IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

IN ORIGINAL JURISDICTION

Appellate Case No: 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.

REPLY BRIEF OF PETITIONERS

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ARGUMENT

Compromise does not create constitutionality. Focusing on the legislative background, Respondents ask this Court to find favor in the 2000 compromise and sever section 10-1-165(B) of the South Carolina Code of Laws, a key component of the Heritage Act, to absolve patent constitutional violations. Yet, in doing so, Respondents readily admit that the Heritage Act was a compromise contingent on the two-thirds voting requirement. Thereby, Respondents waive severability because they are bound by their own admissions. These admissions, coupled with this underlying constitutional violation alone, warrant a declaration that the Heritage Act should be struck.

In addition to the supermajority requirement and admitted inability to sever, the Heritage Act is unconstitutional special legislation and violates Home Rule. While Respondents raise a litany of defenses, their attempts fall flat. No compromise or contorting can change that the Heritage Act improperly binds our current General Assembly and has frozen the ability to expand, protect, or change only some monuments, memorials, and names of public places in direct violation of our constitution.

I. This Facial Challenge is Justiciable and Ripe for Review.

While Respondents dedicate much of their combined efforts contending this matter is not ripe for review by objecting to posturing, the Court may address this facial challenge based on Petitioners' legal rights and the existence of a justiciable controversy. This stems from the relief provided by the Declaratory Judgment Act.

The Declaratory Judgment Act broadly provides parties an avenue to address questions about their legal rights. S.C. Code Ann. § 15-53-10. The statute allows any parties "who have or claim any interest which would be affected by the declaration" to be included. S.C. Code Ann. § 15-53-80. Thus, if this Court finds Petitioners have or can claim *any* interest, then it should be proper to proceed. Such liberal construction of the Declaratory Judgment Act is necessary "to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships." *Thompson v. State*, 415 S.C. 560, 565, 785 S.E.2d 189, 191 (2016) (quoting *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995)).

There is no question that Respondents have enforced and publicly stated that they will continue to enforce the provisions of the Act.[1] Petitioners have direct and independent interests for this Court to declare their rights under and the validity of the Act. Petitioner Jennifer Pinckney's interest stems from economic and fiduciary interests surrounding the fundraising and preparation of a monument and the protection of memorial markers in her husband's honor. Before finishing fundraising and plans for Senator Pinckney's monument, Petitioner Pinckney needs

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[1] *See, e.g.*, Maayan Schechter, *S.C. Gov. McMaster takes side on Strom, but not on college's push to change building names*, The State (Columbia, SC), June 20, 2020 (found at https://www.thestate.com/news/politics-government/article243656952.html); Meg Kinnard, *Confederate statues likely to go undisturbed in SC in 2021*, Associated Press, Jan. 12, 2021 (found at https://statesville.com/news/state-and-regional/confederate-statues-likely-to-go-undisturbed-in-sc-in-2021/article_f2c76f18-d5c4-52fa-8e13-ef96acf832c5.html).

to know she has the ability to protect and have the monument moved or changed as necessary. Petitioner Duvall, as a member of Columbia's City Council, has vested interests, fiduciary and economic, in knowing the parameters of the law before drafting, introducing, advocating, and voting to change any of the items subject to the Heritage Act. Petitioner Patterson has personal interests in the protection of the memorial marker that discusses his legacy and community.

Respondents misplace their contentions that this case is not ripe because monuments have not been moved and prior votes have occurred without objection by the General Assembly. *See Thompson* 415 S.C. at 565, 785 S.E.2d at 191; *see also* Lucas Brief at 5-6 (outlining prior legislation). There is neither a requirement to violate the Act to make a facial challenge nor any waiver of review because no one has complained before or set up a challenge with a futile legislative act.

