THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

Glenn F. McConnell, President *Pro Tempore* of the South Carolina Senate,..... Petitioner,

v.

Nikki R. Haley, Governor of the State of South Carolina,..... Respondent.

RETURN OF GOVERNOR HALEY IN OPPOSITION TO THE PETITION FOR ORIGINAL JURISDICTION AND TO DISMISS COMPLAINT

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INTRODUCTION

As the Court is certainly aware, this case has drawn significant media attention in the short time following Governor Nikki Haley's charge to the General Assembly to reconvene for the purpose of addressing four now-pending bills. An article in Saturday's edition of *The State* newspaper, a copy of which is attached as Exhibit A, quoted Senator Joel Lourie as saying, "This is uncharted waters for us all. It's like 'Star Trek,' going where we've never gone before."

With great respect for Senator Lourie and his legislative colleagues, this is simply not so. South Carolina's governors have regularly reconvened the General Assembly to address important legislation that was pending at the time the legislature ceased its business. The Governor's authority derives from the South Carolina Constitution, and in recognition of the independence of each branch of government, her exercise of this power cannot be second-guessed by the General Assembly or reviewed by this Court. Accordingly, the Court should reject the Petition for a Writ of Injunction and dismiss this case.

BACKGROUND

The People of South Carolina have demanded that state government reform itself. For too long, our government has wasted precious resources through myriad inefficiencies, duplication of efforts, and a less-than-accountable, less-than-effective executive branch. The People deserve better.

In November 2010, Governor Haley was elected by the People to rally and lead this reform effort. But she was not the only elected official who recognized these shortcomings and worked to address them. During the 2011 legislative session, the South Carolina House of Representatives passed four bills that would significantly reform and

restructure the executive branch of state government. Under the leadership of Speaker Harrell and others, the following measures passed the House and were sent to the Senate:

Table 1: Reform Legislation Pending Before the Senate[1]

Bill Number	Subject Matter	Vote in House of Representatives	Date Sent to Senate
H. 3066	Create a "Department of Administration" within the Executive Branch	96–13	March 3, 2011
H. 3267	Consolidate state probation services into agency overseeing prisons	81–21	March 31, 2011
H. 3070	Amend the Constitution to make the State Superintendent of Education an appointee of the Governor	82–28	March 3, 2011
H. 3152	Amend the Constitution to allow the Governor and Lieutenant Governor to be elected jointly	106–6	March 3, 2011

Although each of these bills carried supermajorities in the House of Representatives, they were not passed in the Senate before the legislators stopped work pursuant to the *Sine Die* Resolution.

In order to give the General Assembly additional time to pass these bills and get them to her desk for final approval, Governor Haley issued Executive Order 2011–13 pursuant to her constitutional authority to call the legislature into special session. A copy of this Executive Order is attached as Exhibit C. Even though the Governor's decision is not subject to judicial review, the Petitioners filed this suit and have improperly asked the Court to enjoin her directive.

[1] Copies of the legislative history of each these bills are attached as Exhibit B.

ARGUMENTS AND AUTHORITIES

The Governor's decision to reconvene the General Assembly to take up four transformational bills is unassailable. The South Carolina Constitution gives her, and her alone, absolute power in this regard: "The Governor may on extraordinary occasions convene the General Assembly in extra session." S.C. Const. art. IV, § 19. Courts uniformly hold that an executive's judgment in utilizing such authority is beyond the judiciary's review. Moreover, Governor Haley's reason for reconvening the legislature—consideration and passage of significant legislation—is consistent with the practices of her predecessors when exercising this same constitutional power. Lastly, her authority to reconvene the General Assembly does not conflict with any other constitutional provisions regarding legislative sessions. For these reasons, the Court should reject the request for a Writ of Injunction and should dismiss the Petition.

I. Because it is a discretionary act, Governor Haley's decision to reconvene the General Assembly cannot be enjoined or reviewed by the Court.

