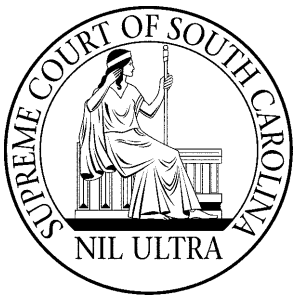

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
September 14, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Books-A-Million, Inc., Petitioner,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2020-001102

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 28110
Heard November 8, 2021 – Filed September 14, 2022

AFFIRMED

Burnet Rhett Maybank, III and James Peter Rourke, both of Nexsen Pruet, LLC, of Columbia, for Petitioner.

Sean Gordon Ryan and Adam J. Neil, both of Columbia, for Respondent.

Anthony E. Rebollo, Benjamin Palmer Carlton, Carmen Vaughn Ganjehsani, of Richardson Plowden & Robinson, P.A., of Columbia, for Amici Curiae Warehouse Home Furnishings Distributors, Inc.

JUSTICE HEARN: For $25 per year, customers of Books-A-Million can become members in the "Millionaire's Club" to receive retail discounts. These memberships became the subject of a tax audit by the South Carolina Department of Revenue ("Department") and, as a result, Books-A-Million ("Taxpayer") was assessed nearly a quarter-of-a-million dollars in back taxes. The Administrative Law Court ("ALC") agreed with the Department's assessment, and the court of appeals affirmed on the grounds that the "proceeding or accruing" language of our sales tax act includes the returns from Millionaire's Club sales. We granted certiorari and affirm.

FACTUAL/PROCEDURAL BACKGROUND

Books-A-Million is a retail bookstore operating thirteen locations throughout South Carolina. In 2015, the South Carolina Department of Revenue audited three years of Books-A-Million's financial records and discovered that no sales tax was being charged on Millionaire's Club memberships. The Department thereafter issued a Notice of Proposed Assessment for $242,076.97[1] in unpaid sales tax.

Taxpayer was granted a contested hearing before the ALC, which upheld the assessment because, under South Carolina law, the sales of intangible memberships can be taxable if their value originates from the sale of taxable goods. Taxpayer then appealed to the court of appeals which affirmed. *See Books-A-Million, Inc. v. S.C. Dep't of Revenue*, 430 S.C. 388, 844 S.E.2d 399 (Ct. App. 2020). Both courts held that the pertinent language of "value proceeding or accruing" from the definition of "gross proceeds of sales" was inclusive of Taxpayer's Millionaire's Club membership fees because the language included value related to sales, not merely the value of the sales themselves. *See id.*; S.C. Code Ann. § 12-36-90 (2014 & Supp. 2021).

ISSUE PRESENTED

Did the court of appeals err in concluding that Books-A-Million's "Millionaire's Club" membership fees were subject to sales tax under South Carolina law?

[1] This figure includes $15,703.13 in interest and $63.14 in penalties.

LAW/ANALYSIS

Taxpayer argues that its sales of Millionaire's Club memberships are not taxable under South Carolina's sales tax because the language of the statute excludes it. The Department contends that our tax code contemplates value not just from sales of tangible goods, but from related costs because of the language "proceeding or accruing" as well as the jurisprudence of this Court. We agree with the Department.

We review questions of statutory interpretation de novo. *See Centex Int'l. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013). Tax statutes are to be interpreted like any other statutes. *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 319-20, 731 S.E.2d 869, 872 (2012) (holding, "[t]he usual rules of statutory construction apply to the interpretation of tax statutes"). We note that "the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Because "the best evidence of legislative intent is the text of the statute[,]" we turn our focus to the words used. *See Creswick v. Univ. of S.C.*, 434 S.C. 77, 82, 862 S.E.2d 706, 708 (2021).

In South Carolina, individuals who are engaged in the sale of tangible personal property must pay five percent of the gross proceeds of their sales in taxes. S.C. Code Ann. § 12-36-910(A) (2014). The statute defines tangible personal property as "personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses." *Id*. § 12-36-60 (2014). "Gross proceeds of sales" is defined as "the value *proceeding or accruing from* the sale, lease, or rental of tangible personal property." *Id.* § 12-36-90. (emphasis added).

While the membership in question is itself intangible, Taxpayer is liable for sales tax generally because it is engaged in the sale of tangible personal property through the sales of books and other merchandise. The question then is whether the language "value proceeding or accruing from" subjects the bookstore to sales tax on Millionaire's Club memberships. This turns on the relationship between the membership and the sale in question.

