THE STATE OF SOUTH CAROLINA
In the Supreme Court
Appellate Case No. 2016-002150

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
The Honorable J. C. Nicholson, Jr., Circuit Court Judge
Case No. 2009-CP-10-7399

Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League,
Petitioners,

v.

Town of Awendaw, and EBC, LLC, Defendants,

Of whom Town of Awendaw is the Respondent.

BRIEF OF PETITIONERS LYNNE VICARY, KENT PRAUSE, AND SOUTH CAROLINA COASTAL CONSERVATION LEAGUE

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STATEMENT OF ISSUES ON APPEAL

1. Do the South Carolina Supreme Court holdings of *St. Andrews* and *Town of Yemassee* providing limited citizen standing to challenge certain annexations apply when no 100% annexation petition was ever filed and the government engaged in deceitful and nefarious conduct?

2. Did the Court of Appeals err in refusing to find that Petitioners had public importance or taxpayer standing to challenge deceitful and nefarious government conduct where there is a strong need for future guidance?

3. Did *St. Andrews* and *Town of Yemassee* judicially create a "statutory standing" class that excludes all other standing when the South Carolina annexation statute is silent on standing?

4. Does the Court of Appeals ruling create absurd results limiting the rights of interested parties to challenge nefarious conduct related to an annexation when such conduct could be challenged in any other context?

STATEMENT OF THE CASE

This case concerns the Town of Awendaw's ("the Town") attempt to annex a ten-foot strip of property within a federally-protected national forest—the Francis Marion National Forest—by asserting that a proper petition for annexation was filed by the United States Forest Service ("Forest Service"), when the Forest Service never requested such an annexation. The Town has annexed property in a similar manner in the past and plans to continue this sort of annexation in the future so long as no court rules it illegal. App. 184, 211 (Wallace Dep. 73:23-74:7).

But as explained below, the Court of Appeals found that two South Carolina Supreme Court cases—*St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston*, 349 S.C. 602, 564 S.E.2d 647 (2002) and *Ex parte State ex rel. Wilson v. Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402 (2011)—barred challenges from parties other than the State or those with "proprietary interests or statutory rights" to any annexation claimed to be conducted by the 100%

annexation method even if such claims were patently false. The Court of Appeals reached this result in contravention of two trial court holdings finding that Petitioners did have standing based on the unique facts presented here. There is a strong need for future guidance in this matter, as the Town and other municipalities can again attempt this sort of nefarious annexation without challenge unless this Court reverses the Court of Appeals ruling.

A. The First Trial Court Order Finding Petitioners Had Standing

This case commenced on November 25, 2009, when Petitioners filed their complaint against the Town and EBC, LLC ("EBC"), the owner of the Nebo Tract that is at issue in this appeal. Petitioners include the South Carolina Coastal Conservation League, a not-for-profit corporation dedicated to protecting the coastal environments of the South Carolina with approximately 15,000 members and activists, including members who reside and own property in the Town, and two local citizens, Lynn Vicary and Kent Prause, who own real property and pay taxes in the Town. All Petitioners are concerned about unbridled growth in the Town and its impact on the Francis Marion Forest, with the individual Petitioners also concerned about the impact of annexations such as this on their taxes. *See, e.g.*, App. 314-316 (Vicary Aff. at ¶¶ 3-6).

On December 22, 2010, EBC and the Town filed a motion for partial summary judgment against Petitioners, arguing that Petitioners lacked standing to mount this challenge pursuant to *St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston*, 349 S.C. 602, 564 S.E.2d 647 (2002) and *Ex parte State ex rel. Wilson v. Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402 (2011), two South Carolina Supreme Court cases that involved good faith annexations made by municipalities pursuant to the South Carolina Annexation Statute, S.C. Code Ann. § 5-3-150. Both *St. Andrews* and *Town of Yemassee* provide for restrictive standing to only those with

"proprietary interests or statutory rights" when a good faith municipal annexation is at issue. *See, e.g.*, *St. Andrews*, 349 S.C. at 604.

On April 19, 2011, Judge Kristi Lea Harrington of the Ninth Judicial Circuit denied EBC and the Town's motion for partial summary judgment and concluded that Petitioners had standing to proceed with this case. *See* App. 4-12 (Judge Harrington Order). Importantly, Judge Harrington found that Petitioners had standing under the public importance exception, under the Declaratory Judgment Act, S.C. Code Ann. §§ 15-53-10 to 15-53-140, and through constitutional standing. *Id.* at 7-10.

Judge Harrington reasoned that Petitioners had public importance standing because "future guidance is needed to resolve the longstanding and recurrent controversy over the Town's practice of annexing National Forest lands without a petition from the Forest Service and provide clarity to the Town and other local governments concerning the scope of their annexation authority." *Id.* at 9. Likewise, Judge Harrington found that the *Town of Yemassee* case "arises in a fundamentally different context." *Id.* at 10. According to Judge Harrington, Petitioners had constitutional standing because they had put forth "undisputed facts showing, among other things, that the individual plaintiffs and members of the Coastal Conservation League personally use and enjoy natural resources that the Town's illegal acts threaten to destroy." *Id.*[1]

B. EBC and the Town's Improper Appeals

EBC and the Town then commenced an improper appeal of the Court's denial of their partial summary judgment motion. *See, e.g.*, *Watson v. Underwood*, 407 S.C. 443, 457, 756 S.E.2d 155, 162 (Ct. App. 2014) ("The denial of a motion for summary judgment is not

[1] Judge Harrington also rejected a statute of limitations argument raised by the Town and EBC. Petitioners do not discuss that argument as it is irrelevant to the issues raised on certiorari.

appealable because it does not finally determine anything about the merits or strike a defense."). That appeal was denied and the case was remitted to the trial court on July 10, 2012. App. 13-14.