South Carolina is among the vast majority of states that authorize their governors to convene the legislature on "extraordinary occasions," a power that parallels the President's under Article II, Section 3 of the United States Constitution to convene Congress "on extraordinary Occasions." The South Carolina Constitution does not define this term, nor does it identify guidelines for invoking this executive power. Instead, it commits this authority to the sole judgment and discretion of the Governor. *Cf.* N.C. Const. art. III, § 5(7) ("The Governor may, on extraordinary occasions, ***by and with the advice of the Council of State***, convene the General Assembly in extra session by his proclamation, stating therein the purpose or purposes for which they are thus convened.") (emphasis added).

When a state constitution vests its chief executive with the sole authority to convene the legislature for a special session, it is hornbook law that the executive's decision is immune from judicial review. As explained in *Sutherland Statutory Construction*:

> Under most constitutions, the governor's power to call a special legislative session is absolute, and his opinion concerning the existence of an emergency or special circumstances demanding immediate legislative attention is unimpeachable by the courts.

1 *Sutherland Statutory Construction* § 5.5, at 235 (7th ed. 2010). More general treatises are in agreement:

> Where the constitution authorizes the calling of such [special] sessions by the governor, he or she is the sole judge as to whether occasion for such session exists, and the exercise of such discretion is not subject to challenge or review by the courts.

81A C.J.S. *States* § 105, at 438 (2004).[2]

In *Farrelly v. Cole*, 56 P. 492 (Kan. 1899), the Supreme Court of Kansas provided a thorough explanation for this universally-held outcome. Drawing first on the parallel

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[2] In fact, this has been the uniform treatment of constitutional provisions of this type throughout history. *See, e.g.*, 49 Am. Jur. *States, Territories, and Dependencies* § 49, at 263 (1943) ("If in authorizing the governor to convene the general assembly on extraordinary occasions the Constitution does not define what shall be deemed an extraordinary occasion for this purpose, or refer the settlement of that question to any other department or power of the government, the governor alone is the judge, and although he errs, ***the courts have no jurisdiction to review his decision or correct his error***.") (emphasis added); 59 C.J. *States* § 62 (1932) ("Extra or special sessions may be called by the governor under constitutional authority, and where the constitution authorizes the calling of such sessions by him, he is the sole judge as to whether or not an occasion for such session exists, and ***the exercise of his discretion is not subject to challenge or review by the courts***.") (emphasis added); 25 R.C.L. *States* § 14, at 382 (1929) ("The question of the existence of an extraordinary occasion of sufficient gravity to justify a call for an extra session of the legislature is to be determined by the governor alone, in the exercise of his discretion as a sworn officer, and ***this discretion is not subject to challenge or review by the courts***.") (emphasis added).

between a governor's power to convene the legislature and that of a United States President, the court described how presidents had regularly used their constitutional power to convene the Senate for routine matters, such as confirming a postmaster appointment. *Id.* at 496. The court observed that this historical practice "show[s] that the words 'extraordinary occasion,' employed in the two constitutions, have been construed by long-continued custom and practical usage not to be synonymous with overpowering and urgent necessity." *Id.* at 497. Accordingly, even mundane matters could serve as a basis for the governor to call the legislature into an extra session. *Id.* at 496–97.

The *Farrelly* court then described the practical difficulties associated with adjudicating whether the governor had properly exercised this constitutional power:

> It would be an unseemly and unprecedented proceeding for this court, or any court, to entertain a controversy wherein, by proof obtained from witnesses sworn in the cause, it sought to ascertain judicially whether an extraordinary occasion existed of sufficient gravity to authorize the governor to convene the legislature in extra session. If jurisdiction be retained of such a cause, what is the rule as to the quantum of evidence necessary to establish that there was no emergency[?] . . . It perverts and destroys the meaning of the word to hold that exercise of discretion may be reviewed or controlled by some other person or tribunal than the person on whom it is conferred.

