, 570, 206 S.E.2d 875, 877 (1974). Likewise, the Court cannot rewrite statutes. *See Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28, 336 S.E.2d 488, 491 (Ct. App. 1985) ("We are not at liberty, under the guise of construction, to alter the plain language of the statute by adding words which the Legislature saw fit not to include."); *cf. State v. Leopard*, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002) (declining to alter a statutory definition, stating "that public policy must emanate from the legislature").

At the outset, there is no doubt the Heritage Act qualifies as a special law. It is well settled that a general law is one that "applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging to that same class." *Kizer v. Clark*, 360 S.C. 86, 92–93, 600 S.E.2d 529, 532 (2004). A law that is general in form but special in its operation is special legislation. *See Thomas v. Macklen*, 186 S.C. 290, 195 S.E. 539, 543-44 (1938) ("There must be some distinguishing peculiarity which gives rise to the necessity for the law as to the designated class. A mere classification for the purpose of legislation, without regard to such necessity, is simply special legislation

of the most pernicious character, and is condemned by the constitution." (internal quotation omitted)).

### A. Prohibition Against Special Legislation to Change the Names of Persons or Places.

The Heritage Act violates the plain language of Section 34(I). Section 34 enumerates seven instances in which the General Assembly "*shall not* enact local or special laws." S.C. Const. art. III, § 34 (emphasis added); *see also Salley v. McCoy*, 182 S.C. 249, 189 S.E. 196, 213 (1936). Included within the absolute prohibitions is the declaration there can be no special law that affects changing the names of persons or places. S.C. Const. art. III, § 34(I); *see Thomas v. Macklen*, 195 S.E. at 543 ("[T]he object of Section 34, Article 3, was to place a *limitation* upon the power of the Legislature. The evil sought to be remedied was the great and growing evil of special and local legislation. To remedy this evil, such legislation was *absolutely* prohibited as to certain enumerated subjects, and *conditionally* prohibited as to all other subjects." (emphasis in original) (internal quotation omitted)).

When given its plain and ordinary meaning, the word "change" means "to make different." *See* Webster's Dictionary (1913) (accessed at https://www.webster-dictionary.org/definition/Change). Thus, the General Assembly may not impose a special law that affects changing or making different the names of public streets, structures, and other places.

The Heritage Act does exactly what is constitutionally prohibited by restricting local governments and even the South Carolina legislature from

changing the names of public places: "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."[10] S.C. Code Ann. § 10-1-165(A). The Constitution forbids the General Assembly from passing a special law concerning precisely these types of name changes. *See Elliott v. Sligh*, 233 S.C. 161, 165, 103 S.E.2d 923, 925–26 (1958) ("[W]hen the unconstitutionality of an act is clear to this court, beyond a reasonable doubt, then it is its plain duty to say so." (citing *Thomas*, 186 S.C. 290, 195 S.E. 539)).

For this reason alone, the Court should declare the Act unconstitutional.

### B. Violation of Equal Protection by Arbitrary Classifications.

Moreover, the Act is special legislation that violates the constitutional guarantee of equal protection. *See* S.C. Const. art. III, § 34(IX). This Court has previously explained:

> A law is general when it applies uniformly to all persons or things within a proper class, and special when it applies to only one or more individuals or things belonging to that same class. [] If the legislation does not apply uniformly, the inquiry then becomes whether the legislation creates an unlawful classification.

*Charleston County Sch. Dist. v. Harrell*, 393 S.C. 552, 558, 713 S.E.2d 604, 608 (2011) (internal quotations and citation omitted).

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[10] Political subdivision is defined throughout the South Carolina Code to include "counties, cities, towns, villages, townships, districts, authorities, and other public corporations and entities whether organized and existing under charter or general law." S.C. Code Ann. § 41-8-10(D); S.C. Code Ann. § 6-11-435 (defining political subdivision to mean to "a municipality, county, or special purpose district").

A law that creates different classifications does not automatically violate the Constitution. Rather, if a statute creates a classification, the inquiry becomes whether the classification violates the equal protection guarantee prohibiting unreasonable and arbitrary classifications. *See id.*; *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 147, 568 S.E.2d 338 (2002); *see also Elliott v. Sligh*, 233 S.C. 161, 165, 103 S.E.2d 923, 925–26 (1958) ("The question must be decided not by the letter, but by the spirit and practical operation of the act."). "A classification is arbitrary, and therefore unconstitutional, if there is no reasonable hypothesis to support it." *Bd. of Trs. for Fairfield Cty. Sch. Dist. v. State*, 409 S.C. 119, 125, 761 S.E.2d 241, 244–45 (2014).

