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.

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

Christopher K. DeScherer, Esq.
S.C. Bar No.: 77753
Catherine M. Wannamaker, Esq.
S.C. Bar No.: 102895
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29403
(843) 720-5270

W. Jefferson Leath, Jr., Esq.
S.C. Bar No.: 03244
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
(843) 937-8811

Attorneys for Petitioners

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In this case, Petitioners Lynne Vicary, Kent Prause, and the South Carolina Coastal Conservation League raise important issues regarding public importance standing in South Carolina and the applicability of Supreme Court precedent, specifically *St. Andrews Public Service District 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), to an invalid annexation that was conducted without following the requirements of the South Carolina annexation statute. *St. Andrews* and *Town of Yemassee* concern only who may challenge a properly conducted "100% method annexation," where all property owners involved affirmatively request annexation by a municipality. This case, in comparison, concerns a nefarious attempt by the Town of Awendaw to use a decades-old letter from the U.S. Forest Service as a 100% method annexation petition after it could not obtain such a petition, and when the decades-old letter did not even identify the property at issue in the annexation. Unlike *St. Andrews* and *Town of Yemassee*, this case also concerns the Town of Awendaw's repeated assurances that it will continue to conduct annexations in this way if not stopped by a court. Rather than address these unique facts, Respondent Town of Awendaw ("the Town") attempts to shoehorn this case into annexation caselaw, adopting a "move along, nothing to see here" approach that relies on a mischaracterization of the facts and a misapplication of law. The Court should consider the serious implications flowing from the Court of Appeals ruling – in short, that no one other than the State or someone with undefined "proprietary" interests may challenge even a purported, but not lawfully conducted, annexation. The Court should reverse given the multiple errors of law in the Court of Appeals opinion, and the absurd results which flow therefrom.

I. The 1994 Letter Was Not a Valid Petition to Annex National Forest Lands by the 100% Annexation Method.

The Town first explains that the "primary issue" in this case is whether the Town could accept the 1994 Letter from the Forest Service stating that it had "no objection" to certain annexations (not the land at issue here) as a valid petition to annex National Forest lands by the 100% annexation method. Town Brief at 4. Petitioners agree. As explained throughout the briefing in this matter, this question is of critical relevance because *St. Andrews* and *Town of Yemassee,* which the Court of Appeals held prevented Petitioners from having standing to challenge the Town's actions here, only concern which parties have standing to challenge 100% method annexations. The 1994 Letter is the only document alleged by the Town to be a petition for annexation by the 100% method.

At the time of the purported annexation of the Ten Foot Strip, the 1994 Letter was ten years old, and the Town only chose to rely upon it after it could not obtain anything in writing from the Forest Service requesting annexation. *See* Petitioners Brief at 8-10 (detailing history leading to Town's attempt to use the 1994 Letter as a petition after it could not obtain a valid petition from the Forest Service). The 1994 Letter did not describe any of the strips of property at issue in this case. *See* App. 460 (*Vicary*, 417 S.C. at 634; 790 S.E.2d at 789).

The Town spends four pages justifying its reliance on this decades-old letter as a valid petition to annex by the 100% method provided for by S.C. Code Ann. § 5-3-150(3). In so doing, the Town first mischaracterizes the legal requirements for such a petition. The South Carolina annexation statute provides that "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.***" S.C. Code Ann. § 5-3-150(3) (emphasis added). But the Town contends that a valid petition to be annexed

by the 100% method exists whenever a landowner writes to a municipality "expressing a desire, willingness, or *consent* to have his property annexed." Town Response at 4 (emphasis added).

In the Town's view, a petition to annex by the 100% method can exist when there is simply *consent* by the landowner. But this is inconsistent with the words of the annexation statute, which explain that a proper petition for annexation by the 100% method exists when all landowners "*request*[]" annexation. *See* S.C. Code Ann. § 5-3-150(3). Consent to an annexation and an active request for annexation are obviously not the same – consent is passive, while the words of the annexation statute require an affirmative act by a landowner to seek annexation. Notably, Town officials have made this same point in deposition testimony. *See* App. 200 (Wallace Dep. at 29:10-13) (Town Administrator explaining "[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.") (emphasis added). The Town's deposition testimony is inconsistent with its current argument that the Forest Service's alleged consent is good enough for the 100% petition method.