Id. at 497. The court concluded that the "utter absurdity of such an inquiry" rendered it one in which no court should engage. *Id.* Instead of the judiciary, the *Farrelly* court explained that the check on the executive's power to convene the legislature was through the ballot box or, in extreme circumstances, the impeachment process. *Id.* at 498.[3]

[3] Kansas, of course, is not alone in this reasoning. Courts across the country have universally deferred to their respective governor's judgment when exercising his or her constitutional power to convene the legislature on "extraordinary occasions." *See, e.g., Gulledge v. Barclay*, 84 S.W.3d 850, 855 (Ark. 2002) (explaining that "the call of an

Though this Court has not encountered the precise issue presented here, it has engaged in the same reasoning employed by the *Farrelly* court with respect to judicial review of the Governor's discretionary conduct under other constitutional provisions. For instance, the Court has held that it will not inquire into the Governor's reasons for declaring that a state of insurrection exists when exercising the constitutional power to suspend the writ of habeas corpus. *See Hearon v. Calus*, 178 S.C. 381, 397, 183 S.E. 13, 20 (1936) ("We hold it to be accepted law that the action of the Governor in declaring that a state of insurrection exists may not be enjoined by this Court, nor reviewed by it."). So too with respect to the reasons underlying a Governor's veto decision. *See S.C. Coin Operators Ass'n v. Beasley*, 320 S.C. 183, 186, 464 S.E.2d 103, 104 (1995) (refusing to inquire into "the sufficiency, rationality or validity" of a veto's basis because "[t]o disallow a veto because the Governor's reasons are not 'sufficient' establishes a

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extraordinary session is solely at the discretion of the Governor" and holding that "the decision to call an extraordinary session is not subject to judicial review"); *Opinion of the Justices*, 198 A.2d 687, 689 (Del. 1964) ("The decision of the Governor to convene such a special session cannot be subjected to judicial review."); *Bunger v. State*, 92 S.E. 72, 73 (Ga. 1917) (holding that when the governor determines that an "extraordinary occasion" exists to convene the General Assembly, "neither the legislative nor the judicial department of the government has any power to call him to account, nor can they or either of them review his action in connection therewith"); *Diefendorf v. Gallet*, 10 P.2d 307, 314–15 (Idaho 1932) ("The determination as to whether facts exist such as to constitute 'an extraordinary occasion' is for him alone to determine. The responsibility and the discretion are his, not to be interfered with by any other co-ordinate branch of the government."); *Geveden v. Commonwealth ex rel. Fletcher*, 142 S.W.3d 170, 172 (Ky. Ct. App. 2004) (noting that the decision to convene the legislature for an "Extraordinary Session" is "entrusted to the discretion of the Governor" and finding that the separation of powers doctrine does not "permit a court to interfere with the Governor's exercise of this discretion"); *In re Platz*, 108 P.2d 858, 863 (Nev. 1940) ("As to the urgency of the legislation, we think it was to be determined solely by the governor. The section of the constitution invests him with extraordinary powers."); *State v. Fair*, 76 P. 731, 732 (Wash. 1904) ("It was the exclusive province of the governor, under the constitution, to determine whether an occasion existed of sufficient gravity to require an extra session of the legislature, and his conclusion in that regard is not subject to review by the courts.").

subjective standard that invites limitless mischief" (quoting *Romer v. Colo. Gen. Assembly*, 840 P.2d 1081, 1085 (Colo. 1992))).[4]

The Court should follow its own precedent here, as well as the uniform crush of case law from elsewhere, as there is no logical distinction between any of these discretionary gubernatorial acts. The unavoidable subjectivity, impossibility of articulating a controlling standard, and inherent separation-of-powers concerns leave no doubt that the Court should decline to "check behind" the Governor's decision to reconvene the General Assembly to consider four government-restructuring bills.

II. Governor Haley's Executive Order is consistent with the reasons previous governors have given for convening the General Assembly.

Although the Court lacks jurisdiction and authority to review or enjoin Governor Haley's decision to reconvene the General Assembly, it is important to note that her decision is aligned with that of her predecessors. The Court has explained that it will "accord weight to past practices" when examining the Governor's constitutional authority. *Williams v. Morris*, 320 S.C. 196, 205, 464 S.E.2d 97, 102 (1995); *see also South Carolina Coin Operators*, 320 S.C. at 188, 464 S.E.2d at 105 ("Long established practice has great weight in interpreting constitutional provision relative to executive veto power.").