EBC and the Town also filed a petition for certiorari in the South Carolina Supreme Court, which was similarly denied on May 25, 2012. App. 15-16. Each of these denials was premised on the grounds that a denial of summary judgment is not immediately appealable.

C. The Second Trial Court Order Finding that Petitioners Had Standing

The remaining claims against the Town proceeded to trial on April 16, 2014.[2] On July 28, 2014, Judge Nicholson, like Judge Harrington before him, ruled that Petitioners had standing to bring this case under principles of public importance standing, and that the annexation standing cases—*St. Andrews* and *Town of Yemassee*—did not apply. *See* App. 20-25 (Nicholson Order).

Judge Nicholson found that "the individual plaintiffs and members of the League are municipal taxpayers who will be called upon to pay for expanded services required to serve the Nebo development" and that "there is a strong public interest in allowing taxpayers, just like the plaintiffs here, to bring suit to prevent the expenditure of public funds to support *ultra vires* acts." *Id.* at 22. With respect to the argument that *St. Andrews* and *Town of Yemassee* barred Petitioners' standing, Judge Nicholson found that "there was no annexation ever completed in the case at bar because the owner of the [property]—the U.S. Forest Service—never took the action necessary to initiate the process. Instead of a 100% petition method, there was in effect a 0% petition method." *Id.* at 23. Likewise, Judge Nicholson distinguished these cases on the grounds that there were allegations regarding "intentional bad faith on the part of the Town." *Id.*

[2] Petitioners settled their claims against EBC prior to this trial. Those facts are not relevant to this appeal, so are omitted from further discussion here.

On the merits, Judge Nicholson ruled that, pursuant to the South Carolina Declaratory Judgment Act, the annexation was void and of no effect because the Town never received a petition for annexation from the Forest Service. *Id.* at 28. On August 4, 2014, the Town filed a motion for reconsideration, which was denied by the trial court on September 22, 2014. *See* App. 30-31 (Order Denying Town's Motion for Reconsideration).

D. The Court of Appeals Decision

The Town filed its Notice of Appeal on October 1, 2014. After briefing, the Court of Appeals heard oral argument on February 11, 2016. In its August 3, 2016 ruling, the Court of Appeals reversed on the sole ground that Petitioners lacked standing to challenge any annexations under *St. Andrews*, 349 S.C. 602, 564 S.E.2d 647 (2002) and *Town of Yemassee*, 391 S.C. 565, 707 S.E.2d 402 (2011). The Court of Appeals concluded that, because the Town "purportedly us[ed] the 100% petition method" for annexation outlined in S.C. Code Ann. § 5-3-150(3), only those with "proprietary interests or statutory rights" or the State could file actions challenging the annexations under *St. Andrews* and *Town of Yemassee*. *See* App. 465 (*Vicary v. Town of Awendaw*, 417 S.C. 631, 639, 790 S.E.2d 787, 791 (Ct. App. 2016), *reh'g denied* (Sept. 23, 2016), *cert. granted* (Sept. 8, 2017)).

The Court refused to consider whether Petitioners had standing based on the well-recognized public importance exception or based on taxpayer standing, implicitly reasoning that *St. Andrews* and *Town of Yemassee* rendered those doctrines inoperable whenever an annexation, no matter how nefarious, was at issue. Importantly, the Court of Appeals made factual findings supporting the trial court's conclusions that no annexation petition for the ten-foot strip of land ever existed, including that (1) "the Forest Service did not provide [the Town] with anything in writing expressing their desire that the Ten Foot Strip be annexed" and that, (2) while the Town

relied on the 1994 Letter as a petition for annexation, "none of the strips described in the 1994 letter were the Ten-Foot strip at issue in this case." *See* App. 460 (*Vicary*, 417 S.C. at 634; 790 S.E. 2d at 789). Thus, while finding that *St. Andrews* and *Town of Yemassee* prevented Petitioners from bringing suit, the Court of Appeals also recognized that there was no valid annexation request here. The Court of Appeals thus relied on annexation standing law to prevent standing when no annexation petition ever existed.

FACTS

This appeal involves a series of *ultra vires* actions by the Town, beginning in 2004 with an unlawful, alleged annexation of property within the Francis Marion National Forest and culminating in October 2009 with the purported annexation of a 359.51-acre, privately-owned in-holding known as the "Nebo Tract" that is virtually encircled by the National Forest. App. 17 (Nicholson Order). The Town's purported annexations were done with the goal of facilitating the expansion of development in the Awendaw area.