Because the Forest Service never requested annexation here, no valid petition to annex by the 100% annexation method existed. In the words of Judge Nicholson, "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." App. at 23 (Nicholson Order). The Forest Service itself explained that it "did not intend for the letter of May 3, 1994, to constitute 'a petition of the federal government' to annex National Forest lands." *See* App. 240 (Letter from

Paul Bradley (Forest Service) to Samuel Robinson (Town) (Feb. 16, 2011). . . .");[1] *see also* App. 202 (Wallace Dep. at 40:9-11) (Town Administrator admitting that "[I]t turned out that they [Forest Service] would not give us anything in writing saying that they desired to be annexed."). Even the Court of Appeals explained 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 (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). The Town does not mention any of these inconvenient findings by the trial court or Court of Appeals, or the complex factual history leading to the Town's decision to attempt to unlawfully use the *decade-old* 1994 Letter as a 100% petition. *See* Petitioner Brief at 8-10.[2] As even the Court of Appeals implicitly acknowledged, the 1994 Letter was not a valid 100% petition requesting annexation.[3]

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[1] The Town argues that this letter only explained that the Forest Service did not intend the 1994 Letter to be a petition to annex pursuant to one section of the S.C. Code governing annexation of National Forest Lands – S.C. Code Ann.§ 5-3-140 – but expressed no opinion on annexation pursuant to the 100% method. *See* Town Brief at 7. This argument strains credulity at best. The far more natural and logical reading of the 1994 Letter is that the Forest Service did not intend the 1994 Letter to be a petition to annex under *any* provision of the S.C. Code.

[2] Rather than address these sections of Petitioners' brief, the Town makes vague arguments that it had some unspecified and unwritten "long term" agreement with the Forest Service to annex 10 foot strips of the National Forest into the Town, *see* Town Brief at 5, and that the Forest Service's primary concern was the annexation of "large areas of its property." *Id.* at 5-6. Not only are these arguments factually incorrect, but they are irrelevant – even if true, no vague long term agreement or non-objection to annexations of small parcels constitutes the required affirmative request by all landowners to annex by the 100% method required by S.C. Code Ann. § 5-3-150(3). No such petition existed here.

[3] The Town repeatedly argues that Petitioners seek to overturn *St. Andrews* and *Town of Yemassee*. *See* Town Brief at 6. This is also a mischaracterization of Petitioners' primary argument, which is that these cases do not apply on these unique facts. *See* Petitioners Brief at 12-14.

II. Public Importance and/or Taxpayer Standing Are Applicable Here.

Because no 100% petition existed, the rules regarding standing to challenge such 100% annexations established by *St. Andrews* and *Town of Yemassee* do not apply, but instead, "normal" standing doctrines established by South Carolina law are applicable. These include public importance and taxpayer standing, as explained in detail in Petitioners' Brief at pages 14-18.[4] *See, e.g., ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (holding that "[s]tanding may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing'; ***or*** (3) under the 'public importance' exception.") (emphasis added). The Town does not rebut these arguments, except by contending that the public importance standing cases concern only "actual expenditures or expenditures under governing bodies not constitutionally appointed," and that Petitioners have not explained why future guidance is needed on these facts. *See* Town Brief at 8. Both contentions are wrong.

First, this Court has never limited public importance standing to cases challenging public expenditures.[5] Rather, the Court has explained repeatedly that many issues are of public importance, and "[t]he key . . . is whether a resolution is needed for future guidance." *ATC S.*, 380 S.C. at 198-99, 669 S.E.2d at 341; *see also Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 79-80, 753 S.E.2d 846, 853 (2014) ("Whether [public

[4] The Town's focus on taxpayer standing is bizarre. *See* Town Brief at 7-8. While Petitioners raise taxpayer standing as a basis for standing, the focus of Petitioners' argument is on public importance standing. The Town's near silence on the requirements for public importance standing is telling.

[5] The Town keeps narrowing its interpretation of public importance standing. In earlier briefing, the Town argued that public importance standing was limited to cases involving public finance, health, or welfare – a category clearly implicated by this case as the conduct involves the misuse of public land. The Town offers an even more limited view of public importance standing now, attempting to limit public importance standing to cases involve public finance. This is unwarranted as described above.

importance standing] applies in a particular case turns on whether resolution of the dispute is needed for future guidance. . . . [T]he need for future guidance generally dictates when [public importance standing] applies."). The Court has allowed public importance standing in cases not involving public expenditures, *see, e.g., Sloan v. Wilkins,* 362 S.C. 430, 436, 608 S.E.2d 579, 583 (2005) (public importance standing to challenge constitutionality of statute); *Sloan v. Sanford,* 357 S.C. 431, 593 S.E.2d 470 (2004) (standing to challenge governor's commission as an officer in the Air Force reserve). This Court has also highlighted that the most appropriate use of the doctrine is in cases involving allegations of government misconduct. *See, e.g., Baird v. Charleston Cty.,* 333 S.C. 519, 533, 511 S.E.2d 69, 72 (1999); *see also S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013) (holding that allegations of illegal government action are "the precise instance where the public importance exception should apply."); *accord S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, No. 2015-001175, 2017 WL 4052370.

