THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case Nos. 00-CP-23-3752, 3753, 4171

Edward D. Sloan, Jr., individually, and as a Citizen, Resident, Taxpayer and Registered Elector of the State of South Carolina, and on behalf of all others similarly situated, ...Petitioner,

v.

The Department of Transportation, an agency of the State of South Carolina, and the Commission of the Department of Transportation, Robert W. Harrell, John N. Hardee, Eugene Stoddard, F. Hugh Atkins, B. Bayles Mack, L. Morgan Martin, and J. M. Truluck, in their capacities as Commissioners thereof, ...Respondents.

PETITIONER'S REPLY BRIEF

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I. MR. SLOAN POSSESSES STANDING.

A. *Sloan v. Sanford* Did Not Require a Personal Nexus for Public Interest Standing.

Respondents argue that this Court "has never allowed a challenge to the allegedly unlawful actions by state officials without some particularized nexus possessed by the challenger" (Respondents' Brief at 12). Respondents' argue that public importance standing requires a plaintiff to have a "greater interest in the outcome of the case" than another potential plaintiff. Respondents ignore *Sloan v. Sanford* referenced in Petitioner's Brief (Petitioner's Brief at 6). *Id.* at 357 S.C. 431, 593 S.E.2d 470 (2004) Respondents cite only the Court of Appeals' unpublished opinion in the case at bar in support of their proposition, and a Utah opinion. *Jenkins v. Swan*, 675 P.2d 1145 (Utah 1983). The Court of Appeals decision in the case at bar was issued before *Sloan v. Sanford.* In *Sanford*, Mr. Sloan had no greater nexus to the Governor's qualification for office than any other citizen of the state, but this Court reasoned,

> We conclude Petitioner has public interest standing because of the importance of the issue he raises. Our conclusion is **consistent with prior case law**. In ***Baird, supra,*** doctors sued Charleston County to enjoin the issuance of tax-exempt bonds to the Medical University of South Carolina (MUSC) for its purchase of St. Francis Hospital. We held the issuance of the hospital bonds clearly impacts a profound public interest, the public health and welfare. The eligibility of South Carolina's governor to serve in this State's highest elected office **is at least as important as the proper funding for a clinical hospital for MUSC**. Accordingly, we confer standing.

Id. (citing *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999)).

Respondents also note two opinions of this Court granting public interest standing in cases where there was an "additional factor" present which they claim "inclined the Court towards standing" (Respondent's Brief at 15). *Baird v. Charleston County*, 333

S.C. 519, 511 S.E.2d 69 (1999); *Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse,* 267 S.C. 463, 229 S.E.2d 718 (1976). Although Respondents argue that in *Baird* and *Thompson*, "the plaintiffs were directly affected in their professional life by the outcome of the case," as quoted above, this Court never noted that factor. Furthermore, the more recent *Sanford* opinion quoting *Baird* demonstrates that the proper focus in both *Sanford* and *Baird* was the level of public importance, rather than some professional or personal nexus between the plaintiff and the alleged violation (Respondents' Brief, p. 15).

Respondents argue that the S.C. Court of Appeals has implicitly and explicitly recognized the "test" used in the Utah case in its decision in the case at bar to require that no one have a nexus greater than a plaintiff granted public importance standing unless that plaintiff has been directly affected by the alleged illegal actions (Respondents' Brief at 16). However, as presented above, *Sloan v. Sanford* demonstrates that the test used by this Court is whether the public importance of the case is high enough to justify an exception to the general standing requirements. *Id.* Respondents argue that Petitioner fails the first part of the Utah test requiring that the plaintiff be adversely affected. However, not only Mr. Sloan, but also all South Carolina taxpayers are adversely affected by the SCDOT violating competitive bidding requirements.

> As explained above, competitive sealed bidding requirements are **principally for the benefit of taxpayers** to ensure their money is spent wisely. As a taxpayer, Sloan has "a direct, intrinsic interest in the procurement practices" of the District, and therefore, he has an implied right of action under the District's procurement code.

Sloan v. The School District of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (emphasis added).