Within the relevant statutory language, the term "proceeding" is critical. When used as an intransitive verb as it is in the statute, *Merriam-Webster* defines "proceed" to mean "to come forth from a source." *See Proceed*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/proceed (last visited November 21, 2021) (listing synonyms of proceed as, "spring, arise, rise, originate, derive, flow,

emanate, proceed, stem [which all] mean to come up or out of something into existence." Further delineating the term by saying "proceed stresses place of origin, derivation, parentage, or logical cause"). For a monetary value to proceed from something, the value must come from it. Here, the value of the club memberships originates from the sale of taxable goods because the only benefit to buying the Millionaire's Club membership is discounts on taxable transactions.[2] Books-A-Million does not require membership for entry into its stores, nor does the membership give any proprietary rights such as advanced purchasing. The only difference between a Millionaire's Club membership holder and the general public is that members pay less per purchase of books and merchandise because they have opted to pay $25 per year to Taxpayer. Allowing Books-A-Million to avoid sales tax on the discounted amount because it has received payment from its customers on a yearly instead of a per-purchase basis would be contrary to the South Carolina tax code. This Court has interpreted our tax code to have broad language which inextricably links value to sales. *See Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 97, 705 S.E. 2d 28, 32 (2011) (finding hotel fees, charged by the taxpayer exclusively for services, were subject to sales tax under the plain language of section 12-36-920(A) as gross proceeds because the service was incidental to the purchase of accommodations). Here, the ALC recognized this broad interpretation in holding:

> South Carolina courts have analyzed the definition of gross proceeds of sales several times and have concluded that gross proceeds of sales includes *all* value that comes from or is [the] direct result of the sale, lease, or rental of tangible personal property.

Other states have unique statutory language that yields different results. In *Barnes & Noble v. Huddleston*, the Tennessee court of appeals, in an unpublished decision, concluded a bookstore's discount membership was nontaxable. *See* 1996 WL 596955 (Tenn. Ct. App. 1996). While the facts are similar, the statute involved is not. The Tennessee provision applied a six-percent sales tax to the total "sales price." *See* Tenn. Code Ann. § 67-6-202(a). The statute defines "sales price" as "the total amount for which a taxable service or tangible personal property is sold… provided, that cash discounts allowed and taken on sales shall not be included.…"

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[2] Members get (a) 40% off the list price of current hardcover Books-A-Million Bestsellers, (b) 20% off the list price of all Books-A-Million adult hardcover books, (c) 10% off the marked Books-A-Million designed adult hardcover books, (d) free shipping with online purchases, (e) up to 40% off bestsellers and featured items online, (f) periodic special promotions online and at Books-A-Million Stores, and (g) one five-dollar reward card good for 30 days after activation.

Tenn. Code Ann. § 67-6-102(25) (1994). This significant difference from our state's "proceeding or accruing language" language led to a different result. In Tennessee, the legislature specifically sought to calculate the tax base as a number exclusive of discounts. In South Carolina, the legislature tied together taxable tangible goods with related intangible assets. Therefore, South Carolina's legislative intent is distinguishable from Tennessee's.

In its brief and in oral argument, counsel for Books-A-Million attempted to bolster its case by arguing that certain "big box" stores are not being taxed on their memberships. While these "conditional retail" and/or "members-only warehouses" are likely not being taxed on their membership sales, the Department declined to confirm or deny this—ostensibly due to taxpayer confidentiality—but proceeded to accept this proposition *arguendo*. Justice Kittredge's dissent[3] would have us treat this hypothetical admission as the dispositive fact in the case. Whether these stores are actually suffering this alleged disparate treatment is not at issue for the Court to decide today. Rather, we are asked to determine whether our sales tax statute permits the Department to tax Books-A-Million on their Millionaire's Club memberships. To be clear, in reaching our conclusion that these memberships are subject to sales tax, we do so based on our view of statutory interpretation, not based on any deference to the Department. We leave the taxability of these other entities for another day.[4]

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[3] We also note that Justice Kittredge's dissent reads our argument as one based on preservation, but that is inaccurate. Outside of this footnote, the word "preservation" does not appear in the Court's opinion. In our view, there are no preservation issues in this case. Instead we focus on the facts in the record, not hypotheticals about parties outside this litigation that were accepted for argument's sake.

When Justice Few pressed at oral argument how this hypothetical disparate treatment argument effects the outcome of this appeal, Taxpayer failed to offer a specific legal theory to justify reversing the court of appeals and instead relied on a general notion of fairness.

[4] In so doing, we are reminded of the words of Chief Justice Roberts during his confirmation hearing that judges should only "call balls and strikes[.]" John G. Roberts, Jr., Confirmation Hearing, before the United States Judiciary Committee (September 12, 2005). The issue pitched to us today concerns only Books-A-Millions' memberships, and that is the issue we resolve.

Books-A-Million also invites us to compare significantly different businesses such as golf courses, zoos, museums, and grocery stores, painting a bleak picture of the havoc[5] which would ensue if the Department's position were affirmed. We disagree because with Millionaire's Club memberships the *only* thing that members receive is a discount on taxable retail sales.

The generic private golf club charges a membership fee as a requirement to play on its course or buy items in its pro shop. This is a conditional retail agreement whereby the membership provides not for discounts, but for use. Museums and zoos are similarly distinguishable. Though most museums and zoos are open to the public, many charge membership fees for discounted admission. This is not discounted retail and is charged under a different section of the South Carolina tax code that does not contain the "proceeding or accruing" language at issue here. *See generally*, S.C. Code Ann. § 12-21-2420 (2017) (making no mention of a tax on "gross proceeds of sales" and thereby no reference to the "proceeding or accruing" language).

