THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ORIGINAL JURISDICTION

RECEIVED

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S.C. SUPREME COURT

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MARK GREGORY THOMPSON,

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VONTISHA PORTEE,

BAYLIS GRIFFIN HYMAN,

CARROLL BROWN, and

CANDICE ABRAMS.....Petitioners,

v.

THOMAS ALEXANDER, in his official capacity as President of the South Carolina Senate;

G. MURRELL SMITH, JR., in his official capacity as Speaker of the South Carolina House of Representatives; and

HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina.....Respondents.

PETITION FOR ORIGINAL JURISDICTION AND DECLARATORY RELIEF

Petitioners urgently request the Supreme Court review, in its original jurisdiction, the constitutionality of the retroactivity provision found in section 2(E) of Act No. 236, 2022 S.C. Acts (effective June 22, 2022). This sweeping new legislation directly overturns this Court's unanimous decision in *Burns v. Greenville County Council*, 433 S.C. 583, 861 S.E.2d 31 (2021) by applying—**retroactive to December 31, 1996**—a more permissive definition of a "service or user fee" than what *Burns* held is required under S.C. Code § 6-1-300(6). Pursuant to a long line of Supreme Court precedent, legislative amendments like this—which seek to reverse a Supreme Court decision and strip South Carolina citizens of vested rights—are unconstitutional because they violate the separation of powers doctrine imbedded in Article I, section 8 of the South Carolina Constitution.

BACKGROUND AND SUMMARY

Last year this Court invalidated Greenville County's road maintenance and telecommunications fees in *Burns* because those fees failed to satisfy the unique benefit requirement of section 6-1-300(6). After *Burns* was decided, but before Act No. 236 was promulgated, Petitioners filed similar lawsuits challenging other counties' and municipalities' road maintenance fees. In these cases, Petitioners' claims are all predicated on this Court's interpretation of section § 6-1-300(6) in *Burns*, which was the governing law in effect at the time those claims were filed. But

since Act No. 236 was ratified by the General Assembly last month, two counties have moved to formally invoke the Act's retroactivity provision to dispose of two Petitioners' claims. The other Petitioners expect similar motions will follow shortly in their cases.

To avoid inconsistent judgments in Petitioners' cases, and for the significant public interest in the timely and efficient resolution of an issue that directly impacts millions of South Carolina citizens and dozens of political subdivisions, Petitioners seek to file a declaratory judgment complaint in the original jurisdiction of this Court pursuant to Article V, section 5 of the South Carolina Constitution, section 14-3-310 of the South Carolina Code, and Rule 245 of the South Carolina Appellate Court Rules. Petitioners' proposed complaint setting forth their claims for declaratory relief is attached hereto. The sole issue presented therein is a pure question of law: whether the retroactivity clause in section 2(E) of Act No. 236 is unconstitutional.

FACTS

On June 30, 2021, this Court filed a unanimous opinion in *Burns v. Greenville County Council*, 433 S.C. 583, 861 S.E.2d 31 (2021), that struck down Greenville County's road maintenance and telecommunications fees because they failed to satisfy the unique benefit requirement of S.C. Code § 6-1-300(6). The statute, when *Burns* was decided, read as follows:

> 'Service or user fee' means a charge required to be paid in return for a particular government service or program made available to the payer *that benefits the payer in some manner different from the members of the general public not paying the fee.*

S.C. Code Ann. § 6-1-300(6) (emphasis added). Section 6-1-300(6) was adopted pursuant to Act No. 138, 1997 S.C. Acts, with an effective date of July 1, 1997. Therefore, section 6-1-300(6), as interpreted by this Court in *Burns*, provided the governing law on "service or user fees" from July 1, 1997, through June 22, 2022, when Act No. 236 was ratified. 2022 S.C. Acts No. 236.

In *Burns*, this Court articulated that "[t]he fact the funds are allocated for road maintenance says nothing of any benefit peculiar to the payer of the fee. In fact, every driver on any road in Greenville County—whether their vehicles are registered in Greenville County, Spartanburg County, or in some other state—benefits from the fact the funds are 'specifically allocated for road maintenance.'" 433 S.C. at 587-588. Therefore, the Court concluded the fee was invalid and essentially functioned as an unlawful tax. *Id.* at 589-90.

Justice Kittredge, in a concurring opinion joined by Chief Justice Beatty, proclaimed:

> [T]his Court in recent years has received an increasing number of challenges to purported "service or user fees." Local governments, for obvious reasons, want to avoid calling a tax a tax. I am hopeful that today's decision will deter the politically expedient penchant for imposing taxes disguised as "service or user fees." I believe today's decision sends a clear message that the courts will not uphold taxes masquerading as "service or user fees." **Going forward, courts will carefully scrutinize so-called "service or user fees" to ensure compliance with section 6-1-300(6).**

Id. at 589 (emphasis added).