The Heritage Act creates classifications that are arbitrary and without any rational basis or compelling circumstances. The first sentence of subsection 10-1-165(A) identifies for protection only ten, and not all, military engagements of the United States and only two, and not all, ethnic heritages. The Act then treats these classifications and their corresponding histories differently—by requiring the General Assembly's supermajority permission to relocate or modify monuments and memorials for the identified items and people in the classifications. The second sentence also creates a classification of some but not all historical figures and events, and protects public streets, structures, and other places named only for historic figures and events.

These unconstitutional classifications may be demonstrated by fact that seeking to change a monument or street name that deals with the War on Terror[11] or Jewish heritage[12] would require taking very different administrative action. Instead of waiting for approval from the General Assembly, a person or group would petition the local governing body or board to make any change. Practically, those subject to the General Assembly's approval by the Act are guaranteed a more burdensome and challenging fight to relocate or modify a monument or change the name of a street; and this would include additional time and costs, and likely have a different result. Moreover, there is neither a rational basis nor compelling circumstances to warrant this difference among similar items. This disparate treatment violates equal protection and cannot stand.

For each of these reasons based on the constitutional prohibition on special legislation, the Act should be declared unconstitutional.[13]

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[11] *See, e.g.*, the Columbia 9/11 & First Responders Monument ("comprised of two steel beams from the World Trade Center South Tower and two granite pillars etched with the names of the 57 South Carolina First Responders killed in the line of duty since its erection") and the Midlands' Wall of Remembrance ("directly behind the Columbia 9/11 & First Responders monument, mounts granite plaques for each of the fallen who gave the ultimate sacrifice") (found at https://www.scremembers911.org/).

[12] *See, e.g.*, Memorials and Sites of the S.C. Council on the Holocaust, which was established through a state legislative mandate and is overseen by a board appointed by the offices of the Governor, President of the Senate, and Speaker of the House (found at https://scholocaustcouncil.org/memorials.php).

[13] Petitioners believe this argument provides the Court the basis to address equal protection through both the South Carolina and U.S. Constitutions. *See* U.S. Const. amends. V & XIV; S.C. Const. art. I, § 3. Petitioners separately assert that the Act violates the Equal Protection Clause of the Fourteenth Amendment for the disparate treatment of the military engagements and ethnic heritages detailed

### III. The Heritage Act Violates Home Rule.

The Heritage Act also violates the Constitution by invading the province of counties and municipalities under Home Rule for regulatory control of local matters. *See* S.C. Const. art. VIII, §§ 1, 7, 9 & 17.[14] In so doing, the Act ignores both constitutional provisions and the broad grant of power given to local governments for local decisions on local matters. This constitutional delegation of authority creates unnecessary conflict and ambiguity between the Act and Home Rule through the local constitutional authority and other enabling laws.

As previously discussed, the General Assembly's plenary power to enact legislation is limited. *Clarke v. S.C. Pub. Serv. Auth.,* 177 S.C. 427, 438–39, 181 S.E. 481, 486 (1935) ("[T]he powers of the General Assembly are plenary as to all matters of legislation unless limited by some provision of the Constitution." (citation omitted)). Since 1973, South Carolina's Constitution has limited state legislative power over counties and municipalities through Home Rule, which grants autonomy to local government for local matters. *See Williams v. Town of Hilton Head Island*,

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above. *See Arnold v. Association of Citadel Men*, 337 S.C. 265, 272, 523 S.E.2d 757, 761 (1999) ("Equal protection requires all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." (internal quotations and citation omitted)); *see also Seabrook v. Knox*, 369 S.C. 191, 200, 631 S.E.2d 907, 912 (2006) (explaining that to establish an equal protection violation, plaintiffs must demonstrate they were intentionally and purposely subjected to treatment different from others similarly situated).

[14] *Cf. also* S.C. Const. art. VIII, § 15 (prohibiting certain state actions affecting streets and public places under local control "without first obtaining the consent of the governing body of the municipality in control of the streets or public places proposed to be occupied for any such or like purpose" and with a similar provision for different limits on state action involving streets and places in counties and consolidated political subdivisions).

311 S.C. 417, 422, 429 S.E.2d 802, 804–05 (1993) ("Article VIII of the South Carolina Constitution was completely revised for the purpose of accomplishing home rule; thus granting renewed autonomy to local government.") (citing *Southern Bell Telephone & Telegraph Co. v. City of Aiken,* 279 S.C. 269, 271, 306 S.E.2d 220, 221 (1983)). *But cf. Town of Hilton Head Island v. Morris*, 324 S.C. 30, 34, 484 S.E.2d 104, 106-07 (1997) (upholding a general law requiring all local governments that collect real estate transfer fees to remit the collections to the State or have the amount deducted from its Aid to Subdivsions).