Consistent with its parade-of-horribles scenario, Books-A-Million also argues that grocery stores will be impacted by the decision in this case, positing that if an individual in line at a grocery store check-out has one item exempt from tax—a gift card, for example—then the Department's interpretation of the "proceeding or accruing" language would render the entire purchase taxable. Because the pertinent language is "proceeding" and not "preceding," this argument is unavailing.[6] A gift card is not a membership that provides discounts on the purchase of other items in the grocery basket; rather, it is an alternative form of consideration. When a gift card is used to purchase a taxable good, there is sales tax on *that* transaction rather than

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[5] Contrary to Taxpayer's argument, ruling that the membership is not taxable is the result most likely to produce havoc. Under the position advanced by Taxpayer, books could be sold at a 90% or 99% discount as a benefit of membership. This is unquestionably tax avoidance and is not legally distinguishable from lesser discounts as present here.

[6] Books-A-Million is not alone in its confusion of these two words. Justice James's dissent concludes, "neither the purchase of a membership, nor the intangible value it holds, proceeds <u>from</u> an as-yet nonexistent purchase of merchandise." Because we can readily imagine an infinite number of loopholes based on this characterization, we disagree that the legislature intended that result. Timing is incidental; it must be the relationship between the two items being purchased that is dispositive of whether one item's value proceeds or accrues from another's.

on the original transaction purchasing the card itself. No interpretation or argument advanced by the Department in this case would change that distinction or connect the purchase of gift cards with the taxable items bought along with them in the original transaction simply because they were purchased at the same time.[7] Between the items in the grocery basket, there is no relationship such that one is deriving value from another. Therefore, value does not proceed or accrue in the way this court has determined is necessary to levy a tax and this case's outcome would have no impact on this scenario.

CONCLUSION

The ALC correctly applied section 12-36-90 to Books-A-Million's sale of Millionaire's Club memberships. The court of appeals did not err in affirming this interpretation but we modify its opinion to the extent it relied on the principle of agency deference as support. A plain reading of the South Carolina tax code coupled with the interpretation this Court has repeatedly utilized results in our sales tax being more inclusive than those of other states. The Millionaire's Club memberships possess value based solely on the discounts they afford on taxable sales. Therefore, Books-A-Million's sales of Millionaire's Club memberships are subject to sales tax in South Carolina.

The decision of the court of appeals is **AFFIRMED.**

BEATTY, C.J., and FEW, J., concur. JAMES, J., dissenting in a separate opinion in which KITTREDGE, J., concurs. KITTREDGE, J., dissenting in a separate opinion.

[7] Indeed, grocery stores regularly sell both taxable and non-taxable items in the same transaction and, as acknowledged by Taxpayer in oral argument before the court of appeals, the point of sale machine is programmed to make the appropriate demarcations.

JUSTICE JAMES: I respectfully dissent. I would reverse the court of appeals and hold the memberships sold by Books-A-Million are not subject to a sales tax.

DISCUSSION

A. Standard of Review

Section 1-23-610(B) of the Administrative Procedures Act sets forth the appropriate standard of review in an appeal from the Administrative Law Court. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 28, 766 S.E.2d 707, 715 (2014). Specifically, section 1-23-610(B)(d) provides an appellate court may reverse the decision of the ALC if the decision is affected by an error of law. As I will explain, I believe the ALC's decision is controlled by its erroneous interpretation of various provisions of the South Carolina Sales and Use Tax Act ("the Act"). *See* S.C. Code Ann. §§ 12-36-5 to -2695 (2014 & Supp. 2021).

Questions of statutory interpretation are questions of law, which we review de novo. *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Because "[t]he best evidence of legislative intent is the text of the statute[,]" we focus upon the words used. *Creswick v. Univ. of S.C.*, 434 S.C. 77, 82, 862 S.E.2d 706, 708 (2021).

Quoting *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313, 319-20, 731 S.E.2d 869, 872 (2012), the majority correctly states that "[t]he usual rules of statutory construction apply to the interpretation of tax statutes[.]" More specifically, however, we have concluded that "in statutes levying taxes, the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used[.]" *Cooper River Bridge, Inc. v. S.C. Tax Comm'n*, 182 S.C. 72, 76, 188 S.E. 508, 510 (1936) (quoting *United States v. Merriam*, 263 U.S. 179, 187-88 (1923)).

The ALC and the court of appeals agreed with the Department that the statutes unambiguously require Books-A-Million to pay a sales tax on sales of memberships. The majority of this Court affirms that conclusion. I believe the majority and the courts below have "extended by implication" the literal meaning of the applicable statutes, especially section 12-36-90. I would hold the statutes unambiguously provide no sales tax is owed.

