THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appellate Case No. 2016-002[illegible]

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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**. Respondent.

BRIEF OF RESPONDENT TOWN OF AWENDAW

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I. INTRODUCTION

This appeal arises on the grant of certiorari to Petitioners from the Court of Appeals ruling in *Vicary v. Town of Awendaw,* 417 S.C. 631, 790 S.E.2d 787, (Ct. App. 2016), *rehearing denied* (Sept. 23, 2016), *cert. granted* (Sept. 8, 2017). Petitioners ask this Court to overturn *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). The Court of Appeals reversed the circuit court and found that Petitioners lacked standing to bring the challenge of the annexation of the Nebo Tract in 2009, which challenge was based upon the Petitioners' claim that the 2004 annexation of a ten (10) foot strip of US Forest Service property and the Nebo Church was void, in favor of which the circuit court had ruled. The Court of Appeals appropriately cited this Court's precedents in *St. Andrews* and *Town of Yemassee* and found Petitioners lacked standing. The Court of Appeals rejected Petitioner's argument to distinguish the present case from those precedents due to the Petitioners' allegation of deception by the Respondent for the 2004 annexation, namely the use of a Forest Service letter not objecting to the annexation as a petition for annexation under the 100% method allowed for annexations, Section 5-3-150(3), S.C. Code Ann. The Petitioners argued the public importance and taxpayer exceptions to standing applied because of the allegations of this allegedly deceitful and nefarious conduct on the part of Respondent Town of Awendaw. The sole issue raised in this appeal is whether Petitioners have standing to challenge of the 2009 annexation of the Nebo Tract based only upon the Petitioners' challenge of the 2004 annexation of the Forest Service ten (10) foot strip and Nebo Church as being void ab initio.

Petitioners have raised the public importance and taxpayer standing exception arguments in seeking a reversal of *St. Andrews* and *Town of Yemassee* and the Court of Appeals. The

Petitioners argue no interested person can meet the limited standing limitations of *St. Andrews* and *Town of Yemassee* if there was nefarious or deceitful government action involved, and future guidance by this Court is needed or "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.*" Brief of Petitioners at 18. The need for future guidance is not a basis for an exception here because (1) the acceptance of the Forest Service letter as a petition is not nefarious or deceitful, and (2) the need cannot exist without the associated need for and entitlement to an injunction. *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, (2012). Petitioners have no proprietary interest in the 2004 or 2009 annexations and did not and cannot show any harm to themselves from the acceptance by Respondent of the 2004 Forest Service letter as a petition to annex the ten (10) foot strip of Forest Service property at issue in this case from the 2004 annexation and the Nebo Church. All of Petitioners' arguments of harm relate to the potential for development of the Nebo Tract, the private property adjacent to the Francis Marion National Forest annexed in 2009, which arguments must fail as Petitioners have no different effects from such potential development than the general public. The Court of Appeals appropriately applied *St. Andrews* and *Town of Yemassee* in this case.

II. COUNTER STATEMENTS OF THE QUESTIONS PRESENTED

1. The 1994 Forest Service Letter identifying the ten foot (10') wide strips of forest service property that could be annexed without objection was submitted to Respondent Town of Awendaw and properly accepted by the Town as a petition under Section 5-3-150(3).

   a. No basis for taxpayer standing or for public importance standing arises from the annexation of the Nebo Tract in 2009, as well as the ten foot (10') wide Forest Service strip on U.S. Highway 17 and the Nebo Church property

annexed in 2004, because the annexation was through properly publicly noticed Town Council meetings and votes for adoption of the annexation ordinance following all statutory requirements and procedures without any deceitful or nefarious conduct, and does not involve public expenditures.

b. This Court's holding in *St, Andrews* and *Town of Yemassee* did not create a statutory standing class and is consistent with the annexation statute's own silence on standing in the 100% section.

c. The Court of Appeal's ruling is consistent with this Court's applicable rulings on annexations and standing and does not create absurd results because actual public expenditure issues may be addressed under other precepts that would provide standing.