Shortly after the *Burns* decision, Petitioners filed a series of lawsuits against their respective counties seeking to invalidate substantially similar road maintenance fees[1] and obtain refunds. Petitioners' lawsuits are captioned as follows:

- *Mitchell v. Richland County*, C/A No. 2021-CP-40-03410 (filed July 9, 2021);
- *Biggs v. Florence County*, C/A No. 2021-CP-21-1560 (filed July 15, 2021);
- *Hargrove v. Spartanburg County*, C/A No. 2021-CP-42-03595 (filed Oct. 21, 2021);
- *Calkins v. Beaufort County*, C/A No. 2021-CP-07-01967 (filed Oct. 28, 2021);
- *Butts v. Georgetown County*, C/A No. 2021-CP-22-00928 (filed Nov. 5, 2021);
- *Thompson v. Aiken County,* C/A No. 2021-CP-02-2323 (filed Nov. 2, 2021);
- *Hyman v. Horry County*, C/A No. 2021-CP-26-07309 (filed Nov. 2, 2021);
- *Brown v. Orangeburg County*, C/A No. 2021-CP-38-01268 (filed Nov. 24, 2021);
- *Portee v. Kershaw County,* C/A No. 2021-CP-28-873 (filed Nov. 1, 2021); and
- *Abrams v. Alverson*, C/A No. 2021-CP-42-03736 (filed Nov. 2, 2021).

To date, Petitioners' lawsuits remain pending and most have proceeded into motions practice and discovery.

On June 22, 2022, Governor Henry McMaster signed Act No. 236 (the "Act") into law. Among other things, the Act amends section 6-1-300(6) by removing the particularized benefit language—the requirement upon which *Burns* was decided—and adding new language that allows fee revenue to "be used to the benefit of the

[1] Each of the fees challenged in these lawsuits are flat fees to fund road maintenance.

payers, *even if the general public also benefits*." Act No. 236, § 2(A) (emphasis added). This amendment effects an extraordinary change in South Carolina law on local governments' authority to raise revenue by eliminating any distinction between a service or user fee and a tax.

To be clear, Petitioners do not challenge the General Assembly's authority to change the law governing service or user fees moving forward. However, the final provision in section 2(E) of Act No. 236 purports to apply this substantial change in the law **retroactively to December 31, 1996**. 2022 S.C. Acts No. 236 § 2(E) ("This SECTION takes effect upon approval by the Governor and applies retroactively to any service or [user] fee imposed after December 31, 1996.")

Since Act No. 236 was signed into law in June, two counties have already invoked section 2(E) to dispose of Petitioners Jane Calkins' and Anne Hargrove's claims. On July 1, 2022, Beaufort County filed a Motion for Judgment on the Pleadings Pursuant to Rule 12(c), SCRCP in *Calkins v. Beaufort County*, C/A No. 2021-CP-07-01967 on the grounds that:

> *Burns* was decided prior to the enactment of Public Act No. 236. Public Act No. 236 amends S.C. Code § 6-1-300(6). In enacting Public Act No. 236, the General Assembly eliminated the "some manner different language" from S.C. Code § 6-1-300(6) that existed at the time *Burns* was decided. The *Burns* Court used this language as both the starting and ending points of its analysis as to whether Greenville County's road maintenance fee is valid. Under amended S.C. Code § 6-1-300(6), a service or user fee is valid if it is "used to the benefit of the payers, even if the general public also benefits." Public Act No. 236 states unequivocally that it applies "retroactively to any service or fee imposed after December 31, 1996."
>
> The Amended Complaint relies exclusively on *Burns* (and on former S.C. Code § 6-1-300(6)) as the basis for its allegations that Beaufort County's

> road maintenance fee is illegal. Public Act No. 236 amends 6-1-300(6) to eliminate any doubt that Beaufort County's road maintenance fee is legal. With the enactment of Public Act No. 236, the Amended Complaint fails as a matter of law.

Shortly thereafter, Spartanburg County amended its Answer in *Hargrove v. Spartanburg County*, C/A No. 2021-CP-42-03595 to plead Act No. 236 as an affirmative defense. Upon information and belief, other counties will file similar pleadings in other Petitioners' cases seeking to dispose of their lawsuits pursuant to section 2(E) of the Act.