Public importance also supports standing and ripeness of this challenge. Monuments are being taken down, like John C. Calhoun's statue in Marion Square in Charleston; changed, like the World War I memorial in Greenwood; and left untouched despite needed changes, like a monument in North Augusta.[2] Based on these and many other examples, legal questions surrounding the applicability and

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[2] *See, e.g.*, Stephen Hobbs, Gregory Yee, et al., *John C. Calhoun statute taken down from its perch above Charleston's Marion Square*, Post & Courier Jun 23, 2020 (updated Nov 23, 2020) (found at https://www.postandcourier.com/news/john-c-calhoun-statue-taken-down-from-its-perch-above-charlestons-marion-square/article_7c428b5c-b58a-11ea-8fcc-6b5a374635da.html); *Waller v. State of S.C.*, Case No. 2015-CP-24-0514 (8th Cir. Ct. of Common Pleas) (World War I memorial); S.C. Atty. Gen. Op., December 13, 2004, 2004 WL 3058237, (noting 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).

actions under the Act throughout the State need guidance from this challenge.[3] The ability of local governments to act remains unclear, including recent efforts and an obvious need for a change, for accuracy and completeness of historical preservation, regarding the historic Hamburg Massacre and the merely historical Meriwether Monument.[4] The Heritage Act appears to treats two sides of the same historical event differently and thus prevents anything from being done because of the confusion and need for guidance.

The need for guidance is equally pressing for the General Assembly as new legislation has been filed to create serious consequences for violating the Act. The legislation includes not only charging a local elected official who votes to take down a monument with a misdemeanor, suspending the officer, and fining them $25 million but also cutting critical state funding for cities and counties that take down monuments. *See* H. 3249 & H. 3358, S.C. Gen. Assemb., Session 124 (2021-22). At least ten bills have been filed to address the treatment of historical monuments.[5]

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[3] *See, 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).

[4] Lindsey Hodges, *Residents write S.C. Legislature seeking removal of racist Meriwether Monument*, The North Augusta Star, Jan. 11, 2021 (found at https://www.postandcourier.com/northaugustastar/news/residents-write-sc-legislature-seeking-removal-of-racist-meriwether-monument/article_3c851a64-5456-11eb-a977-5b55c79400af.html); S.C. Atty. Gen. Op., July 21, 2020, 2020 WL 4365489.

[5] *See, e.g.*, H. 3135, S.C. Gen. Assemb., Session 124 (2021-22) (establishing a monument review study committee to study the potentially offensive monuments on the State House grounds and to determine how the monuments may be removed or altered to be historically accurate); H. 3249, S.C. Gen. Assemb., Session 124 (2021-22) (proposing amending the Heritage Act to expand the type of monuments that

Practically, it is necessary for all involved in the governing process on each level, including Petitioner Duvall in particular, to know the Heritage Act's legality. For these reasons, this Court should reach the merits of this constitutional challenge.

II. The Supermajority Voting Requirement cannot be Severed.

The two-thirds voting requirement is not severable. The General Assembly's intention cannot be fulfilled without the supermajority requirement, as evidenced by Respondents' own admissions to this Court.

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may not be relocated, removed, or disturbed, to withhold all disbursements from the local government fund for any county or municipality that violates this section, and to provide that any member of a local governing body who votes for any action that violates this section is guilty of misconduct in office); H. 3326, S.C. Gen. Assemb., Session 124 (2021-22) (adding section 60-11-75 to provide that inscriptions and depictions on historical monuments and memorials on property owned by political subdivisions of the state or school districts are subject to review and approval by the Department of Archives and Natural History, and to provide related requirements for a related review and approval process; and to amend section 60-11-30 to include the approval of such inscriptions, depictions, and messages); H. 3350, S.C. Gen. Assemb., Session 124 (2021-22) (amending the Heritage Act to provide that provisions do not apply to such property under the jurisdiction and control of political subdivisions of this state, including school districts, and public institutions of higher learning); H. 3351, S.C. Gen. Assemb., Session 124 (2021-22) (repealing the Heritage Act); H. 3357, S.C. Gen. Assemb., Session 124 (2021-22) (requiring the State Treasurer to withhold all disbursements from the local government fund for any county or municipality that removes the monument or memorial of a historical figure); H. 3358, S.C. Gen. Assemb., Session 124 (2021-22) (prohibiting a local government from removing the monument or memorial of a historical figure or the name of a historical figure for which a structure is named, and to provide that any member of a local governing body who votes for such removal is guilty of a misdemeanor and must be fined twenty-five million dollars); S. 163, S.C. Gen. Assemb., Session 124 (2021-22) (repealing the Heritage Act); S. 165, S.C. Gen. Assemb., Session 124 (2021-22) (providing the Heritage Act does not apply to political subdivisions, including school districts and public institutions of higher education); S. 274, S.C. Gen. Assemb., Session 124 (2021-22) (repealing the Heritage Act).