> The expenditure of public funds pursuant to a competitive bidding statute is of immense public importance. Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our government believes it should go to maintain the public's trust and confidence in governmental management of public funds. The integrity of the competitive sealed bidding process is so important that in some states "once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds [is] presumed ... without showing that the municipality suffered any alleged injury." 18 Eugene McQuillin, *The Law of Municipal Corporations* § 52.26 (3d ed.1993); *see* 5 Sandra M. Stevenson, *Antieau on Local Government Law* § 73.04 [11] (2d ed.1999) (stating that where a bid statute has been disregarded, injury to taxpayers is almost conclusively presumed). The Missouri Supreme Court went a step further and held, "Even though an expenditure might produce a net gain, if the expenditure is not contemplated by the enabling legislation, it is illegal and should be enjoined." Eastern Missouri Laborers Dist. Council, 781 S.W.2d at 47.

Id.

Furthermore, Respondents argue that Petitioner fails the second part of the Utah test because disappointed bidders have a "far greater interest in SCDOT's procurement policy than Sloan" (Respondents' Brief at 16). This argument fails for two reasons: first, the SCDOT is exempted from the Consolidated Procurement Code and the SCDOT's governing statutes do not provide a cause of action for disappointed proposers; second, competitive sealed bidding requirements are enacted for the benefit of taxpayers, not bidders and proposers. *Id.* at 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000).

Therefore, Respondents' theory of an additional nexus requirement for public interest standing is novel, unsupported, and contrary to the precedent of this Court, and in any event, Petitioner passes that test.

B. THE MAJORITY OF JURISDICTIONS ALLOW STATE TAXPAYER STANDING TO CHALLENGE UNLAWFUL DISBURSEMENTS OF STATE FUNDS REGARDLESS OF WHETHER STATUTORY OR CONSTITUTIONAL OR WHETHER A PERSONAL NEXUS EXISTS OTHER THAN CONTRIBUTING TO THE FUND IN JEOPARDY.

Taxpayer standing is an exception to the general rule requiring the plaintiff's personal interest in a matter to be granted standing to bring an action. Although not established by this Court, Respondents continue to argue that a state taxpayer's standing requires that the plaintiff have a personal nexus (effectively general standing not falling within the taxpayer exception) and have contributed more than a *de minimis* amount of taxes to the threatened funds or have filed a constitutional challenge.[1]

Most jurisdictions allow state taxpayer standing to challenge improper state expenditures regardless of the amount of taxes contributed or a personal interest. Indeed, this Court has allowed a state taxpayer to bring an action against Respondents in a prior action and did not establish the limitations the Respondents seek to introduce in the case at bar. *Myers v. Patterson* 315 S.C. 248, 433 S.E.2d 841 (1993).

California District Court of Appeal thoroughly presented the positions of the majority of jurisdictions in addressing the standing of state taxpayers and citizens who brought suit to enjoin the approval of procurement contracts with certain textbook publishers.

> While there seems to be a conflict of authority as to whether a taxpayer has the right to enjoin an illegal expenditure by a state official, we believe that the great weight of authority suggests the rule that the taxpayer does have such a right. In a very complete and informative annotation it is state in 58

[1] Respondents state that Petitioner contributed gas taxes that are contributed to the funds in question by non-citizens as well as state citizens. However, Respondents have admitted that the State Infrastructure Bank funds contributed to the projects in question originated from the general tax funds of the state which contain only contributions of state taxpayers.

> Americal Law Reports 588, at page 589: '**In a majority of the jurisdictions in which the question of the right of a taxpayer and citizen to enjoin a waste or unlawful expenditure of state funds has been rasied, that right has been upheld.**' And at page 599: '...The municipal or county taxpayer is allowed to maintain the suit, not because of an individual interest differing from other taxpayers, but because as such taxpayer he is so interested in the municipal funds that he may ask the court to protect them from misuse or misappropriation; **the taxpayer bears the same relation to the state funds as to the municipal funds, except in degree, a point which should not enter into the question.**'

Ahlgren v. Carr, 25 Cal.App.2d 248, 252, 25 Cal.Rptr. 887, 889 (1963) (emphasis added). The Court also explained the policy reasons behind allowing state taxpayer standing.