2. The Court of Appeals ruling that Petitioners lacked standing should be affirmed on appeal upon the additional sustaining ground that the statute of limitations in Section 5-3-270, S.C. Code Ann., barred Petitioners' challenge of the 2004 annexation of the Forest Service ten (10) foot strip of property within its challenge of the 2009 Nebo Tract annexation.

III. ARGUMENT

A. The 1994 Forest Service Letter identifying the ten foot (10') wide strips of forest service property that could be annexed was submitted to Respondent Town of Awendaw and properly accepted by the Town as a petition under Section 5-3-150(3).

Petitioners continue to claim deceit and fraud on the part of Respondent Town of Awendaw in adopting the ordinance to annex the Forest Service ten (10) foot strip of property into the Town in 2004 where there is none. Respondent Town of Awendaw clearly followed the Section 5-3-150(3), S.C. Code Ann., annexation requirements for the 2009 annexation of the Nebo Tract as well as the requirements for the development agreement for this property. The statutory requirements were also followed for the 2004 annexation of the Nebo Church property and the US

Forest Service ten foot (10') strip at issue in this case. The primary issue placed before the courts by Petitioners in this case is simply whether the acceptance of the 1994 United States Forest Service letter as a Petition under Section 5-3-150(3) by Respondent in 2004 for annexation of a ten (10) foot strip of Forest Service property is deceitful or nefarious conduct requiring an exception to the limited standing allowed in 100% annexations, or is an appropriate exercise of legislatively granted authority for this annexation. This issue has not been substantively addressed by the Petitioners; instead Petitioners merely claim deceitful and nefarious behavior on the part of Respondent by accepting the letter as a petition but failed to prove or show any evidence of any deceit or nefarious behavior.

The statutory language at issue is:

> §150(3) Notwithstanding the provisions of subsections (1) and (2) of this section, any 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.

The simple interpretation of this provision is that any written document from a land owner to a municipality expressing a desire, willingness or consent to have his property annexed is a petition. The letter from the Forest Service on May 3, 1994 to Respondent Town of Awendaw fits

squarely within this plain and simple meaning of petition[1]. The Respondent's acceptance of the letter as a petition was open, public and without objection by anyone. The letter has been used for annexation of other ten (10) foot strips. App. At 211 (Wallace Dep. 75, l. 23, 76, l. 15). The Forest Service understood the acceptance of the letter as a petition for the specific properties described in it following many conversations with Respondent about annexing those ten (10) foot strips of Forest Service property. The Forest Service used clear language acknowledging the use of the letter: "The Forest Service has no objection to the Town of Awendaw's annexation of a ten-foot wide strip of the Francis Marion Forest". App. at 182.

Moreover, the Respondent and Forest Service understood the long term nature of the agreement for Respondent to annex ten (10) foot strips of the Francis Marion National Forest into the Town. The Town Administrator[2] clearly described before the trial court the annexation history involving the Forest Service. *See* App. At 122, l. 12 – 126, l. 20. The ten (10) foot strips described in the petition could not be annexed until situations arose with other property owners for them to connect the property with the Town to make them contiguous. The Forest Service, the property owner with standing to challenge such annexations, was aware of this particular annexation as well as all of the other ten (10) foot strip annexations. *See* App. At 129, l. 18 – 130, l. 12, and at 133, ll. 9-23. No fraud or deceit can be shown on these facts.

The Appendix also has other evidence that the Forest Service and Town had ongoing discussions about annexing Forest Service property over the years, and that the primary concern

[1] The Forest Service letter, App. at 182, clearly expresses the understanding and agreement of the Respondent and Forest Service about the annexations of the sections of Forest Service property: "It is our understanding that this action will not encumber National Forest management now or in the future. Our stance of "no objection" is based on this understanding. We appreciate the good working relationship we have with the Town and look forward to working closely with you and the council members."