[4] The Petition claims that the Court's ruling in *Seagers-Andrews v. Judicial Merit Selection Commission*, 387 S.C. 109, 691 S.E.2d 453 (2010), somehow vests the judiciary with the ability to scrutinize discretionary political decisions as long as they are couched in terms of a separation-of-powers violation. That case's holding, however, stands for precisely the opposite conclusion and confirms the fundamental point that the Court will not "opine on issues where the constitution delegates authority" to a coequal branch of government. *Id.* at 122–23, 691 S.E.2d at 460–61. The Court should reject the Petitioner's argument on this point accordingly.

Like the President reconvening the Senate for matters as simple as appointing a postmaster, South Carolina's governors have regularly used their authority to reconvene the legislature for routine matters. As a sampling of recent examples indicates, this authority has typically been used to bring legislation back before the General Assembly after that body has recessed or adjourned:

Table 2: Recent Uses of the Governor's Power to Reconvene the Legislature[5]

Governor	Executive Order Number	Basis for Convening the General Assembly
Hodges	2002–34	Evaluate possible budget cuts to address shortfall
Hodges	2001–15	Address the absence of an appropriations act
Hodges	99–32	Address then-pending "video gaming legislation"
Beasley	96–11	Address the then-pending Rural Development Act of 1996 and the African-American History Monument Bill
Campbell	91–22	Address the then-pending Ethics, Government Accountability and Campaign Reform Act of 1991 and the State Bond Bill
Edwards	76–33	Address "pending certain necessary legislative matters of urgency," though they are unidentified
West	Unnumbered; Issued on September 4, 1973	Address then-pending reapportionment of the House of Representatives
West	72–6	Elect leadership of the House of Representatives and the Senate

[5] Copies of these Executive Orders are attached hereto as Exhibit D.

Governor Haley's efforts to give the General Assembly additional time to consider four government-restructuring bills is certainly aligned with these prior exercises of gubernatorial power. Accordingly, to the limited extent that the Court believes it should evaluate whether Governor Haley's conduct is consistent with her authority under Article IV, Section 19, the State's historical practice makes clear that she is operating well within the bound of her constitutional authority.[6]

III. The Governor has the authority to reconvene the General Assembly at any point when it is not conducting business, regardless of whether it has "adjourned," "recessed," or otherwise suspended its work.

As discussed above, the General Assembly has not yet adjourned *sine die*, but has only adjourned pursuant to the *Sine Die* Resolution with a self-imposed directive to reconvene at noon on June 14, 2011. However, this is a distinction that makes no difference to the Governor's constitutional authority.

Courts have been clear that a governor's ability to convene a special session of the legislature applies at all times, including when the legislature is in recess of a regular term or before it has adjourned *sine die*. *See, e.g.*, *In re Opinions of the Justices*, 132 So. 311, 312 (Ala. 1932) ("[S]hould there be a lengthy recess of the regular term and an

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[6] In *Arnold v. McKellar*, 9 S.C. 335, 343 (1878), the Court described in *dicta* its view of when an "extraordinary occasion" may occur that would trigger the Governor's constitutional authority to convene the legislature. That discussion, however, provided only generalized descriptions, not objective standards or any other metric against which Governor Haley's—or any of her predecessors'—conduct can be evaluated. For instance, although the *Arnold* Court suggested that the Governor's power could be asserted when "unforeseen" circumstances arise, it gave no indication as to how to measure this abstract term. Unforeseen by the Governor? Unforeseen by the General Assembly? Unforeseen by the citizenry? Indeed, the subjectivity inherent in this analysis is precisely why courts nationwide always have refused to review a governor's decision to reconvene the legislature. Thus, it is no surprise that the *Arnold* Court never indicated a contrary rule that would give the judiciary authority to second-guess the Governor's discretion. This *dicta*, therefore, should have no bearing on the outcome here.

emergency or necessity should arise, there is no reason why the Governor cannot convene the Legislature into a special session during the recess of said regular term."); 72 Am. Jur. 2d *States, Etc.* § 46 (2001) ("A governor has been deemed to have the power to call a special session under such a [constitutional] provision even if the legislature, not having adjourned *sine die*, is still in general session. If one branch of the legislature has already acted, the governor has power to convene the other."); 81A C.J.S. *States* § 105, at 438 (2004) ("The governor may convene the legislature into a special session during the recess of a regular term or during a recess of a special session the governor had previously called."). The State Attorney General has twice opined that this rule applies in South Carolina. Op. S.C. Att'y Gen. (June 3, 2011), *available at* http://www.scag.gov/wp-content/uploads/2011/06/6.3.11-Opinion-Haley.pdf; Op. S.C. Att'y Gen., 1984 S.C. AG LEXIS 206, at *2–3 (June 22, 1984).[7]