A. The Nebo Tract

In 2009, EBC, LLC, the owner of the Nebo Tract, requested that the Town annex the Nebo Tract under the 100% petition method in S.C. Code Ann. § 5-3-150(3). App. 35 (Second Amended Complaint). On October 1, 2009, the Town passed an ordinance purporting to accept the petition and annex the Nebo Tract. *See* App. 188 (EBC Annexation Ordinance). The annexation was part of an overall effort to make intensive residential and commercial development of the Nebo Tract possible. Accordingly, the Town also passed ordinances rezoning the Nebo Tract as a "planned development" and approving a development agreement with EBC. *See* App. 224-34 (Town Ordinance Nos. 09-09, 09-10, & 09-11).[3] These actions

[3] More specifically, prior to these annexations and rezonings, the Nebo Tract was subject to the zoning and other ordinances of the County of Charleston. App. 36 (Second Amended

would allow for up to 360 residential units and up to 90,000 square feet of gross floor area for commercial uses and 80,000 square feet of gross floor area for office uses. App. 293-94 (Everett Aff. at ¶ 4).

The Nebo Tract borders some of the Francis Marion's rarest habitats, including longleaf pine, freshwater swamps, pitcher plant flats, and Carolina Bays. App. 292-98 (Affidavit of Jean B. Everett, Ph.D.); App. 300-03 (Affidavit of Richard D. Porcher, Ph.D.). The Tract also provides habitat for a number of uncommon species, such as the swallow-tailed kite and the federally-protected red-cockaded woodpecker. App. 33-4 (Second Amended Complaint). It is home to one of the world's largest populations of the woodpecker, which is one of the species' designated core recovery populations. *Id.* In addition, this unique area supports a number of other federally-protected and sensitive species, including the Flatwoods salamander, which has been nearly extirpated from South Carolina but was last documented in the Francis Marion. *Id.* Not only is the Nebo Tract mostly surrounded by the Francis Marion, it is also close to Cape Romain National Wildlife Refuge, which provides habitat for federally protected species and has been classified as an Outstanding Resource Water by the state of South Carolina. *Id.* Development of the Nebo Tract would have many detrimental effects on the Francis Marion, the principal one being that it would interfere with the Forest Service's ability to continue using prescribed burns to manage the Forest's vital long-leaf pine habitat. App. 295-96 (Everett Affidavit); App. 303-05 (Porcher Affidavit).

Complaint). The Nebo Tract was zoned Agricultural Preservation District (AG-10), which permitted no more than one house per every ten acres of land or one house per every five acres of land under a Planned Development. *Id.* The Town's annexation and rezoning were designed to remove these restrictions and foster much more intense development near the National Forest.

B. The Town's String of Annexations to Establish Contiguity with the Nebo Tract

The Town's efforts to annex and allow development of the Nebo Tract hinge on its contiguity with Town property. The Town has attempted to manufacture contiguity with the Nebo Tract—the third domino in a string of three unlawful annexations—by allegedly annexing a ten-foot wide strip of the Francis Marion (hereinafter the "Ten-Foot Strip of the Francis Marion" or the "Ten-Foot Strip").

The Ten-Foot Strip is part of the National Forest and is actively managed for the benefit of the public by the Forest Service. This Ten-Foot Strip is approximately 1.25 miles long, and is the first domino in this illegal chain. *See* App. 189-91 (Ten-Foot Strip Annexation Ordinance); App. 235 (Nebo Map). The Ten-Foot Strip is allegedly contiguous with the second domino in the chain—the "Nebo Church Tract"—which purportedly connects the Nebo Tract to the Ten-Foot Strip. *See* App. 235 (Nebo Map). In sum, the annexation of the Nebo Tract relies entirely on the alleged contiguity established by the two previous illusory annexations in 2004 of the Ten-Foot Strip and the Nebo Church Tract.

The Town attempted to annex each of these three tracts using the 100% petition method, an annexation method used when all property owners affirmatively petition for the annexation. For more than two months in late 2003 and early 2004, the Town repeatedly requested that the Forest Service enable the Town to annex the Ten-Foot Strip so that it could also annex the Nebo Church Tract. *See, e.g.*, App. 184 (Letter from W.H. Alston (Town) to Sutton (Forest Service) (Jan. 23, 2004)) (reiterating that the Town "need[ed the Forest Service's] assistance" to annex the church); App. 185 (Letter from Wallace (Town) to Sutton (Forest Service) (Feb. 12, 2004)) (stating that annexing part of the Forest was the "only possible way" the Town could annex the Nebo Church Tract because "[t]he church [wa]s not contiguous to the existing town limits and

[could not] be annexed without first annexing other parcels between it and the town boundary"); App. 186 (Letter from Martin (Town) to Sutton (Forest Service) (Feb. 12, 2004)) (emphasizing the Town's "understanding that the Service is generally opposed to annexation" and attempting to reassure the Forest Service about impacts to Forest management); App. 200-203 (Wallace Dep. at 39:14-16 & 42:12-43:2) (describing conversations that took place between the Town and the Forest Service).

C. The Forest Service's Refusal to Request Annexation

Despite this lengthy campaign, the Forest Service declined to grant the Town's requests. The Town admitted that "it turned out that they [Forest Service] would not give us anything in writing saying that they desired to be annexed." App. 202 (Wallace Dep. at 40:9-11); *see also* App. 20 (Nicholson Order) (finding that "[a]lthough the Town represented to the public that it received a 100% petition from the Forest Service, it never did"). Not only did the local and regional Forest Service representatives refuse to request annexation of any property, they also declined to put even a neutral, no-objection position in writing. App. 203 (Wallace Dep. at 42:14-16) (admitting that "the Forest Service would not provide [the Town] anything in writing" and reasoning this was "because it would have to go all the way to Washington").