[2] Mr. Wallace testified as to his position and experience with the Town and its annexations. *See* App. At 118, ll. 8-22.

of the Forest Service was the annexation of large areas of its property. *See* App. at 198, Wallace Dep., 21, ll. 2-20 and 22, ll. 11-19; App. at 199, 26, ll. 2-24; App. at 200, 32, l. 13 through App. at 201, 33, l.7; App. at 201, 35, l. 2-36, l. 18; App. at 202, 38, l. 13-40, l. 16; App. at 203, 42, l. 4-43, l. 2; and App. at 204, 45, l. 14-46, l. 16. The Forest Service letter presents the landowner's consent as required for the 100% method to be used by the Respondent. Acceptance of it as the required petition for any Forest Service property described within it is not nefarious or deceitful.

Petitioners do not offer a definition of what a petition is nor directly rebut the letter as a petition other than through the conclusory statements that the acceptance of the letter as a petition was deceitful and nefarious. The Court of Appeals did not agree and did not confirm Petitioner's allegations of deceitful or nefarious behavior, but instead ruled under *St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston,* 349 S.C. 602, 564 S.E.2d 647 (2002); *Ex parte State ex rel. Wilson v. Town of Yemassee,* 391 S.C. 565, 707 S.E. 2d 402 (2011) that Petitioners had no statutory standing, proprietary rights or any other basis for standing. The Court of Appeals correctly overturned the circuit court's finding of standing for Petitioners. Therefore the 2004 annexation of the ten (10) foot strip was not void, and the Nebo Church property was in the Town and contiguous to the Nebo Tract for its annexation in 2009.

Finally, the question of what may be accepted by a municipality as a petition under the 100% section includes the guidance from this Court as well as the South Carolina Attorney General. In 1966 S.C. Op. Atty. Gen. 62 (S.C.A.G.), 1966 S.C. Op. Atty. Gen. No. 2001, 1966 WL 9296 Assistant Attorney General Goolsby opined on the then codified 100% method of annexation in regard to a charitable organization (a church) owning property being annexed: "We, therefore, conclude that the consent of that church would be necessary to the validity of the annexation petition under Section 47–195." In *Town of Yemassee* this Court concluded: "In sum,

the 100% method is a 'fast track' for annexation that may be used only when all of the property owners consent." *Town of Yemassee,* 391 S.C. at 572, 707 S.E.2d at 406. The Forest Service was well aware of the plans to annex the ten (10) foot strips and had other such property annexed before. Even in the Petitioners' extrinsic evidence letter prepared for trial in 2011 to claim that the 1994 Forest Service letter was not a petition, the Forest Service only stated that it was not intended to be a petition "to annex National forest lands as required by S.C Code Ann. § 5-3-140", not pursuant to the 100% method used in the instant case. Appendix at 240. The concern of the Forest Service over large tracts being annexed appears to be the basis for the letter, not the ten (10) foot strips that would not encumber management of the National Forest. The 'no objection' term in the 1994 letter is consent, and the evidence supports that that consent was not withdrawn over the ten (10) foot strip annexed by Respondent in 2004. The Forest Service never objected to or challenged any of the ten (10) foot strip annexations.

B. No basis for taxpayer standing or for public importance standing arises from the annexation of the Nebo Tract in 2009, as well as the ten foot (10') wide Forest Service strip on U.S. Highway 17 and the Nebo Church property annexed in 2004, because these annexations were through properly publicly noticed Town Council meetings and votes for adoption of the annexation ordinances following all statutory requirements and procedures without any deceitful or nefarious conduct.