The wisdom behind this position is straightforward. If the governor's authority to convene the General Assembly were contingent on the legislature adjourning *sine die*, then the legislature could altogether negate the governor's constitutional power simply by entering into extended periods of recess. Such posturing would nullify a key component to the Constitution's checks and balances between the executive and legislative branches.

[7] Of course, the Governor's ***constitutional*** authority to reconvene the legislature trumps the ***statutory*** language relied on by the Petitioner in South Carolina Code § 2-1-180. Likewise, the notion that "an agreement between the members of each house, and also between the two houses," somehow undoes the Governor's constitutional authority finds no support in the law, nor does the Petitioner identify any legal basis for this argument. In short, regardless of any legislative rule, legislative custom, or statute dictating when the General Assembly should meet, the State Constitution's framers gave the Governor the sole discretion to convene the legislature if the circumstances, in her judgment, warranted it. The legislature cannot bypass this constitutional power through an internal rulemaking process, "agreement between the members," or even by statute. Only the People, through constitutional amendment, can limit the Governor's authority on this issue.

See State ex rel. Groppi v. Leslie, 171 N.W.2d 192, 200 (Wis. 1969) ("To deny the governor the power to call a special session while the legislature is in general session would in effect deny the governor the right to call the legislature into session to give priority consideration to those items he claims are of immediate statewide concern. This power of the governor is a part of the checks and balances in our tripartite form of government.").

Nor does a recent amendment to the General Assembly's ability to go into recess impact this analysis. That constitutional amendment reads in pertinent part as follows:

> After the convening of the General Assembly, ***nothing in this section*** shall prohibit the Senate or the House of Representatives, or both, from receding for a time period not to exceed thirty consecutive calendar days at a time by a majority vote of the members of the body of the General Assembly seeking to recede for a time period not to exceed thirty consecutive calendar days, or from receding for a time period of more than thirty consecutive calendar days at a time by a two-thirds vote of the members of the body of the General Assembly seeking to recede for more than thirty consecutive calendar days at a time.

S.C. Const. art. III, § 9 (emphasis added).

By its very terms, the legislature's ability to go into extended periods of recess is still subject to ***other*** constitutional provisions, including the Governor's authority to reconvene the General Assembly under Article IV, § 19. There is certainly nothing in the amendment to suggest that it was intended to cancel or limit the Governor's authority, and implied repeal—particularly of a constitutional power—is highly disfavored by the law. *B&A Dev., Inc. v. Georgetown County*, 372 S.C. 261, 268, 641 S.E.2d 888, 892 (2007). Accordingly, Governor Haley's decision to reconvene the General Assembly was not affected by the legislature's decision to recess, rather than to adjourn *sine die*.

IV. Questions about what type of business the General Assembly may take up during this extra session are not properly before the Court.

The Governor called the General Assembly back into session for consideration of four specific pieces of legislation. At this time, the Governor takes no position as to whether the legislature can consider other bills during the extra session, and respectfully submits that any such analysis by the Court would be an improper advisory opinion, as no such other business is being contemplated.

CONCLUSION

The South Carolina Constitution vests the Governor alone with the power to reconvene the General Assembly, and it commits this decision to her sound judgment and discretion. As a result, courts universally agree that it is beyond the judiciary's authority to review the wisdom of a governor's exercise of this authority. Nevertheless, Governor Haley's decision to reconvene the General Assembly here is consistent with the practices of her predecessors, who brought the legislature back into session to address matters such as video poker and selecting its own leadership. Reforming and restructuring the State's government is unquestionably as critical as—if not much more so—these permitted uses of the Governor's constitutional power. The Petition should be denied accordingly, and the legislature should set about completing the work for which the People elected it.

SIGNATURE PAGE ATTACHED

Respectfully submitted,

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