JURISDICTION AND STANDING

This Court may exercise original jurisdiction "if the public interest is involved, or if special grounds of emergency or other good reasons exist why the original jurisdiction of the Supreme Court should be exercised …." Rule 245, SCACR; *see also* S.C. Const. art. V, §§ 5, 20; S.C. Code Ann. § 14-3-310 (1976); *Key v. Currie*, 305 S.C. 115, 406 S.E. 2d 356, 357 (1991). Recognizing the significant public interest and constitutional concerns with section 2(E) of Act No. 236, Petitioners seek to bring this action for their own personally affected interests and on behalf of the significant public interests of millions of other citizens throughout the State.[2]

"A plaintiff must have standing to institute an action." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 547, 590 S.E.2d 338, 347 (Ct. App. 2003). "Standing is 'a personal

[2] This Court has on recent occasions exercised its original jurisdiction to hear challenges to laws passed by the General Assembly. *See, e.g., Pinckney v. Peeler*, 434 S.C. 272, 862 S.E.2d 906 (2021) (challenge to the Heritage Act); *Doe v. State*, 421 S.C. 490, 808 S.E.2d 807 (2017) (challenge to definitions of "household member" in the Domestic Violence Reform Act and the Protection from Domestic Abuse Act); *S.C. Pub. Interest Found. v. Lucas*, 416 S.C. 269, 270, 786 S.E.2d 124, 125 (2016)

stake in the subject matter of a lawsuit.'" *Newman v. Richland Cnty. Historic Pres. Comm'n*, 325 S.C. 79, 82, 480 S.E.2d 72, 74 (1997) (quoting *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). "Standing may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing'; or (3) under the 'public importance' exception." *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Here, Petitioners have constitutional standing and contend the petition should be granted for its great public importance.

Constitutional Standing

The elements of constitutional standing are injury in fact, causal connection between the injury and conduct, and likelihood the injury will be addressed by a favorable decision. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Petitioners have personal stakes and interests in the litigation over the constitutionality of section 2(E) of Act No. 236, and they have suffered and will continue to suffer injury from the continued enforcement of the Act. A favorable decision on the constitutionality of section 2(E) of the Act will avoid Petitioners' injuries from continued enforcement. Petitioners have constitutional standing because of their personal involvement, injury, and stake in the continued enforcement of Act No. 236 in their underlying lawsuits, and in this case regarding the constitutionality of section 2(E) of the Act.

(challenge to Appropriations Act proviso); *Bodman v. State*, 403 S.C. 60, 742 S.E.2d 363 (2013) (challenge to exemptions and caps placed on the State's sales tax); *Am. Petroleum Inst. v. S.C. Dep't of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009) (challenge to a law under the "one subject" provision of the South Carolina Constitution).

Public Importance Exception

"Under the public importance exception, 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 Transp.*, 365 S.C. 299, 303, 618 S.E.2d 876, 878 (2005) (quoting *Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)). Thus, "[t]he key to the public importance analysis is whether a resolution is needed for future guidance." *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. at 199, 669 S.E.2d at 341. "In cases falling within the ambit of important public interest, standing is conferred 'without requiring the plaintiff to show he has an interest greater than other potential plaintiffs.'" *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40, 44 (2012) (quoting *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007)). As has been recognized, "[a]llowing interested citizens a right of action in our judicial system when issues are of significant public importance ensures this accountability and the concomitant integrity of government action." *Sloan v. Greenville Cnty.*, 356 S.C. 531, 551, 590 S.E.2d 338, 349 (Ct. App. 2003). Appellate courts in this state have routinely applied the public importance exception.[3]

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[3] *See, e.g.*, *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 804 S.E.2d 854 (2017); *S.C. Pub. Interest Found. v. Lucas*, 416 S.C. 269, 786 S.E.2d 124 (2016); *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013); *Sloan v Friends of the Hunley*, 393 S.C. 152, 711 S.E.2d 895 (2011); *Am. Petroleum Inst. v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009); *Sloan v. S.C. Dep't of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008); *Davis v. Richland Cnty. Council*, 372 S.C. 497, 642 S.E.2d 740 (2007); *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee Cnty.*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. S.C. Dep't of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005); *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005), *abrogated on other grounds by Am. Petroleum Inst. v. S.C. Dep't of Rev.*, 382 S.C. 572, 677 S.E.2d 16 (2009); *Sloan v. Sanford*, 357

There is great public interest in the constitutionality and enforceability of section 2(E) of Act No. 236. The Act seeks to retroactively change the legal definition of a broad swath of service or user fees that have been imposed upon millions of South Carolina citizens by dozens of political subdivisions across the State. Without a determination by this Court, confusion, inconsistency, and uncertainty will continue to reign in this area of great public importance.