Petitioners fail to show any basis for taxpayer standing in its effort to prevent the Nebo Tract from being annexed into the Town and developed. No testimony or evidence appears in the Appendix that demonstrates any facts about the expenditure of public funds related to the annexation of the ten (10) foot strip, Nebo Church or even the Nebo Tract[3]. Any public funds used in development of the Nebo Tract would be addressed in future legislative actions or as described

[3] Respondent notes that this Court has ruled that "the better policy is to limit 'outsider' annexation challenges to those brought by the State 'acting in the public interest.'" *St. Andrews* at 605, 564 S.E.2d at 648 (overruling, in part, *Quinn v. City of Columbia*, 303 S.C. 405, 401 S.E.2d 165 (1991)). Even if such taxpayer standing was deemed to be present here, it would be solely for the Nebo Tract annexation in 2009 and has no bearing on the challenge of the 2004 ten (10) foot strip or Nebo Church property.

in the development agreement for the Nebo Tract. Moreover, Petitioners and EBC, LLC, the property owner, settled and resolved the potential public expenditures issue. App. at 359-366. With no evidence of any expenditures, much less mishandling or malfeasance regarding any expenditures, there is no basis for taxpayer standing in this case. The authority cited by Petitioners only support standing for questions arising in regard to actual expenditures or expenditures under governing bodies not constitutionally appointed. Petitioners also confuse public importance and taxpayer standing exceptions, but more importantly fail to show any basis for such exception nor even express any particular guidance needed to redress the mistaken allegation that Respondent Town was deceitful and acted nefariously. The Court of Appeals correctly determined that there was no deception on the part of Respondent and that there was no basis for the public importance exception. *See Vicary v. Town of Awendaw*, 417 S.C. 631, 639, 790 S.E.2d 787, 791; Appendix at 465 (2016): "Respondents contend *St. Andrews* and *Yemassee* are distinguishable from the present case because those cases involved annexations carried out in good faith, not through deception. We disagree and note Respondents fail to cite any case law to support this argument."

Without harm from the action complained of, Petitioners cannot seek redress. ""[A] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." *Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000). *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, (2012). Here the legislative adoption of an annexation ordinance is not reviewable by a court unless a challenge has been timely filed by one with a proprietary interest being harmed thereby or statutory standing. Petitioners lack standing on all counts.

C. This Court's holding in Saint Andrews and Yemassee did not create a statutory standing class or preclude all other possible bases for standing, is consistent with the annexation statute's own silence on standing, and should not be overturned here.

Without a finding of fraudulent or deceitful governmental action, and without a showing by Petitioners of any infringement of any proprietary interest or harm of any kind and lacking any statutory standing, the Court of Appeals correctly applied the standard set by this Court in *St. Andrews* and *Town of Yemassee*. While the lack of statutory standing may have been enough in and of itself for the Court to render its opinion, the Court of Appeals also found Petitioners had "failed to show any infringement of their own proprietary interest", *Vicary*, 417 S.C. at 639, 790 S.E.2d at 791, and disagreed that the acceptance of the Forest Service letter as a petition was deceitful. *Id.* This Court's holdings in *St. Andrews* and *Town of Yemassee* did not create a statutory standing class. These cases describe the proprietary interest or the role of the State in challenging annexations where the statute itself is silent in this section on standing. The Legislative silence in this section of the statute, where everyone with a property interest consents to the annexation, creates statutory standing for those with such a proprietary interest. The very remedies Petitioners argue for, taxpayer and public importance standing, are not statutory but derived from our jurisprudence and applied as facts and justice may require consistent with the laws adopted by the Legislature. The Court of Appeals ruling is consistent with this section of the statute where the property owners whose property is being annexed have statutory standing, and with *St. Andrews* and *Town of Yemassee*. The Court of Appeals merely saw no basis to find an exception to this Court's holdings in its ruling on this case, just as this Court found no basis for an exception in *St. Andrews* and *Town of Yemassee*. While the taxpayer or public importance exceptions may be applicable to other government actions, as it was in *S.C. Pub. Interest Found. v. South Carolina Trans. Infrastructure Bank,* 403 S.C. 640, 744 S.E.2d 521 (2013), where the potential for an unconstitutionally formed public body may have its actions about expenditure of public funds

questioned as a result, no such situation appears here with the 100% method of annexation. The State did not take action, the Forest Service did not take action, Petitioners have no proprietary interests, and most importantly no deceitful or corrupt government action on the part of Respondent Town has taken place. The Court of Appeals reversal of the circuit court should be upheld.