B. Analysis

Three statutes in the Act are in play in this case—sections 12-36-60, -90, and -910(A). Section 12-36-910(A) provides that persons who sell tangible personal property at retail must pay a sales tax on the gross proceeds of their sales. Section 12-36-60 defines "tangible personal property" as "personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses." The parties agree Books-A-Million memberships are not tangible personal property. The primary benefits of a membership are discounts on merchandise and free shipping.

The dispute in this case centers upon the interpretation of the term "gross proceeds of sales," which is defined in section 12-36-90 as "the value proceeding or accruing from the sale, lease, or rental of tangible personal property." The parties agree "the sale of tangible personal property" contemplated by section 12-36-90 is the sale of merchandise. Of course, Books-A-Million collects a sales tax on the sale of merchandise and pays it over to the Department. The precise question we must answer is whether the $25 Books-A-Million receives from the sale of a membership is a "value proceeding or accruing from" a later sale of tangible personal property.

The Department argues the answer to this question turns on the general relationship between the membership and the eventual purchase of tangible merchandise. The Department contends the statutes unambiguously provide that the $25 membership payment Books-A-Million receives on the front end is a value "proceeding or accruing from" the sale of merchandise, which occurs on the back end. Books-A-Million contends the statutes do not require payment of a sales tax on the memberships because the $25 value Books-A-Million receives from the sale of a membership cannot possibly proceed or accrue from a sale of merchandise that has not yet occurred. I agree with Books-A-Million.

Again, under sections 12-36-60, -90, and -910(A), Books-A-Million must pay a sales tax on the value proceeding or accruing from the sale of tangible personal property. First, I consider the word "value" as it is used in section 12-36-90. *Merriam-Webster* defines "value" as "the monetary worth of something." *See Value*, Merriam-Webster, https://www.merriam-webster.com/dictionary/value (last visited June 21, 2022). Because Books-A-Million is the taxpayer, we must consider the value Books-A-Million receives from the sale of the membership, not the value the member receives from buying the membership.

I next consider the words "proceeding or accruing from" as they are used in section 12-36-90. *Merriam-Webster* defines "proceed" as "to come forth from a source." *See Proceed*, Merriam-Webster, https://www.merriam-webster.com/dictionary/proceed (last visited June 21, 2022). *Merriam-Webster* defines "accrue" as "to come as a direct result of some state or action." *See Accrue*, Merriam-Webster, https://www.merriam-webster.com/dictionary/accrue (last visited June 21, 2022).

The statutes require the payment of a sales tax on the value that proceeds or accrues from the sale of tangible personal property, not from the sale of an intangible membership. The Department argues "section 12-36-90 has only one reasonable interpretation—gross proceeds of sales include *all* value that proceeds or accrues to a taxpayer from the sale of tangible personal property." I agree with that general statement, but the sale of tangible personal property—merchandise—comes after the sale of the membership. The "value proceeding or accruing from" the sale of merchandise cannot possibly include the $25 value Books-A-Million receives before it sells the merchandise. I believe the Department's interpretation does violence to the plain meaning of section 12-36-90.

The majority states "the value of the club memberships originates from the sale of taxable goods because the only benefit to buying the Millionaire's Club membership is discounts on taxable transactions." I again note that because Books-A-Million is the taxpayer, we must consider the value Books-A-Million receives from the sale of a membership, not the value the member receives from buying the membership; however, even if we consider the value received by the member, the majority's reasoning does not track the plain language of section 12-36-90. Members realize the benefits of their intangible membership only *if* they purchase merchandise. Quite plainly, neither the purchase of a membership, nor the intangible value it holds, proceeds from an as-yet nonexistent purchase of merchandise.[8]

[8] In its footnote 6, the majority takes issue with this sentence and maintains I have confused the terms "proceeding" and "preceding." For what it is worth, the quoted sentence ended my point that we must view the value of the sale of the membership through the eyes of Books-A-Million, not the member, but that even if we do view the transaction through the eyes of the member, the majority's reasoning does not track the plain language of section 12-36-90. Whatever the case, I, like the majority, do not understand Books-A-Million's rationale as to how the outcome of this appeal might impact certain grocery store transactions; however, I know the difference between the terms "proceeding" and "preceding." The final sentence of the

The majority has written into the Act an exception allowing the Department to collect a tax on the sale of a non-tangible item. The legislature can amend the Act to subject such a sale to a tax, but this Court does not have that authority. An exception to the plain and unambiguous language of a statute must come from our legislature. *Doe v. R.D.*, 308 S.C. 139, 142, 417 S.E.2d 541, 543 (1992).

1. *Travelscape*

The majority cites *Travelscape, LLC v. South Carolina Department of Revenue*[9] for the proposition that we have interpreted our tax code to have broad language which "inextricably links value to sales." I respectfully disagree with that characterization of *Travelscape*. Though the Department insists otherwise, we have never assigned such a reading to our tax code. The holding in *Travelscape* was limited to the unique facts of that case and is of no import to the Department's dispute with Books-A-Million.