Additionally, it is an issue of significant public importance because a determination of this issue will impact the continued expenditure of public funds that Petitioners claim should be refunded. Our courts have recognized, "the public interest involved is the prevention of the unlawful expenditure of money raised by taxation." *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 523, 537 S.E.2d 299, 303 (Ct. App. 2003). The same public importance involved in the continued expenditure of public funds in *Sloane* is also a public concern here.

This Court's opinion on the constitutionality of Act No. 236 is needed because there is no other final authority on the issue, which impacts millions of South Carolina citizens and dozens of local governments. This purely legal issue will control the outcome of at least a dozen cases filed all across the State and can only be definitively settled by a decision of this Court. A ruling by this Court on whether

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S.C. 431, 593 S.E.2d 470 (2004); *Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000); *Baird v. Richland Cnty.,* 333 S.C. 519, 511 S.E.2d 69 (1999); *Sloan v. Greenville Cnty.*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003); *Sloan v. Sch. Distr. of Greenville Cnty.*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

section 2(E) of the Act overturns *Burns* with respect to fees collected prior to its effective date will avoid inconsistent circuit court rulings, prevent several years of prolonged appellate litigation, facilitate resolution of these cases of great public interest, and provide clarity on the General Assembly's power to reverse a decision by this Court. For these reasons, this Court should find Petitioners have standing and that the Petition should be granted because the issue it raises is of great public importance.

GROUNDS FOR GRANTING THE PETITION

"Subject to constitutional limitations, the legislature has plenary power to amend a statute. However, a judicial [interpretation] of a statute is determinative of its meaning and effect, and any subsequent legislative amendment to the contrary will only be effective from the date of its enactment and cannot be applied retroactively." *Steinke v. S.C. Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 402, 520 S.E.2d 142, 157 (1999) (citing *Lindsay v. Nat'l Old Line Ins. Co.*, 262 S.C. 621, 628-29, 207 S.E.2d 75, 78 (1974)) (alteration in original). "This implicates the doctrine of separation of powers." *Id.* (citing S.C. Const. art. I, § 8) ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no ... departments shall assume or discharge the duties of any other.").

In *Steinke*, the Court addressed whether 1997 Act No. 155, Part II, § 55(C) (the "1997 Act"), which purported to apply retroactively "to claims or actions pending," governed the petitioner's lawsuit filed prior to the Act's effective date. The 1997 Act

reversed this Court's interpretation of S.C. Code § 15-78-120 in *Southeastern Freight Lines v. City of Hartsville*, 313 S.C. 466, 443 S.E.2d 395 (1994). Citing the separation of powers doctrine, the Court held that "[t]he Legislature may not retroactively overrule this Court's interpretation of the statutes in *Southeastern Freight Lines*." 336 S.C. at 403, 520 S.E.2d at 157-158.

Four years later, in *Simmons v. Greenville Hospital System*, 355 S.C. 581, 586 S.E.2d 569 (2003), the Court reaffirmed its decision in *Steinke* and extended its holding to shield from retroactive legislation not only lawsuits **filed** prior to the effective date of the new law, but also those claims that **arose or accrued** prior to the effective date. 355 S.C. at 588, 586 S.E.2d at 572 ("The Legislature had authority to reinstate the caps, but it could only do so prospectively, with respect to those claims that **arose or accrued** after the effective date of the reenactments.") (emphasis in original).

In this case, Petitioners' claims all accrued prior to the effective date of Act No. 236. Indeed, Petitioners' underlying lawsuits were all filed prior to June 22, 2022, the effective date of Act No. 236. Therefore, it is clear under *Steinke* that the retroactivity clause in section 2(E) of the Act is unconstitutional as to Petitioners' filed lawsuits because, if applied, it would overturn this Court's interpretation of section 6-1-300(6) in *Burns*. And under *Simmons*, section 2(E) of the Act is unconstitutional as applied to any other fee payer's accrued, but unfiled, claims. Accordingly, this Court should declare that the retroactivity provision in section 2(E)

of Act No. 236 is an unconstitutional invasion of this Court's authority pursuant to *Steinke* and *Simmons*.

REQUEST FOR EXPEDITED CONSIDERATION

Because of the need for clarity on the constitutionality of the retroactivity provision of Act. No. 236, Petitioners respectfully request that this Court expedite consideration of this case. Discovery is not necessary and the case can be decided based upon filings by the parties and any briefing requested by the Court.

CONCLUSION

For all of these reasons, this Court should grant the Petition and declare the retroactivity provision in section 2(E) of Act No. 236 unconstitutional.

Respectfully submitted,

July 29, 2022

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