> The rational of the overwhelming acceptance of the principle of the right of a state taxpayer to maintain a suit to enjoin the illegal expenditure of state funds is set forth in a law review comment in 50 Harvard Law Review 1276, 1283, as follows: 'The taxpayers' suit must then be understood as not only a means of vindicating individual rights but as a governmental device to **safeguard the legal restrictions on state and local governments**, which, if not subjected to the careful scrutiny of individual taxpayers, might well become dead letters.

Id. at 889-890 (emphasis added). The Third District Court of Appeal for California later also recognized state taxpayer standing to enjoin illegal expenditures of state money.

> In California, as in most jurisdictions, a state taxpayer has standing to maintain an injunction suit against a state official to prevent illegal expenditures of state money. **Approximately three-fourths of the states permit taxpayers' actions against public officials**. (Collins and Myers, The Public Interest Litigant in California: Observations on Taxpayers' Actions 10 Loyola L.A.L.Rev. 329, 331). California courts have analogized taxpayers' suits against state officials to those permitted against local officials pursuant to Code of Civil Procedure section 526a. (See generally Hastings L.J. 477, California Taxpayers'Suits: Suing State Officers Under Section 526a of the Code of Civil Procedure.)

Farley v. Cory, 78 Cal.App.3d 583, 589, 144 Cal.Rptr. 923, 926 (1978) (emphasis added). The Court explained its rational.

> Underlying California's affirmative response to the question of taxpayers' standing is the confidence expressed in decisional law that governmental performance, commanded by statute, is measurable and thus amenable to judicial redress. The essence of the taxpayer suit in California is accurately expressed: '[T]he judicial process is the only means by which the individual citizen is guaranteed an influence on official conduit. In the end, the foundation of democratic government rests in the individual. If he is unable to do no more than ratify in the voting booth political decisions that have already been made or support with his vote some general policy trend that he favors, he is left without the ability to influence the day-to-day affairs of the state. These daily decisions determine how far and in what direction our society will advance. Consequently, the individual citizen must be able to take the initiative through taxpayers' suits to keep government accountable **on the state as well as the local level**.'

Id. (quoting 28 Hast.L.J. at p. 508) (internal citations omitted) (emphasis added).

The Alabama Supreme Court is also one of the jurisdictions to uphold state taxpayer standing in this manner.

> 'In a long line of decisions this Court has recognized the right of a taxpayers to challenge, **either as unconstitutional or as not conforming to statute**, the expenditure of public funds by county officers. **The right of a taxpayer to challenge the unlawful disbursement of state funds likewise is unquestioned.**

Hunt v. Windom, 604 So.2d 395, 396 (Ala.1992) (internal citations omitted) (emphasis added). The Court reasoned:

> "'If a taxpayer does not launch an assault, it is not likely that there will be an attack from any other source, because the agency involved is usually in accord with the expenditure. There may be instances in which the affected public official might pursue the matter. The Attorney General would be an appropriate officer to bring such a suit, but in some instances this is not done and it is in such cases that it is only the taxpayer's attack which preserves public treasure.'"

Id. at 397 (quoting *Zeigler v. Baker*, 344 So.2d 761 (Ala.1977) (quoting *Department of Administration v. Horne*, 269 So.2d 659 (Fla.1972)).

The effect of Respondents' theory would be to completely bar state taxpayer standing because it would bar state taxpayers from challenging violations by state

government of the statutes governing the expenditure of taxpayer funds. Respondents cite no case that limits taxpayer standing in this way. The number of state taxpayers concerned enough to devote their own resources to challenging violations is certainly limited. Respondents would have this Court cut off these efforts in the future unless they involve a constitutional or local challenge or unless there is a personal nexus, either through a large tax payment or some other direct interest. Petitioner submits that this is not in the best interest of the State of South Carolina.

> Although South Carolina has allowed taxpayer standing in other contexts, we have not been confronted with a case wherein a taxpayer challenges a violation of a statute requiring competitive bidding in the award of governmental contracts. However, other states have addressed this issue and held taxpayers have standing because **competitive bidding laws are for the benefit of taxpayers**.

Sloan v. Greenville County School District, 342 S.C. at 521, 537 S.E.2d at 302 (emphasis added) (lengthy internal citations omitted).