In addressing severability of an unconstitutional statute, this Court has explained:

> 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 & Amusement Co. v. State, 338 S.C. 634, 648–49, 528 S.E.2d 647, 654 (1999) (citation omitted). This Court has held two provisions of an act should not be severed when they were mutually dependent and so intertwined that one could not be enforced without the other. *See Sojourner v. Town of St. George*, 383 S.C. 171, 178, 679 S.E.2d 182, 186 (2009).[6]

Moreover, this Court has refused to sever provisions in an act that had a general severability clause. *See, e.g.*, *Doe v. State*, 421 S.C. 490, 508–09, 808 S.E.2d 807, 816–17 (2017) (refusing to sever unconstitutional provisions of acts, even though the acts had severability clauses).[7] Simply put, "the question is whether the intention of the Legislature can be fulfilled absent the offending provision." *S.C.*

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[6] *See also Knotts v. S.C. Dept. of Nat. Resources*, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002) (refusing severance where it would leave the program created by the statute without a body to direct expenditures).

[7] *See also, e.g.*, *Fairway Ford, Inc. v. Timmons*, 281 S.C. 57, 60, 314 S.E.2d 322, 324 (1984) (holding that the different sections were not severable from the rest of the statute because the obvious intent of General Assembly was to prohibit annexation without consent of a majority of freeholders, and it could not be said the rest of the statute would have been enacted without the section); *S.C. Tax Comm'n v. United Oil Marketers, Inc.*, 306 S.C. 384, 388-89, 412 S.E.2d 402, 405 (1991) (holding that the unconstitutional portion of a taxing statute was not severable from remainder of statute because the clear intent of the General Assembly was to benefit only intrastate concerns).

Tax Comm'n v. United Oil Marketers, Inc., 306 S.C. 384, 388–89, 412 S.E.2d 402, 404–05 (1991).

Here, the Heritage Act's purpose cannot be accomplished without the supermajority enforcement mechanism. By Respondents' own admissions to this Court, the Heritage Act's passage hinged on the voting requirement. *See* Rule 801(d)(2)(D), SCRE (designating statements by a party's agent in the scope of agency as admissions of a party opponent). Respondent Peeler explained: "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 members of the General Assembly." Peeler Brief at 6. While Respondents later turn to the boilerplate severability clause to try to salvage the Heritage Act from the unconstitutional supermajority requirement, the clause proves ineffective with the next admission:

> **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.

Peeler Brief at 7 (emphasis added); *see also* Lucas Brief at 3 (describing the Heritage Act as "a legislative compromise to remove the Confederate flag from atop the Statehouse Dome." (quoting S.C. Atty. Gen. Op. June 25, 2020, 2020 WL 3619620)); McMaster Brief at 3 (same). This sentiment is also echoed by the Attorney General, who explained:

> Passage of the Heritage Act, with its two-thirds vote requirement, was part of that compromise. It is evident that the 'supermajority' requirement to amend or repeal the Act indicated the Legislature's intent to 'freeze' all protected monuments and nameplates so as to prevent alteration or renaming except as the Legislature determined by a supermajority of each house.

S.C. Atty. Gen. Brief at 4. That is the true purpose of the Act too, to freeze all protected monuments, memorials, and names of places as of 2000 and prevent any changes except by two-thirds of the General Assembly.