Subsequently, three of the Town's representatives met, either in person or by telephone, and decided to make use of a decade-old letter written ***in 1994*** from a Forest Service representative stating that the agency had "no objection" to the annexation of ambiguously-described property referenced as Forest strips (hereinafter the "1994 Letter"). App. 243 (Letter from David Wilson (Forest Service) to Alston (Town) (May 3, 1994)); App. 203-04 (Wallace Dep. at 44-46); App. 131-32 (Transcript of April 16, 2014 Trial at 61:21–62:1). The location of the strips described in the 1994 Letter does not provide a valid legal description of any property

at issue in this matter and fails to describe the Ten-Foot Strip of the Francis Marion. App. 20 (Nicholson Order); App. 113-14 (Transcript of April 16, 2014 Trial at 40:21–41:21). The Forest Service also confirmed that the 1994 Letter was never intended to be a petition for annexation. *See* App. 240 (Letter from Paul Bradley (Forest Service) to Samuel Robinson (Town) (Feb. 16, 2011) ("[T]he Forest Service did not intend for the letter of May 3, 1994, to constitute 'a petition of the federal government' to annex National Forest lands . . . .").

D. The Town's Ordinance and Purported Annexation

On May 10, 2004, the Town passed an ordinance stating that a "proper petition has been filed" for annexation of the Ten-Foot Strip and purporting to accept the petition. App. 20 (Nicholson Order); App. 189-91 (Ten-Foot Strip Annexation Ordinance). Relying on the Ten-Foot Strip for contiguity, the Town passed another ordinance purporting to annex the Nebo Church Tract on the same day. *Id.*

The Town knew it did not have the authority to annex the Ten-Foot Strip—as the Town itself has explained, "[t]hat's not the way the process works. The town does not send people a request and say, we want you to annex. The person who owns the property ***asks*** [through] a petition to the town to annex their property." App. 28 (Nicholson Order) (citing App. 200 (Wallace Dep. at 29:10-13)). Yet the Town has indicated in correspondence to the Forest Service and at trial that it intends to continue to rely on the 1994 Letter in the future as a purported annexation petition. *See* App. 184 (Letter from Alston (Town) to Sutton (Forest Service) (Jan. 23, 2004)) (requesting use of Ten-Foot Strip to annex Nebo Church and enable "other future annexations"); App. 147 (Transcript of April 16, 2014 Trial at 74:6-9) (Wallace responding "Yes" when asked if "the town intends in the future to use this 1994 letter if it deems it necessary regardless of any petitions from the federal government to annex land").

The Town then failed to follow proscribed procedures and notify the public and the Charleston County Planning Department of the annexation until 2009 (although the parcels were allegedly annexed in 2004). *See* App. 189 (September 2009 Letter from Town of Awendaw to Charleston County Planning Department) (noting that "[a]lthough this parcel was annexed in 2004, we have found that this information may not have been sent to your department.").

ARGUMENT

In denying Petitioners standing, the Court of Appeals set forth a sweeping new rule that conflicts with controlling Supreme Court precedent regarding the law of standing in South Carolina, and creates absurd, unjust results that the General Assembly never intended. Under the Court of Appeals ruling, so long as a municipality merely claims to have conducted a 100% method annexation—whether this is true or, as here, patently false—only the State or those with undefined "proprietary interests or statutory rights" can challenge such conduct, however arbitrary and deceptive it might be. Under the Court of Appeals ruling, the greater the municipal deception and more brazen its intent to repeat it, the ***less*** reviewable the action will become, in flat contradiction to long-standing principles of South Carolina judicial review.

This Court should reverse the Court of Appeals' errors in failing to adhere to Supreme Court precedent allowing public importance and taxpayer standing to citizens challenging unlawful government acts of public importance, such as those at issue here, under the Declaratory Judgment Act. Without reversal by this Court, the Court of Appeals ruling will strip citizens of this State of their right to challenge any nefarious government conduct related to an annexation, a result that was not intended by the Legislature. Further, without reversal by this Court, other municipalities in South Carolina can engage in similarly deceptive conduct without the threat of judicial review so long as an annexation (vs. other nefarious conduct that would be

reviewable under public importance standing) is involved. The Court of Appeals ruling is erroneous and illogical and should be reversed.

I. The Court of Appeals Erroneously Applied *St. Andrews* and *Town of Yemassee* when No Valid Annexation Petition Existed.

First, this Court should reverse the Court of Appeals application of *St. Andrews* and *Town of Yemassee* to annexations such as this made in bad faith. Contrary to the Court of Appeals' holding, these cases have no applicability to the present facts, where no annexation was validly initiated pursuant to the 100% method.