II. S.C. CODE ANN. § 57-5-1620 REQUIRES RESPONDENTS TO PROCURE FROM A BIDDER.

S.C. Code Ann. § 57-5-1620 requires that Respondents' award of construction contracts for $10,000 or more shall be made to "the lowest qualified bidder," whose "bid" meets SCDOT requirements. *Id.*

This issue turns on the definitions of "bidder" and "bid" and "proposer" and "proposal." The Court of Appeals recently established the differences between competitive sealed bidding using an Invitation for Bids, and competitive sealed proposals using Requests for Proposals in *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (2003).

Mr. Sloan challenges the validity of 3 contracts procuring more than $800 million of construction using Requests for Proposals ("RFPs"), a process not authorized by statute. Respondents did not publish invitations for bids or receive bids. The contractors were not bidders. Therefore, each contract is an *ultra vires* act of the State.

Respondents argue inconsistently. First, they argue that although they did not procure from a "bidder" whose "bid" was accepted, they were not obligated to do so, for a variety of reasons (Respondents' Brief, pp. 18-31). Then, alternatively, they argue that a bid equates to a proposal (Respondents' Brief, pp. 32-36).

Likewise, Respondents' Statement of Facts presents inconsistencies. First, they present the differences between a bid and a proposal and the differences between an invitation for bids and a request for proposals as explained by Judge Anderson's well reasoned opinion from the Court of Appeals. *Sloan v. Greenville County,* 356 S.C. 531,

590 S.E.2d 338 (Ct. App. 2003). However, they insist that they may use the terms interchangeably.

The trial court ruled that the collaborative funding for the three projects from the SCDOT, State Infrastructure Bank and federal government justified the Respondents' use of a method of source selection other than competitive sealed bidding and that the RFP process complied with S.C. Code Ann. § 57-5-1620. *Id.* The Court of Appeals affirmed this decision on the merits without oral argument (App. at 611).

This panel of the Court of Appeals, unlike Judge Anderson, failed to appreciate the fundamental differences between a Request for Proposals and an Invitation for Bids, but rather used the two terms interchangeably (App. at 612-613). *Id.* at 356 S.C. 531, 540-541, 590 S.E.2d 338, 343-344 (S.C. App., 2003). Similarly, the trial court ruled that a "proposer" in the competitive sealed process equates to a "bidder" in the competitive sealed bidding process (App. pp. 25-26). This ruling was also an error of law. Respondents possess statutory authority to procure only from a "bidder."

The Court should not change the wording of the statute by judicial fiat. When the statute says "bidder" who submits a "bid," the Court must not read it "proposer" who submits a "proposal." The terms are distinct and not interchangeable.

> Under the plain meaning rule, **it is not the court's place to change the meaning of a clear and unambiguous statute.** *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the **court has no right to impose another meaning.** *Id.* at 233, 509 S.E.2d at 262 (*citing Paschal v. State Election Comm'n,* 317 S.C. 434, 454 S.E.2d 890 (1995)).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (emphasis added).

Respondents contend that a bidder closely resembles a proposer, and that by procuring from the proposer, they comply with the statute (Respondents' Brief at 32-37). This Court in *Hodges v. Rainey* disagreed.

> When the language of a statute is clear and explicit, **a court cannot rewrite the statute and inject matters into it which are not in the legislature's language**, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning. *Timmons v. South Carolina Tricentennial Comm'n,* 254 S.C. 378, 175 S.E.2d 805 (1970).

Id. at341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (emphasis added).

Respondents possess no statutory authority to procure construction from anyone other than the "lowest qualified bidder."

A. General Statutes Do Not Modify S.C. Code Ann. § 57-5-1620.

Respondents argue that various general statutes addressing the general powers of the Department of Transportation authorize Respondents to disregard S.C. Code Ann. § 57-5-1620 which establishes the method of source selection for Respondents. The general statutes enumerating the general powers do not address methods for selection of source, nor do they address procurement at all. These general statements of power cannot overrule the specific limitation on how Respondents select the source of construction procurement. This Court has ruled that specific statutes prevail over general statutes.