D. The Court of Appeal's ruling is consistent with this Court's applicable rulings on annexations and standing and does not create absurd results.

Petitioners declare that absurd results will be created by the Court of Appeals ruling and this Courts' holdings in *St. Andrews* and *Town of Yemassee*. Somehow Petitioners see other statutory sections of Title 5, Chapter 3 are affected by these holdings. Petitioners Brief at 22, 23. Annexations under other sections in the future that do have harmful impacts on property owners that involve public expenditures may certainly be addressed by our courts as the facts and jurisprudence may require. But unlike here, those situations may show the harmful impacts that justify an exception that the Legislature did not include in the this section of the statute *for anyone but the property owners whose property is being annexed with the owners' consent*. Petitioners' arguments that this case creates absurd results is speculation without foundation and should be dismissed.

E. The Court of Appeals ruling that Petitioners lacked standing should be affirmed on appeal upon the additional sustaining ground that the statute of limitations barred Petitioners' challenge of the 2004 annexation of the Forest Service ten (10) foot strip of property.

Petitioners have tried to discount in this appeal the argument of Respondent that the timeliness of their challenge of the 2004 annexation as being void ab initio within Petitioners' challenge of the 2009 Nebo Tract annexation is a basis for finding they lack standing under the applicable statute of limitations. The statute of limitations argument was briefed before the Court of Appeals and is clear in the record, and Petitioners cannot hide from it when the Court of Appeals

did not address it because "it is not necessary to address the Town's remaining issues" where it found Petitioners otherwise lacked standing. *Vicary*, at 639, 791-792. However, the language of the statute is crystal clear on the timeliness required for challenging an annexation. Section 5-3-270, S.C. Code Ann. applies to any "person interested therein" and limits the time to file a challenge to ninety (90) days. *State ex. rel. Condon v. Columbia*, 339 S.C. 8, 528 S.E.2d 408, 411 (2000). The Legislature used the terms "*must* be instituted" and "*no contest* thereabout *shall be allowed*" (emphasis added) in this section and this Court has interpreted the strict time limit to apply to the State as well as individuals interested in the annexation. *Id.*; *Ex parte State ex rel. Wilson v. Town of Yemassee,* 391 S.C. 565, 707 S.E.2d 402 (2011). The standing of any kind for any person is limited in time to the filing of a challenge within ninety (90) days of the annexation. The five (5) year time period between the 2004 Forest Service strip annexation and the 2009 Nebo Tract annexation is more than ninety (90) days, and Petitioners cannot bootstrap the 2004 challenge into the 2009 challenge. On this additional ground this Court should uphold the Court of Appeals.

IV. CONCLUSION

Petitioners' claims of deceitful and nefarious action on the part of Respondent Town of Awendaw to challenge the acceptance by Respondent of the 2004 Forest Service letter it received that explicitly did not object to the annexation of its property must fail not only under *St. Andrews* and *Town of Yemassee* but also because Petitioners are asking the Court to fill in the blanks the Legislature chose not to in the 100% method statute. No prescriptive language for what a petition must be is given, leaving to our local legislative bodies the ability to deal with landowners and annexations and what can be accepted as a petition. A landowner whose property is annexed by any method will have standing to challenge it. The State, acting in the public interest, may also

have standing to challenge any annexation. Disgruntled residents, associations and others with no proprietary interests should not be allowed to intervene in the annexation because they object to it. *St. Andrews* and *Town of Yemassee* were correctly applied by the Court of Appeals, and this Court should uphold that ruling in this appeal. The fact that the sole basis of the 2009 annexation challenge by Petitioners on appeal is the challenge of the 2004 annexation as being void ab initio provides the additional ground for upholding the Court of Appeals as that challenge inherent in Petitioners' appeal was well outside the statute of limitations of Section 5-3-270, S.C. Code Ann. for appealing any annexation. The Court of Appeals ruling should be upheld.

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November 20, 2017

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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