Travelscape is an online company providing discount travel services through a website, Expedia.com. Travelscape entered into agreements with hotels in South Carolina under which the hotels accepted discounted room rates lower than the rate offered by the hotel to the general public (the "net room rate"). When a customer booked a room on the Expedia website, Travelscape charged the customer's credit card and added to the net room rate a service fee, a facilitation fee, and a tax recovery charge. Travelscape paid the hotel the net room rate and the tax recovery charge, and it kept the service and facilitation fees. The Department contended Travelscape was obligated to pay a sales tax on those two fees, and Travelscape contended it was not.

The pertinent sales tax provision in *Travelscape* was section 12-36-920(A). Subsection (A) imposes a sales tax on "the gross proceeds derived from the rental or charges for any rooms" furnished by a hotel. Faced with the question of what meaning to give "gross proceeds" as used in section 12-36-920(A), we used the definition of "gross proceeds of sales" set forth in section 12-36-90(1)(b)(ii) (defining "gross proceeds of sales" as "the value proceeding or accruing from

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majority's footnote 6 shows the majority does not read the words of section 12-36-90 as they are plainly written. The majority states, "[t]iming is incidental; it must be the relationship between the two items being purchased that is dispositive of whether one item's value proceeds or accrues from another's." I disagree with that statement. Timing is not "incidental" under section 12-36-90. It is paramount.

[9] 391 S.C. 89, 705 S.E.2d 28 (2011).

the . . . rental of tangible personal property . . . without any deduction for . . . the cost of materials, labor, or service"). The narrow issue before us was whether the service and facilitation fees paid by customers to Travelscape were taxable under section 12-36-920. We held that "[b]ecause the cost of services is specifically included in the definition of gross proceeds of sales, . . . the fees retained by Travelscape for its services are taxable as gross proceeds." *Id*. at 98, 705 S.E.2d at 33.

Our holding in *Travelscape* was narrow and tailored to the facts of that case: the service and facilitation fees charged by Travelscape were, by clear statutory provision, part of the gross proceeds subject to sales tax. However, in the instant case, the court of appeals adopted the Department's reading of *Travelscape* by adding the verbiage that our holding in *Travelscape* was partly controlled by our conclusion that the service fees were "merely incidental" to the purchase of the hotel accommodations. *Books-A-Million*, 430 S.C. at 394, 844 S.E.2d at 402. The phrase "merely incidental," and for that matter, the word "incidental," appear nowhere in *Travelscape*.

2. *Meyers Arnold*

The Department relies heavily upon the court of appeals' decision in *Meyers Arnold, Inc. v. South Carolina Tax Commission*[10] for the proposition that "but for" the sale of tangible merchandise, Books-A-Million would not sell memberships. In that case, the court of appeals held lay away fees Meyers Arnold received were subject to sales tax as gross proceeds of sales. Under the lay away approach to sales, if a customer wanted to buy an item but did not want to pay the entire sales price up front, the store might offer to hold the item aside for the customer and charge a lay away fee. Meyers Arnold contended it did not have to pay sales tax on the lay away fee. As the court of appeals noted, the pertinent statute in that case, section 12-35-30, defined "gross proceeds of sales" as "the value proceeding or accruing from the sale of tangible personal property . . . without any deduction for service cost." *Id.* at 307, 328 S.E.2d at 923. The court of appeals concluded that "[b]ut for the lay away sales, Meyers Arnold would not receive the lay away fees. The fees are obviously charged for the service rendered in making lay away sales." *Id*. The court of appeals simply held the lay away fee was a service cost incurred in the sale of tangible personal property and, pursuant to statute, was included in the seller's "gross proceeds of sales." The court of appeals' holding in *Meyers Arnold* is not applicable in the least to the memberships sold by Books-A-Million.

[10] 285 S.C. 303, 328 S.E.2d 920 (Ct. App. 1985).

3. *Rent-A-Center East*

The Department argues the court of appeals' holding in *Rent-A-Center East, Inc. v. South Carolina Department of Revenue*[11] requires the application of a sales tax to Books-A-Million memberships. I disagree. In that case, Rent-A-Center operated establishments allowing customers to rent-to-own durable consumer goods such as furniture, appliances, and electronics. In conjunction with these transactions, Rent-A-Center offered an Optional Liability Waiver ("waiver"). If a customer purchased a waiver, Rent-A-Center waived any right it had under the rent-to-own contract to demand the customer pay for damage to the goods purchased under the contract. The waiver absolved the customer of the risk of loss if the customer paid all installments, including the waiver fee, through the date of loss. Rent-A-Center did not charge a sales tax on the waiver fee. After an audit, the Department demanded Rent-A-Center pay a sales tax on the waiver fees for the audit period. The court of appeals held that because the waivers and the rental agreements "were inextricably linked, the value proceeding from the Rental Agreements included the value [Rent-A-Center] received from the Waivers[.]" *Id.* at 592-93, 824 S.E.2d at 222-23.