> If there be conflict between a general law and a special law on the same subject, the latter will prevail. *Truesdell v. Johnson,* 144 S.C. 188, 142 S.E. 343; *State ex rel. South Carolina Tax Commission v. Brown,* 154 S.C. 55, 151 S.E. 218; *Spartanburg County v. Pace,* 204 S.C. 322, 29 S.E.2d 333. This rule is close akin to another which is to the effect that an inconsistent statute dealing with common subject matter in a minute way will prevail over a general statute relating to the same subject matter. *Smith v. South Carolina Highway Com.,* 138 S.C. 374, 136 S.E. 487; *State ex rel. South Carolina Tax Commission v. Brown, supra,* 154 S.C. 55, 151 S.E. 218; *Murray v. W.O.W.,* 192 S.C. 101, 5 S.E.2d 560.

South Carolina Electric & Gas Co. v. South Carolina Public Service Authority, 215 S.C. 193, 54 S.E.2d 777, 784 (1949).

The General Assembly inserted, "Notwithstanding any other provision of law," at the beginning of the grant of new authority to the SCDOT in *Mosteller v. County of Lexington*. *Id.* at 336 S.C. 360, 364, 520 S.E.2d 620, 622 (1999). This Court ruled that such language manifested a clear intent to revoke all prior limitations on the power granted therein. *Id.* This language is absent from each of the statutes on which Respondents rely to grant them the power to ignore the procurement statute (Respondents' Brief at 18-31). Thus, S.C. Code Ann. § 57-5-1620 governs Respondents' procurements.

B. Statutes Creating the State Infrastructure Bank Did Not Modify S.C. Code Ann. § 57-5-1620.

Respondents also argue that the statutory system that created the State Infrastructure Bank ("SIB") repealed S.C. Code Ann. § 57-5-1620 by implication. Repeal of a statute by implication is disfavored in the law. *Hodges v. Rainey*, 341 S.C. 79, 88-89, 533 S.E.2d 578, 583 (2000).

> **Repeal by implication is disfavored and is found only when two statutes are incapable of reconcilement.** *Butler v. Unisun Ins.Co.*, 323 S.C. 402, 475 S.E.2d 758 (1996).

Mullinax v. J.M. Brown Amusement Co., 333 S.C. 89, 95-96, 508 S.E.2d 848, 851 (1998) (emphasis added).

> **"[T]he repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconcilement; for if they can be construed so that both can stand, the [c]ourt will so construe them."** *City of Rock Hill v. South Carolina Dept. of Health & Envtl. Control*, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990). "[T]o effect an implied repeal of one statute by another, they must both relate to the same subject, and cover the same situations,

> since one statute is not repugnant to another unless there is such relation." *McCollum v. Snipes, et al.*, 213 S.C. 254, 268, 49 S.E.2d 12, 17-18 (1948).

Justice v. Pantry, 330 S.C. 37, 43, 496 S.E.2d 871, 874 (1998) (emphasis added).

Likewise, when the conflict in the two laws is only an apparent conflict and not an actual conflict, the two statutes should be construed together to give full effect to the intent of the legislature.

> It is a well settled principle of law that where two statutes are in apparent conflict, they should be so construed, if reasonably possible, as to allow both to stand and to give force and effect to each. The primary endeavor is to ascertain and give effect to the manifest intention of the legislature. Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865; Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889; Crescent Mfg. Co. v. Tax Commission, 129 S.C. 480, 124 S.E. 761.

Stone & Clamp v. Holmes, 217 S.C. 203, 60 S.E.2d 231, 234 (1950). *See also, Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992) ("Statutes in apparent conflict should, if reasonably possible, be construed so as to allow both to stand and to give effect to each").

In the case at bar, the later statutes establishing the SIB did not specifically repeal S.C. Code Ann. § 57-5-1620. Indeed, the SIB statutes do not mention or address a method of source selection in procurement. The statute requiring the Respondents to procure through bids can be harmonized with the statutes that established the SIB. One statute governs methods of source selection; the other governs special financing. Thus, Respondents are required to follow § 57-5-1620 and issue an Invitation for Bids and select the lowest qualified bidder while meeting their financing requirements.

C. Respondents' Conduct did not Modify S.C. Code Ann. § 57-5-1620.

Respondents cite no statutory authority which allows them to procure through proposals. The statute requires bids, but Respondents admit that for some years they have been procuring through proposals (App., pp. 211-213; Respondents' Brief, p. 2). They have entered into contracts that obligate them to procure through proposals. They have sought and received "approval" from the United States Department of Transportation to use proposals to procure projects funded in part by federal funds. A federal agency cannot authorize a South Carolina agency to ignore a South Carolina statute governing the conduct of the South Carolina agency.