The "100% petition method allows a municipality to annex property upon the signature of all persons who own real estate in the annexed area." *Town of Yemassee*, 391 S.C. at 570, 707 S.E.2d at 405. The 100% annexation method is a unique process that "provides neither an express notice provision nor an authorization for third parties to challenge the annexation." *Id.* at 572, 707 S.E.2d at 406. As explained in *Town of Yemassee*, these restrictions on notice and the ability to challenge 100% annexations are "readily understood in light of the requirement that ***all*** property owners in the annexed area consent by signing the annexation petition." *Id.* (emphasis in original). "In sum, the 100% petition method is a 'fast track' for annexation that may be used only when all of the property owners consent." *Id.*

St. Andrews and *Town of Yemassee* articulate specific requirements for establishing standing to challenge 100% method annexations made in good faith by municipalities. Both cases ultimately hold that citizens must allege a sufficient infringement of their "proprietary interests" or "statutory rights" to have standing and "that the only non-statutory party which may challenge a municipal annexation is the State, through a quo warranto action." *St Andrews*, 349 S.C. at 605, 564 S.E.2d at 648; *Town of Yemassee*, 391 S.C. at 573-4, 707 S.E.2d at 406-407. The Court of Appeals applied these holdings to conclude that Petitioners had not suffered any

infringement of their own proprietary interests or statutory rights and thus could not have standing.

But the Court of Appeals wrongly applied *St. Andrews* and *Town of Yemassee* here. This case does not concern procedural defects in a properly initiated 100% annexation, such as whether the proper signatures were obtained on an otherwise valid or partially valid annexation petition. *See, e.g., Town of Yemassee*, 391 S.C. at 404, 707 S.E.2d at 569 (challenging lack of State signature on annexation petition signed by other owners). Instead, this case involves a situation where there was never a valid petition for annexation of the Ten-Foot Strip in the first place—and where there was deceptive, nefarious government conduct that goes beyond the realm of mistake and into the world of malfeasance. Here, the annexation process was never commenced because the petition that was misleadingly said to initiate it did not, in fact, exist.

The Court of Appeals concluded that the Forest Service never initiated an annexation. App. 240 (Feb. 16, 2011 Letter from Paul Bradley (Forest Service) to Samuel Robinson (Town)) ("[T]he Forest Service did not intend for the letter of May 3, 1994, to constitute 'a petition of the federal government' to annex National Forest lands . . . ."); App. 202 (Wallace Dep. 40:9-11). Indeed, the Court of Appeals found that that the Town "purportedly" used the 100% petition method, *Vicary*, App. 460 (417 S.C. at 633-34, 790 S.E. 2d at 789); noted the "Town's admission that the Forest Service did not provide them anything in writing expressing their desire that the Ten-Foot Strip be annexed," *id.*; and determined that "none of the strips described in the 1994 letter were the Ten-Foot Strip at issue in this case," *id.* But after making these factual conclusions—which show that an annexation petition was never filed and annexation procedures were never invoked—the Court of Appeals went on to apply caselaw applicable only when a

100% petition has been filed. There was no 100% petition filed, so *St. Andrews* and *Town of Yemassee* do not apply.

The Court of Appeals ruling is equally troubling for future cases. Pursuant to this ruling, a municipality need only pronounce that it is conducting an annexation pursuant to the 100% method—no matter whether this is true or patently false, as here—and it is insulated from challenge by anyone except the State in a *quo warranto* action. This is so even when a municipality has engaged in a pattern of falsification and deception and no annexation ever occurred as a matter of law—and even when the municipality announces that, unless stopped by a court, it intends on repeating these actions in the future.

In sum, unlike *St. Andrews* and *Town of Yemassee*, this is not a case involving an irregularity or good-faith error in accepting an annexation petition or quibbling over whether an annexation was made through the 75% or 100% petition method. As Judge Harrington held, "[t]he statutory provisions [in the annexation statute] governing standing and timing exist to serve as shields for legitimate annexation attempts. No case supports [the Town's] efforts to transform them instead into a sword that municipalities can wield to eviscerate the strict limitations on municipal authority delineated by the General Assembly." App. 6. The Court should reverse the Court of Appeals' holding that *St. Andrews* and *Town of Yemassee* apply in this situation or similar ones that will arise in the future. Rather, this case is controlled by whether Petitioners have public importance or taxpayer standing, which they unquestionably do, as discussed below.

II. The Court of Appeals Erroneously Denied Petitioners Public Importance or Taxpayer Standing to Challenge Corrupt Government Conduct.

The Court should also reverse the Court of Appeals opinion because it abruptly departs from a long line of Supreme Court cases finding that citizens have standing to challenge just the

sort of deceptive or unlawful government conduct at issue here. By concluding that *St. Andrews* and *Town of Yemassee* precluded Petitioners' standing, the Court of Appeals implicitly rejected the notion that Petitioners could establish standing through public importance or taxpayer standing. This holding was also erroneous and requires reversal.

This Court has repeatedly found that standing is "not inflexible," and that "public importance" standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. *Sloan v. Dep't of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (finding citizen had standing to bring actions for alleged violation of statutory bidding violations by the Department of Transportation); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005) (holding citizen had standing to challenge legislative enactment); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Baird v. Charleston Cty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999); *Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976) (holding that the plaintiffs had standing because the questions involved were of such wide concern, both to law enforcement personnel and to the public); *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951). Just last month, this Court again endorsed the concept of public importance standing in *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, No. 2015-001175, 2017 WL 4052370 (S.C. Sept. 14, 2017), finding that a public interest organization had standing to challenge the South Carolina Department of Transportation's expenditure of public funds for the inspection of bridges in private subdivisions because future guidance is needed on the issue. This Court has also repeatedly recognized that citizens may have standing based on their status as taxpayers. *See, e.g., Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985) (discussing taxpayer standing in South Carolina). In the words of the Court of Appeals, "[a] taxpayer's standing to challenge unauthorized or illegal

governmental acts has been repeatedly recognized in South Carolina." *Sloan v. Sch. Dist. of Greenville Cty.*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct. App. 2000) (holding that taxpayer had standing to bring declaratory judgment action challenging whether Department of Transportation properly authorized emergency procurement for road construction project since issue was of great public importance and taxpayer alleged misuse of government authority).