The Home Rule delegation of authority and constitutional balance "reflects a serious effort upon the part of the electorate and the General Assembly to restore local government to the county level." *Knight v. Salisbury*, 262 S.C. 565, 569, 206 S.E.2d 875, 876 (1974). This balance tips in favor of local control for local decisions, according to the Constitution: "The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Powers, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution." S.C. Const. art. VIII, § 17.

As part of Home Rule, the General Assembly was directed to determine and delegate powers to local governments. "Acting under this authority, the General Assembly enacted various statutes regarding the powers of counties and municipalities." *Hosp. Ass'n of S.C., Inc. v. County of Charleston*, 320 S.C. 219, 225–27, 464 S.E.2d 113, 117–18 (1995). Local governments' power includes broad

"necessary and proper" powers for county governments, S.C. Code Ann. § 4-9-25 ("All counties of the State . . . have authority to enact regulations, resolutions, and ordinances . . . respecting any subject as *appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them*." (emphasis added)), and municipal governments, S.C. Code Ann. § 5-7-30 (establishing that every municipality has the power to "enact regulations, resolutions, and ordinances . . . respecting any subject which appears to it *necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it*" (emphasis added)). In interpreting these statutes, this Court has previously found that both provide "broad grant[s] of power" to local governments in addition to the powers directly covered. *Hosp. Ass'n of S.C.*, 320 S.C. at 224, 464 S.E.2d at 117. In sum, these laws signal the power of these local governments to utilize their full authority to act in the interest of their communities.

The Heritage Act's prohibitions stand in direct conflict to the broad powers vested with local government. Home Rule, through both the Constitution and other laws, vests local governments with the power to decide the names of local places and to ensure the health, safety, and welfare of local communities. By severely limiting local government from acting on the names of local streets, structures, and other public places and from changing some types of monuments and memorials, the Heritage Act creates a clear conflict in authority and undermines local governments' ability to carry out their duties and obligations to their local

constituencies on local matters—including local decisions for peace, order, and good government in changing names of public streets, structures, and other places and in relocating of monuments as needed.

In recent weeks, local governments have been faced with increasing issues and demands about monuments and other named public places. As protestors gathered recently, the issue of health and safety became a paramount concern, especially during this time of COVID-19. Local governments have had to expend additional resources for safety of its citizens as well as the protection of the monuments and signs. Deciding how to address these matters from both an economic and safety perspective is and should be within the authority and control of the local government.

Local governments better understand their communities. Because of their proximity and responsibility for local matters, they can be more responsive and best decide what changes, if any, to make to monuments and the names of places and also how to manage resources—in both the short and long term. Additionally, it is the local community that is taxed with the cost of upkeep, maintenance, and preservation of their monuments, memorials, and public places that are not on State House grounds. They should be allowed to have a voice, through their local elected officials, in the items they pay for, additional costs that could arise, as well as which monuments and what names for streets, structures, and other public places they see daily.

As written, Article VIII, Section 17 mandates that local governments are entitled to make these decisions. Accordingly, this Court should also declare the Act is unconstitutional for violating Home Rule.

## CONCLUSION

For each of these four independent reasons, this Court should declare the Heritage Act is unconstitutional in its entirety and permanently enjoin its enforcement.

**IN THE STATE OF SOUTH CAROLINA**
**IN THE SUPREME COURT**

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**IN ORIGINAL JURISDICTION**

**Appellate Case No: 2020-000970**

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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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RULE 211(b) CERTIFICATE

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I certify, as counsel for Petitioners in this matter, that the Brief of Petitioners was filed and served according to South Carolina Appellate Court Rules and that, to the extent it applies, this brief complies with the Rule 211(b).

Matthew T. Richardson

October 21, 2020

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CERTIFICATE OF FILING AND SERVICE

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I certify that, on October 21, 2020, the Brief of Petitioners was filed and served on Respondents and the South Carolina Attorney General by email, in accordance with *In re Operation of the Appellate Courts During the Coronavirus Emergency*, App. Case No. 2020-000447, Amended Order No. 2020-05-29-02, ¶¶ (c)(6) & (g)(3) (S.C. Sup. Ct. filed May 29, 2020), and addressed as follows:

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October 21, 2020

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