Respondents contend that if they do not continue to violate the procurement law, they will lose millions of federal highway dollars. In short, they argue that because they have acted for some time as though they possessed such authority, they now find themselves in difficult circumstances (of their own making), in which they have contractual obligations that require them to violate specific statutory authority. They ask this Court to turn a blind eye to the plain language of the statute, and extricate them from their predicament. The General Assembly is the proper branch of government to update statutes, and they have not acted to amend S.C. Code Ann. § 57-5-1620.

D. Actions of the United States Did Not Modify S.C. Code Ann. § 57-5-1620.

Respondents argue that they entered into agreements beyond their statutory authorization with the United States and certain counties. Respondents argue that these agreements and methods of source selection permitted by other jurisdictions permit them to violate their own procurement statute (App. p. 86). They argue that because they have

already entered into such agreements, this Court should bend the law based on political and practical expediency. It is a very dangerous precedent to allow Respondents to disregard the procurement statute enacted to specifically govern them without action by the General Assembly, simply because they believe that the governing procurement statutes are outdated. The proper action would have been to request the General Assembly to change the statute governing the selection of source and to build in protections for the South Carolina taxpayers.

E. Respondents' "Necessity" Did Not Modify S.C. Code Ann. § 57-5-1620.

Respondents further argue that it was "necessary" for them to violate the procurement law because otherwise they could not have received federal money for new highways and bridges.

Respondents' arguments in support of legal justification are weak. They rely instead on the hope that this Court will ignore the governing statute and focus on practical concerns that are appropriate for legislative deliberation. The case at bar does not address the wisdom or expediency of the violation, but rather requests a declaratory judgment interpreting the law for future guidance. This Court should rule to uphold the law in this case just as this Court did in *Berkeley Electric Cooperative, Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992).

> **Restrictions on municipal power are created to protect citizens.** Although it may seem harsh to deny Berkeley a remedy for impairment of its franchise, it is better that Berkeley suffer from the mistakes of Mount Pleasant than for this Court to adopt a rule which, through improper combination or collusion, could be detrimental or injurious to the public. *See* 10 E. McQuillan, *The Law of Municipal Corporations**211 § 29.26 (3d ed. 1990). **When a municipality goes beyond the law, the person who deals with it in so doing does so at his own risk.** *Mason v. Williams,* 194 S.C. 290, 9 S.E.2d 537 (1940).

Id. at 583. As in *Berkeley*, the public deserves the protection of laws that are followed by government rather than disregarded for expediency.

CONCLUSION

Respondents spent more than $800 million in public funds, using "proposals" when the statute requires "bids." Respondents' actions were illegal, invalid, and *ultra vires*. This Court should grant declaratory relief, prospective injunctive relief forbidding these statutory violations in Respondents' future projects, and should remand to the Court of Appeals for a substantive ruling on the bonding issues and to the Circuit Court for any other appropriate specific remedies as in *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301, n. 2 (1985) (Supreme Court affirmed summary judgment finding an improper use of taxpayer money and remanded because the trial judge's order did not determine what relief would be appropriate in this case).

Respectfully submitted,
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The Department of Transportation, an agency of the State of South Carolina, and the Commission of the Department of Transportation, Robert W. Harrell, John N. Hardee, Eugene Stoddard, F. Hugh Atkins, B. Bayles Mack, L. Morgan Martin, and J.M. Truluck, in their capacities as Commissioners thereof, ... Respondents.

PROOF OF SERVICE

I certify that I have caused to be served three copies of Appellant-Respondent's Final Briefs by United States Mail, first class postage prepaid, on November 18, 2004, addressed to their attorneys of record, William A. Coates, ROE CASSIDY COATES & PRICE, PA at Post Office Box 10429, Greenville, SC 29603 and Franklin J. Smith, Jr., RICHARDSON PLOWDEN CARPENTER & ROBINSON, PA at P.O. Drawer 7788, Columbia, SC 29202.

November 18, 2004

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