The Department argues *Rent-A-Center* requires the imposition of a sales tax on Books-A-Million memberships because there is no meaningful difference between the money collected for a liability waiver and the Books-A-Million membership fee. I disagree. The waiver fees collected by Rent-A-Center were collected per transaction, while the Books-A-Million membership fees are not.

4. Agency Deference

The Department argues its interpretation and application of the Act are entitled to deference. In *Sierra Club v. South Carolina Department of Health & Environmental Control*, we summarized the deference owed to an agency's interpretation of a statute or regulation the agency is charged with administering:

> "The Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). "If the statute or regulation is silent or ambiguous with respect to the specific issue, the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah*, 411 S.C. at 33, 766 S.E.2d at 717.

[11] 425 S.C. 582, 824 S.E.2d 217 (Ct. App. 2019).

> "Nevertheless, where . . . the plain language of the statute or regulation is contrary to the agency's interpretation, the Court will reject the agency's interpretation." *Brown*, 354 S.C. at 440, 581 S.E.2d at 838. Therefore, in summary, "We defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute or regulation.'" *Kiawah*, 411 S.C. at 34-35, 766 S.E.2d at 718 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

426 S.C. 236, 256, 826 S.E.2d 595, 606 (2019) (cleaned up). Because the Department's interpretation of the applicable statutes is manifestly contrary to the plain meaning of the statutes, I would give no deference to that interpretation.

CONCLUSION

In *Jack Ulmer, Inc. v. Daniel*, we reviewed a circuit court ruling addressing the applicability of the unemployment tax act to a taxpayer. 193 S.C. 193, 7 S.E.2d 829 (1940). We quoted with approval the entire circuit court order, in which the circuit court pointedly noted, "The Act is a taxing law and should be strictly construed, and the Court does not think that anyone who is liable for contributions should escape liability, but neither does the Court think that the meaning and interpretation of the Act should be stretched so as to include people not specifically included therein." *Id.* at 200, 7 S.E.2d at 832. I agree with this sentiment. I see no reason to permit a taxing statute to be stretched beyond its plain meaning to include a transaction that does not fall within the grip of the tax. In my view, the court of appeals' interpretation of the term "gross proceeds of sales" and the phrase "proceeding or accruing from" stretches the Act beyond its plain meaning. I would reverse the court of appeals and hold the Books-A-Million membership fee is not subject to a sales tax.

KITTREDGE, J., concurs.

JUSTICE KITTREDGE: I join Justice James in dissenting. I write separately to offer a few additional thoughts to Justice James's persuasive dissent, with which I fully concur.

The Department of Revenue (the Department) acknowledges the Books-A-Million club membership is not tangible personal property. For example, in the Administrative Law Court, the Department stated it "has never argued that the membership program is tangible personal property." Instead, the Department advances a strained interpretation of the phrase "proceeding or accruing from" in section 12-36-90 of the South Carolina Code (Supp. 2021). According to the Department, anything it believes is "inextricably linked" to a sale of tangible personal property is subject to the state sales tax. The majority reaches its decision today by adopting the Department's argument. This interpretation of "proceeding or accruing from" may have ostensible appeal from a public policy standpoint, but, as Justice James demonstrates, it is contrary to our statutes.

Beyond Justice James's dispositive statutory construction position, Books-A-Million's allegation of disparate treatment is troubling—it is alleged the Department has chosen to treat other, similar marketing approaches differently. For instance, Books-A-Million contends that Costco and Sam's Club sell memberships that allow members to purchase tangible personal property at reduced or wholesale prices. Yet, according to Books-A-Million, the Department gives Costco and Sam's Club a pass, exempting those membership fees from the sales tax base. At Costco, for example, a membership is mandatory, and only members are allowed to purchase goods. On the other hand, any member of the public—including non-members—may purchase an item from Books-A-Million. It would seem the Department's "inextricably linked" approach would easily capture Costco's membership fees in the sales tax base. I do not suggest for a moment that Costco's (or Sam's Club's) membership fees should be subject to the state sales tax. Indeed, in dissenting I find based on our statutes that the membership fees of Books-A-Million and other similarly situated taxpayers are not subject to the state sales tax. But Justice James and I have lost this argument, and the majority's decision puts Books-A-Million's disparate treatment challenge front and center.

The majority suggests the disparate treatment argument belatedly arose on appeal. In truth, Books-A-Million has pressed this challenge from the beginning. The record is replete with Books-A-Million raising the concern. The following, taken from Books-A-Million's argument in the Administrative Law Court, is typical of

its constant drum beat crying foul over the Department's apparently inexplicable, unequal practice of taxing similar membership schemes:

> So why is the Department attempting to take the contrary positions that the membership fees charged by Sam's Club and Costco are not subject to sales tax – but Books-A-Million are? The membership fees charged by Sam's Club "would not exist without [Sam's] sale of tangible personal property." "Said differently, but for [Sam's Club's] sales of tangible personal property, [Sam's Club] would not receive the [Sam's Club] Membership Fees." So, obviously "The mere fact that the [Sam's Club] Membership Fees would not exist without [Sam's Club's] sales of tangible personal property [does not] make the [Sam's Club] Membership Fees part of the value proceeding or accruing from the [Sam's Club's] sales of tangible personal property. Accordingly, the Membership Fees [charged by Sam's Club] are [not] includable in the [Sam's Club] gross proceeds of sales and subject to sales taxes."
>
> Does this case turn on the fact that Books-A-Million doesn't have a "membership-only warehouse?" Obviously, no one would pay to join a membership-only warehouse if it didn't sell goods (or services). Does this case turn on the fact that Books-A-Million doesn't offer an adequate selection of brand-name merchandise? Books-A-Million claims that it does. It does meet the Sam's Club/Costco test that all membership types receive the same benefits.
>
> So what's the difference?

(Quoting the Department's reasoning to tax the Books-A-Million memberships, with alterations inserted by Books-A-Million.) The majority wants to paint a picture that this challenge was raised by Books-A-Million only "[i]n its brief and oral argument," and thus the Court should not address this unpreserved issue. Moreover, the majority lectures that we should not address unpreserved issues by citing to the familiar mantra that judges, like umpires, "should only 'call balls and strikes.'" I agree. But it is disingenuous to suggest that this issue was raised for the first time in brief and oral argument. As demonstrated above, Books-A-Million has been throwing this pitch since the first inning. I do not know whether Books-A-Million's pitch is a ball or a strike due to the Department's recalcitrance in helping us explore the issue, but I believe we have a duty to make the call.

A cornerstone of the law is the unwavering commitment to ensure that the law is applied even handedly—similarly situated parties must be fed from the same spoon. The law abhors the dissimilar treatment of the similarly situated. One would think the Department would welcome the opportunity to respond to and refute the troubling charge made throughout this litigation by Books-A-Million regarding the disparate treatment of taxpayers, but it ran from the opportunity instead.

At oral argument, the Department was invited to distinguish Books-A-Million's taxable membership fee from the non-taxable membership fees at Costco and Sam's Club. Regrettably, the Department declined the Court's invitation to explain why Costco's and Sam's Club's membership fees are not subject to sales taxes. Nonetheless, in its brief, the Department offered what I believe is a weak rationale to avoid judicial scrutiny of the alleged disparate treatment: The Department contends its decision to treat Books-A-Million differently from Costco and Sam's Club is entitled to "deference." The concept of deference to an administrative agency has no place on the issue of alleged unlawful disparate treatment of taxpayers. Perhaps in recognition of the lack of merit in its deference defense, the Department's brief concludes by claiming it does not "allow a retailer to use a discount club as a means to avoid payment of sales tax." The Department continues, "Rather than charging the actual retail price for the merchandise, a retailer could simply sell a coupon or club membership that provides extensive discounts to the consumer and then only charge sales tax on the greatly reduced purchase price." This, the Department states, "would be an improper . . . method of impermissibly lowering the sales tax obligations." Books-A-Million counters that this is precisely the situation with Costco and Sam's Club—the non-taxable club membership allows the member to purchase merchandise at a reduced price. Notably, the Department is silent to Books-A-Million's rejoinder. That silence is accepted by the majority.

I offer no opinion on the merits of the Department's decision to treat Books-A-Million differently from Costco and Sam's Club. Perhaps there is a valid reason why the Department treats these taxpayers differently, but I am unable to determine a valid reason from this record. Given the importance of ensuring that all similarly situated taxpayers are treated equally, I would prefer this Court not allow the Department to dodge such an important challenge. The charge of disparate treatment of similarly situated taxpayers is squarely before the Court, and I would insist upon a resolution of this challenge—force the Department to address the issue and call it a ball or a strike—to ensure that our taxation laws are applied equally to all similarly situated taxpayers, free from the Department's arbitrary

selection of winners and losers.

I dissent.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Poly-Med, Inc., Plaintiff,

v.

Novus Scientific Pte. Ltd., Novus Scientific, Inc.; Novus Scientific AB, Defendants.

Appellate Case No. 2021-000027

CERTIFIED QUESTIONS

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinion No. 28111
Heard September 22, 2021 – Filed September 14, 2022

CERTIFIED QUESTIONS ANSWERED

Stephen L. Brown and Russell G. Hines, both of Clement Rivers, LLP, of Charleston, and Paul Peter Nicolai and Marwan S. Zubi, both of Nicolai Law Group, PC, of Springfield, MA, for Plaintiff.

Mark C. Dukes, Jennifer L. Mallory, A. Mattison Bogan, and Robert H. McWilliams Jr., all of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Defendants.

JUSTICE KITTREDGE: The United States Court of Appeals for the Fourth Circuit certified the following questions to this Court pursuant to Rule 244 of the South Carolina Appellate Court Rules:

1. Under a contract with continuing rights and obligations, does South Carolina law recognize the continuing breach theory in applying the statute of limitations to breach-of-contract claims, such that claims for separate breaches that occurred (or were only first discovered) within the statutory period are not time-barred, notwithstanding the prior occurrence and/or discovery of breaches as to which the statute of limitations has expired?