The purpose of public importance standing is to "[a]llow[] interested citizens a right of action in our judicial system when issues are of significant public importance to ensure . . . accountability and the concomitant integrity of government action." *Sloan v. Greenville Cty.*, 356 S.C. at 551, 590 S.E.2d at 349. Because of this purpose, this Court has repeatedly held that public importance standing is especially appropriate in cases challenging illegal government action.

For example, in *Baird v. Charleston County*, doctors alleged that the Charleston County government had committed an illegal act by issuing hospital bonds beyond the County's statutory authority. 333 S.C. 519, 524-26, 511 S.E.2d 69, 72 (1999). The Court found that this allegation was sufficient to establish public importance standing because allegations of illegal government action are of public importance. *Id.* at 531, 511 S.E.2d at 75; *see also S.C. Pub. Interest Found. v. S.C. Trans. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013). There the issuance of illegal hospital bonds was of public importance because it affected public health and welfare. *Id.*[4] In the recent *South Carolina Public Interest Foundation* case, the Court reasoned that the question of whether public funds can be used by government entities

[4] Notably, however, nothing in this Court's precedent limits public importance standing to grievances related to public health, welfare, or finance. Instead, the Court has afforded citizens public importance standing to challenge government misconduct more broadly when there is a need for redress for future guidance. *See, e.g., Sloan v. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (finding citizen had standing to bring actions for alleged violation of statutory bidding violations by the Department of Transportation)

to inspect bridges in private subdivisions is of public importance because it involves "the conduct of a government entity," the decision could have "far-reaching . . . consequences," and there is no "judicial guidance addressing the issue." *S.C. Pub. Interest Found.*, No. 2015-001175, 2017 WL 4052370 at *3.

Like *Baird* and the recent *South Carolina Public Interest Foundation* case, it is hard to imagine a case that would better fit the public importance exception to standing than the present one as both trial court judges concluded. First, allegations of illegal government action are "the precise instance where the public importance exception should apply." *S.C. Pub. Interest Found.*, 403 S.C. at 646; *accord S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, No. 2015-001175, 2017 WL 4052370, at *3. The actions of the Town here are beyond just alleged violations of law, but actually nefarious—conduct by a government entity pretending that an annexation petition existed when it did not and passing an ordinance that it knew was based on false premises. As noted above, the Court of Appeals even recognized some of these facts while denying Petitioners standing. *See Vicary,* App. 460 (417 S.C. at 633-34, 790 S.E. 2d at 789) (noting the "Town's admission that the Forest Service did not provide them anything in writing expressing their desire that the Ten-Foot Strip be annexed," and that "none of the strips described in the 1994 letter were the Ten-Foot Strip at issue in this case"). Likewise, resolution of Petitioners' claims is needed to conserve rare, nationally important public resources in the Francis Marion National Forest, as the trial court recognized. App. 24 ("resolution of plaintiffs' claims is necessary to protect unique flora and fauna contained in the National Forest, which is owned, maintained, and conserved for the benefit of all Americans").

More broadly and importantly, however, resolution of Petitioners' claims is necessary to ensure that municipalities cannot engage in deception without challenge in the annexation of

property in the future. *See ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008) (holding that for public importance standing "[t]he key . . . is whether a resolution is needed for future guidance."); *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 79-80, 753 S.E.2d 846, 853 (2014) ("[T]he need for future guidance generally dictates when [public importance standing] applies."). The Town has brazenly stated that it intends to continue its pattern of nefarious conduct unless stopped by a court. App. 147 (Transcript of April 16, 2014 hearing at 74: 6-10). Without resolution by this Court, other municipalities could do the same without judicial review by simply invoking the words "100% petition" and the accompanying shield of *St. Andrews* and *Town of Yemassee*.

In sum, as two trial court judges found, the Court of Appeals ruling conflicts with this Court's repeated and explicit endorsement of public importance standing allowing citizens to challenge even less nefarious government action than what occurred here.[5] While this Court has explained that a balance is required such that standing is not "granted to every individual who has a grievance against a public official," *see Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472, the Court of Appeals ruling does not effectuate this balance. Rather, it prevents interested parties from challenging even the worst sort of government conduct so long as it arises in the annexation context. The Court of Appeals decision must be reversed.

III. The Court of Appeals Erroneously Required "Statutory Standing" When the Annexation Statute is Silent on Standing for Most Annexations.