This sort of government misconduct – and the need for future guidance – is precisely what exists here in the Town's attempt to manufacture a petition for a 100% annexation when no such petition existed and subsequent passage of an ordinance explaining that such a petition had been received. *See* Petitioners' Brief at 17-18; App. 20 (Nicholson Order); App. 189-91 (Ten-Foot Strip Annexation Ordinance). The Town does not address these arguments, except in a sweeping and incorrect claim that Petitioners do not "express any particular guidance needed to redress the mistaken allegation that Respondent Town was deceitful and acted nefariously." Town Brief at 8. Petitioners explain precisely why future guidance is needed – (1) guidance to stop the Town from future unlawful annexations, which it admits it may continue unless stopped by a court, *see* App. 147 (Transcript of April 16, 2014 hearing at 74: 6-10), and (2) guidance to

prevent other municipalities from attempting the same sorts of annexations without a proper petition by simply invoking the words "100% petition" and the accompanying shield of *St. Andrews* and *Town of Yemassee*. *See* Respondent Brief at 17-18. This Court should allow Petitioners public importance standing to challenge the illegal government conduct at issue and to provide future guidance on unlawful annexations.

In fact, the need for future guidance is heightened by the Town's new argument that "consent" is enough to allow annexation by the 100% method under S.C. Code § 5-3-150(3). The Court should reach the merits of this important issue, as the Town's reading of the annexation statute would fundamentally change the statutory language for 100% method annexations and annexation procedures across this state.

III. The Town Merely Repeats the Court of Appeals' Error and Fails to Address the Absurd Results which Flow from that Ruling.

Rather than address the important issues here, the Town repeatedly argues that the Court of Appeals properly found that Petitioners "had no infringement of any proprietary interest" to challenge the annexation of the Nebo development tract in 2009. Town Brief at 9 (arguing that Petitioners cannot show "any infringement of any proprietary interest or harm of any kind"). This argument merely recapitulates the Court of Appeals' error rather than responding to the issues presented here regarding whether the Court of Appeals misapplied *St. Andrews* and *Town of Yemassee* or erroneously failed to consider public importance or taxpayer standing. Indeed, the argument that Petitioners could not have standing because they lack a "proprietary" interest (a term that does not appear in the annexation statute) is tantamount to admitting that the Court of Appeals ruled out public interest or constitutional standing in all annexation cases. That is a serious legal error which requires reversal.

The Town also misses the point of Petitioners' argument that the Court of Appeals' reading of *St. Andrews* and *Town of Yemassee* creates absurd results. *See* Petitioners Brief at 21-23. Petitioners do not argue that other sections of the annexation statute "are affected by these holdings." Town Brief at 10. Rather, Petitioners argue that the Court of Appeals ruling requiring "statutory standing" when the annexation statute is silent on standing for all but one type of annexation challenge makes no sense. To highlight this point, Petitioners simply cited other provisions of the annexation statute as examples of situations where the Court of Appeals' logic fails. *See, e.g.,* Petitioners Brief at 22-23 (citing annexation statute provisions on annexations of corporate property and annexations by election as examples of absurd results created by Court of Appeals ruling). This Court should consider the absurd results which flow from the Court of Appeals ruling – namely that the 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 Sloan v. Sch. Dist. of Greenville Cty.*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (2000) ("A taxpayer's standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina."). 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.***

IV. The Statute of Limitations Does Not Bar Petitioners' Claims.

Finally, the Town argues that the Court should affirm the Court of Appeals on the "additional sustaining ground" that the statute of limitations barred Petitioners' from challenging the 2004 annexation of the Ten Foot Strips necessary to the 2009 annexation of the Nebo Tract.

As a threshold matter, the Town does not point to any law allowing the Supreme Court to consider an additional sustaining ground as a basis to uphold a Court of Appeals ruling ***on certiorari review***. While the doctrine is frequently discussed as a basis for a Court of Appeals to affirm rulings of the trial court that were adequately presented but perhaps not ruled upon, *see, e.g., I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000), this case arises in a different procedural posture. Here, the Supreme Court has granted *discretionary* review of three discrete questions – these were the only issues raised in the petition for certiorari and the only issues on which this Court granted certiorari. Respondent should not be able to raise an additional sustaining ground in this unique posture – and points to no law demonstrating that it can.