A rubber-stamp severability clause cannot mask the General Assembly's intent.[8] Beyond being bound by Respondents' admissions, the General Assembly's intent is shown by the decision to require heightened enforcement to freeze in time certain monuments, memorials, and names of places; mirroring the supermajority provisions in other statutory provisions addressing monuments, flags, and names of public places that "ha[ve] no traceable authority to the Constitution." Petitioner's Final Brief at 14 & note 8 and accompanying text; *see also* S.C. Code Ann. § 1-10-10 (outlining that the flags authorized to fly atop the State House dome may only be changed by an act which has received a two-thirds vote in the General Assembly); S.C. Code Ann. § 10-1-160 (detailing that the display of certain flags on State House grounds may only be amended or repealed by two-thirds vote of the General Assembly).

The General Assembly intended this freeze to maintain control over heightening political pressures of the day as a guarantee that their viewpoint and

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[8] *See generally Douglass v. Watson*, 186 S.C. 34, 195 S.E. 116, 121 (1938) (refusing to sever a provision that was "essential to [the act's] operation").

policy would remain. Respondents adamantly and repeatedly seek shelter from legal review because of this compromise. But the compromise made the supermajority enforcement an essential part of the Act's protections. Respectfully, it is time for them to be bound by the intent of that compromise.

III. The Heritage Act is Unconstitutional Special Legislation.

Article III, section 34 of the South Carolina Constitution prohibits special legislation about changing the name of public places. While Respondents contend that the origin of this absolute limitation does not apply to the Act and that Petitioners are adding "affect" into the language of Article III, section 34(I), these assertions ignore the plain language and broad framing of this constitutional prohibition. The Heritage Act is also a special law that violates equal protection.

The plain constitutional language of section 34(I) bars the General Assembly from enacting any special law "concerning" any change to the names of places. S.C. Const. art. III, § 34(I). This plain language encompasses restricting the ability to rename or alter. The operative words in the constitutional provision are "concerning . . . change," and its broad framing is of an absolute prohibition. The constitution bars the General Assembly from enacting any special legislation that deals with name changes of places—that is, no special legislation weighing in with the entire category of changes to the names of places—whether it is allowing or prohibiting change.[9]

[9] As to Respondents' arguments about the historical origin of the provision, such background is unnecessary given the broad prohibition and that the constitutional provision does not include qualifiers like "individual," "private," or "one-off" for

Additionally, in carving out special categories of groups subject to the Heritage Act, the law also violates Article III, section 34(IX), which prohibits special laws where a general law could be used. S.C. Const. art. III, § 34(IX). Respondents contend that the Heritage Act gives heightened protection to monuments and memorials for African Americans and Native Americans because of their prior treatment in this State and thus the designated class of ethnic heritages exists to reconcile the past and preserve their history. This gloss ignores the reality that existing monuments and memorials cannot be updated, expanded, or changed without permission from a supermajority of the General Assembly for these two groups of people, but not for any other ethnic heritages. Practically, this makes it harder to preserve and update the histories of the designated groups compared to others. These consequences of the Act are shown not only by the burdens to update any current memorials and monuments but also by the fact that once a new memorial or monument is created it automatically becomes subject to the Heritage Act.

Feigned flattery fails to fix the practical operation of the law. *See Elliot v. Sligh*, 233 S.C. 161, 165, 103 S.E.2d 923, 925-26 (1958) (explaining that in determining if a statute creates a classification that violates the equal protection guarantee "[t]he question must be decided not by the letter, but by the spirit and practical operation of the act."). There is neither a rational basis nor a compelling

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people or places. *See generally Davis v. County of Greenville*, 313 S.C. 459, 463, 443 S.E.2d 383, 385 (1994) (explaining the courts must give the language of the constitution its plain and ordinary meaning).

circumstance to warrant the statutory distinctions in the Act. For these reasons, the Act should be declared unconstitutional special legislation.

CONCLUSION

For all these reasons and those set forth in Petitioners' final brief, this Court should declare the Heritage Act is unconstitutional in its entirety and permanently enjoin its enforcement.

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RULE 211(b) CERTIFICATE

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

Matthew T. Richardson

January 20, 2021