As noted throughout this brief, the Court of Appeals refused to consider alternative bases for Petitioners' standing by relying exclusively on *St. Andrews* and *Town of Yemassee*, and

[5] Similarly, the ruling conflicts with the purpose of taxpayer standing, which allows taxpayers who are directly affected by government conduct to bring challenges to that conduct when there is some overriding public purpose or concern and a need for future guidance. *See, e.g., Sch. Dist. of Greenville Cty.*, 342 S.C. at 522, 537 S.E.2d at 303 (allowing taxpayer standing to challenge allegedly illegal government contracts).

erroneously creating a rule requiring "statutory" standing to challenge deceptive municipal annexations. But even the S.C. annexation statute itself does not contain language creating standing for challenges to 100% annexations. The Court of Appeals holding regarding "statutory standing" is not only erroneous, but also creates absurd results.

A. The Court of Appeals Opinion Wrongly Required "Statutory Standing" as a Sole Basis for Standing.

This Court has made clear that "[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing'; ***or*** (3) under the 'public importance' exception." *ATC S.*, 380 S.C. at 195, 669 S.E.2d at 339 (emphasis added). Supreme Court precedent routinely considers whether a plaintiff has standing on any of these three bases. *See, e.g.*, *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E. 2d 40, 43 (2012).

Yet here, the Court of Appeals ended its inquiry after deciding that Petitioners did not have what it termed "statutory standing." *Vicary*, App. 463 (417 S.C. at 637, 790 S.E. 2d at 790). The Court of Appeals held that, because Petitioners had not shown an infringement of their "proprietary interests or statutory rights" and were not the State of South Carolina, they were "prohibited from challenging the Town's annexations pursuant to *St. Andrews* and *Yemassee*." *Id.* at *4. Thus, the Court of Appeals held that plaintiffs are barred from establishing constitutional or public importance standing if there is a statute that arguably provides some basis for standing. This result is inconsistent with *ATC S.* and *Freemantle*, and is all the more egregious here because, as discussed below, the relevant statute, S.C. Code Ann § 5–3–150(3), does not contain language providing for statutory standing. Rather the "proprietary interests or statutory rights" language was judicially-created in *St. Andrews* and *Town of Yemassee* and cannot deprive Petitioners of their right to establish standing through other means.

B. The Annexation Statute Provides No "Statutory Standing" for 100% Method Annexations.

As noted above, neither *St. Andrews* nor *Town of Yemassee* dictates a conclusion that Petitioners lack standing on the facts presented here. The Court of Appeals' reliance on these cases to bar Petitioners from establishing standing through the public importance exception or taxpayer standing just because there was "purportedly" a 100% annexation was erroneous. But even if *St. Andrews* and *Town of Yemassee* are construed to preclude Petitioners' standing here, these cases are wrong in their conclusion that there is an ***exclusive*** "statutory standing test for challenges to 100% annexations." *St. Andrews*, 349 S.C. at 605, 564 S.E.2d at 648.

Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation. *See Freemantle*, 398 S.C. at 194–95, 728 S.E.2d at 44-45; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (stating the issue of statutory standing as "whether this plaintiff has a cause of action under the statute").

While *Town of Yemassee* and *St. Andrews* discuss "statutory standing" for challenges to 100% method annexations, the relevant statute confers no such standing on any party. Instead, the statute merely provides the method for 100% annexations, ***but says nothing about who may sue to challenge such an annexation***. The entire statutory text governing 100% annexations reads as follows:

> [A]ny area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation. Upon the agreement of the governing body to accept the petition and annex the area, and the enactment of an ordinance declaring the area annexed to the municipality, the annexation is complete. No member of the governing body who owns property or stock in a corporation owning property in the area proposed to be annexed is eligible to vote on the ordinance. This method of annexation is in addition to any other methods authorized by law.

S.C. Code Ann. § 5-3-150(3).[6]

Thus, contrary to the holding of *St Andrews* and *Town of Yemassee*, there is no "statutory standing" for 100% method annexations. Rather, *St. Andrews* and *Town of Yemassee* have created a jurisprudential test for standing for 100% method annexations that is not derived from the language of the statute. *See, e.g.*, *St. Andrews*, 349 S.C. at 604, 564 S.E.2d at 648 (holding that a challenger to a 100% petition annexation "must assert an infringement of its own proprietary interests or statutory rights"). But as discussed above, this judicially-created method of establishing standing cannot erase other methods of demonstrating standing recognized in South Carolina, including public importance or taxpayer standing. *See ATC S.*, 380 S.C. at 195, 669 S.E.2d at 339.

IV. The Court of Appeals Opinion Creates Absurd Results.

Finally, the Court of Appeals ruling creates absurd results, whereby unlawful government conduct that could be challenged by affected citizens in ***any*** context ***other*** than annexation now cannot be challenged by anyone but the State or those with "proprietary interests" because the unlawfulness is related to a "purported" annexation. For example, if the deceptive government conduct here had arisen in the state contracting context, Petitioners would be able to challenge it via public importance standing. *See Sch. Dist. of Greenville Cty.*, 342 S.C. at 520, 537 S.E.2d at 301 ("A taxpayer's standing to challenge unauthorized or illegal governmental acts has been

[6] By comparison, the statutory text for 75% annexations ***does*** provide both the method for accomplishing a 75% annexation, and statutory standing to certain parties. *See* S.C. Code Ann. § 5-3-150(1)(5) ("[T]he municipality or any resident of it and any person residing in the area to be annexed or owning real property of it may institute and maintain a suit in the court of common pleas, and in that suit the person may challenge and have adjudicated any issue raised in connection with the proposed or completed annexation."). Other provisions of the annexation statute suggest broader rights for interested persons to challenge annexations as well. *See, e.g.*, S.C. Code Ann. § 5-3-270 (setting time frame in which "person interested therein" may challenge any type of annexation).