In any case, there is no dispute that Petitioners timely challenged the purported annexation of the Nebo Tract. As required by statute, Petitioners filed a Notice of Intention to Contest Extension of Town of Awendaw's Municipal Limits on November 25, 2009, within 60 days of the purported annexation of the Nebo Tract on October 1, 2009, and also filed their First Amended Complaint to add Plaintiffs' annexation claims on December 22, 2009, within 90 days of the purported Nebo Tract annexation. *See* S.C. Code Ann. § 5-3-270; App. 25. The Town argues though, that because Respondents did not challenge the 2004 annexations of the Ten-Foot Strip and the Nebo Church Tract within the statute of limitations, they are barred from raising those arguments at this juncture.

With respect to the Ten-Foot Strip and the Nebo Church Tract, the trial court's holding regarding timeliness was two-fold. The trial court's first and primary holding was that Respondents' challenges to those purported annexations were not barred by the statute of limitations because there was never a valid act to annex these properties, and "the passage of time cannot transform a void and unauthorized annexation into a valid one." App. 25 (Nicholson Order at 9). As the trial court explained, this is because municipalities like the Town have only the powers granted them by Article VIII of the South Carolina Constitution and by state legislation. *Id.* at 26-27 (citing *Hospitality Ass'n of S.C. v. Cty. Of Charleston*, 320 S.C. 219, 225-26, 464 S.E.2d 113, 117-18 (1995)). Actions outside these powers are void and have no effect. *See Bostick v. City of Beaufort*, 307 S.C. 347, 350, 415 S.E.2d 389, 391 (1992).

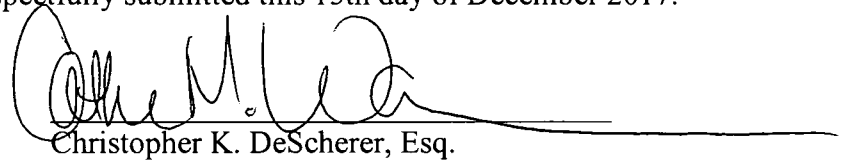
In *Bostick*, the Court explained that in the annexation context, procedural or technical deficiencies – such as the omission of a date – may be retroactively corrected, but where, as here, an annexation is "fatally flawed" and a "nullity upon origination," no subsequent action makes it valid. *Bostick* 307 S.C. at 350, 415 S.E.2d at 391. Thus, because there was no valid annexation of the Ten-Foot Strip or Nebo Church Tract, the statute of limitations does not bar Petitioners' arguments. *See* Order at 9-10; *see also Cabazon Band of Mission Indians v. City of Indio, Cal.*, 694 F.2d 634, 637-38 (9th Cir. 1982) (holding that a plaintiff "was not required to take action within any prescribed statutory time to establish invalidity" where a city attempting to complete an annexation "had no authority to act at all" absent requisite federal consent); *People ex rel. Forde v. Town of Corte Madera*, 115 Cal. App. 2d 32, 38, 251 P.2d 988, 991 (Cal. Dist. Ct. App. 1952) ("no life can be breathed into . . . void . . . [annexation] proceedings by the failure to

contest them").[6] In sum, if it reaches the Town's statute of limitations argument, the Court should affirm on these same findings made by the trial court – that the statute of limitations is simply not a bar on these facts, where the annexations are void because no valid petition for annexation existed.

CONCLUSION

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

Respectfully submitted this 15th day of December 2017.



Christopher K. DeScherer, Esq.
S.C. Bar No.: 77753
Catherine M. Wannamaker, Esq.
S.C. Bar No.: 102895
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(843) 720-5270

W. Jefferson Leath, Jr., Esq.
S.C. Bar No.: 03244
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
(843) 937-8811

Attorneys for Petitioners

[6] The trial court's secondary holding as to why Respondents' arguments regarding the Ten-Foot Strip and Nebo Church Tract were not time-barred relied on equitable principles. In the words of the trial court, "statutes of limitations are not automatic bars to claims, but rather, they are affirmative defenses that can be waived and are subject to equitable doctrines, including estoppel and tolling." Order at 10. The trial court also concluded that even if the statute of limitations applied, the Town was prevented by principles of equity from asserting such a defense because it engaged in deceitful conduct. *See* Order at 10.

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Petitioners on all parties by depositing a copy in the United States Mail, postage prepaid, on December 15, 2017, addressed to their attorneys of record, as indicated below:

Newman Jackson Smith, Esq.
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street, Suite 600
Charleston, South Carolina 29401

This 15th day of December 2017.

Christopher K. DeScherer, Esq.
S.C. Bar No.: 77753
Catherine M. Wannamaker, Esq.
S.C. Bar No.: 102895
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29403
(843) 720-5270