repeatedly recognized in South Carolina").[7] But under the Court of Appeal's ruling, Petitioners may not do so here because this involves a "purported" annexation—even though the statutory provision at issue here says nothing about limiting public importance standing or constitutional standing ***or standing at all.***

The Court of Appeals' conception of *Town of Yemassee* also creates absurd results within the annexation statute itself. As noted above, "whether a statute confers standing is an exercise in statutory interpretation." *See Youngblood v. S.C. Dep't of Social Servs.*, 402 S.C. 312, 317, 741 S.E.2d 515, 518 (2013). Here, the Court of Appeals interprets *Town of Yemassee* to mean that, despite silence on who has standing to challenge 100% annexations in the statute, no party but those with (judicially conjured) "proprietary interests or statutory rights" may challenge such annexations (or the State through a *quo warranto* action). The Court of Appeal's rationale—and *Town of Yemasssee*'s holding—would apply equally to all forms of annexations other than the 75% method, the only annexation method for which the statute provides clear, affirmative language limiting who may file a challenge. Accordingly, under the Court's logic, annexations of property owned by a corporation could only be challenged by "the stockholders of the corporation," who are the only delineated party with "statutory rights." *See* S.C. Code Ann. § 5-3-120. Neighboring property owners who alleged harm from the annexation and could satisfy the other requirements of establishing constitutional standing would be barred from any challenge under the Court's logic. Similarly, the annexation of property within a multicounty

[7] As noted above, Petitioners brought this action under the Declaratory Judgment Act seeking a declaration that the alleged annexations never occurred as a matter of law, and that the Town engaged in deceptive conduct in representing that it had received a valid petition for annexation. Petitioners' allegations and request for relief under the Declaratory Judgment Act are similar to allegations and remedies sought in the *Sloan* cases cited above. The Court of Appeals ruling thus conflicts with South Carolina Supreme Court law allowing these types of claims to be brought pursuant to the Declaratory Judgment Act and based on public importance standing as discussed above in section II.

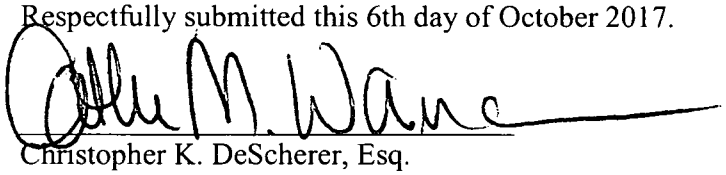
park could only be challenged by the "State Fiscal Accountability Authority" and not broader state or public entities who could demonstrate harm from the annexation. *See* S.C. Code Ann. § 5-3-115. The judicially-created limitation of standing to "statutory" parties becomes even more unworkable when considered in the context of annexations-by-election, since those annexations involve action—and inaction—by various overlapping or disparate subgroups of citizens. *See, e.g.*, S.C. Code Ann. §§ 5-3-30, 300. It defies belief to think that, in enacting a lengthy statute with nearly a dozen distinct procedures for different kinds of annexations, the Legislature meant to include—by omission—a unique and highly restrictive limitation on standing that applies to all annexation procedures (except one) regardless of the absurdities that would result.

In effect, the Court of Appeals has created a rule where all of these forms of annexation would be essentially unreviewable by harmed citizens just because each of the respective annexation sub-provisions is silent on who can file a challenge. *But see* S.C. Code Ann. § 5-3-270 (setting time frame for any "person interested" to challenge annexations). The Opinion thus deprives parties of the right to establish constitutional, public importance, or taxpayer standing because of statutory ***silence***. This result flies in the face of other Supreme Court precedent allowing parties to establish constitutional standing where no statutory standing exists. *See Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518. As explained above, there is no statutory basis for removing recognized methods of establishing standing—or this absurd result—contained in S.C. Code Ann. § 5-3-150(3).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court reverse Court of Appeals and remand for further proceedings.

Respectfully submitted this 6th day of October 2017.



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THE STATE OF SOUTH CAROLINA
In the Supreme Court
Appellate Case No. 2016-002150

APPEAL FROM CHARLESTON COUNTY
The Honorable J. C. Nicholson, Jr., Circuit Court Judge
Case No. 2009-CP-10-7399

Lynne Vicary, Kent Prause, and South Carolina Coastal Conservation League,
Petitioners,

v.

Town of Awendaw, and EBC, LLC, Defendants,

Of whom Town of Awendaw is the Respondent.

PROOF OF SERVICE

I certify that I have served Brief of Petitioners on all parties by depositing a copy in the United States Mail, postage prepaid, on October 6, 2017, addressed to their attorneys of record, as indicated below:

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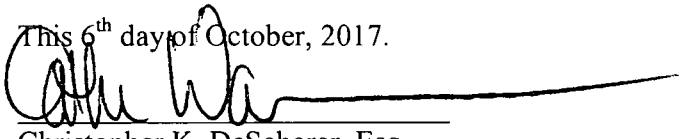
This 6th day of October, 2017.



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