2. Does it matter if the breaches are of the same character or type as the previous breaches now barred?

South Carolina does not recognize the continuing breach theory. Moreover, it may matter greatly "if the breaches are of the same character or type as the previous breaches now barred." Nevertheless, in a contract action, it is the intent of the parties that controls. Whether separate breaches of the same character or type as time-barred breaches trigger a new, separate statute of limitations depends on the parties' contractual relationship—specifically, what the parties intended.[1]

I.

The rule on certification is designed for this Court to answer questions of South Carolina law. *See Butler v. Travelers Home & Marine Ins. Co.*, 433 S.C. 360, 366, 369, 858 S.E.2d 407, 410–12 (2021) (recognizing that Rule 244(a), SCACR, permits this Court to answer questions of law, not questions of fact). Difficulty arises when intended legal questions are inextricably linked to disputed facts. Experience has shown that the purpose of the rule for "certification of questions of law" is rarely achieved because parties to the underlying dispute almost invariably

[1] We answer the certified questions, cognizant of the fact our discussion may stray beyond the issues raised on appeal to the Fourth Circuit.

insert alleged facts of the case into the question. To no fault of the certifying court, this results from the apparently common belief that "favorable facts" supporting a party will influence this Court to rule favorably for that party on the legal question presented. This comment is not intended as a criticism but merely a recognition that good lawyers well understand that legal decision-making is often context dependent, and the result shifts as the facts shift. We have recognized this issue and expressed a similar concern before. *See Donze v. Gen. Motors, L.L.C.*, 420 S.C. 8, 24, 800 S.E.2d 479, 487 (2017) (Kittredge, J., concurring) ("We are often presented with ostensible questions of law that are predicated on certain factual assumptions. We must answer those questions narrowly and recognize that even a slight tilting of the facts can impact the analysis and alter the conclusion.").

Out of respect for the certifying court, we answer these certified questions as fully as we are able, without the benefit of the parties' contract and without offering an opinion as to the viability of the claims of Plaintiff Poly-Med, Inc.

II.

In June 2005, Poly-Med, Inc. (Poly-Med) entered into a Sale of Materials and License Agreement (the Agreement) with the predecessor in interest to Defendants Novus Scientific Pte. Ltd., Novus Scientific, Inc., and Novus Scientific AB (collectively, Novus). The Agreement required Poly-Med to develop a surgical mesh for Novus's exclusive use in hernia-repair products.

The dispute between Poly-Med and Novus arises from two ongoing obligations in the parties' Agreement. As characterized by the Fourth Circuit, the alleged breach of the Agreement centers on the contractual provisions that contain these two obligations: the "hernia-only" provision and the "patent-application" provisions. The parties accept the federal court's characterization of the dispute.

Poly-Med commenced a breach of contract action against Novus on May 8, 2015, in the federal district court, alleging Novus violated the Agreement's hernia-only and patent-application provisions on multiple, separate occasions.[2] The statute of limitations for actions pursuant to contract is three years. S.C. Code Ann. § 15-3-530(1) (2005). Novus moved for partial summary judgment, arguing Poly-

[2] Poly-Med brought other claims against Novus that are not involved in the certified questions.

Med's breach of contract claims were time-barred by the three-year statute of limitations. The federal district court found, and it is undisputed, that Poly-Med was on notice of both the hernia-only and patent-application contract claims against Novus by 2010.

From the outset, Poly-Med has conceded its claims on the "older" breaches are time-barred. Poly-Med nevertheless maintains its claims are viable for what it contends are the "fresh" breaches that Novus committed or that Poly-Med only could have discovered within three years of the May 8, 2015 federal court complaint. According to the federal district court, this argument required it to determine whether South Carolina recognized the continuing breach theory "wherein each discrete event of alleged breach individually starts a new limitations period." *Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, No. 8:15-CV-01964-JMC, 2018 WL 1932551, at *7 (D.S.C. Apr. 24, 2018). In other words, *by operation of law*, this doctrine would operate to save Poly-Med's later arising claims, even if the statute of limitations had lapsed for earlier breaches of the same contract provisions.

The federal district court determined, based in part on this Court's decision in *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*,[3] that South Carolina had not adopted the continuing breach theory. As a result, the federal district court found Poly-Med's breach of contract claims were time-barred and granted summary judgment to Novus. Poly-Med appealed, challenging the federal district court's rejection of the continuing breach theory in light of this Court's decisions in *Janssen* and another case, *Marshall v. Dodds*,[4] which was decided after summary judgment was entered. It is apparent from the order of certification that our majority decision in *Marshall* was the impetus for the Fourth Circuit's decision to certify the questions.

III.

The first certified question asks whether South Carolina law recognizes the continuing breach theory. At the outset, we must understand what is meant by the phrase "continuing breach theory." The federal district court used multiple terms

[3] 414 S.C. 33, 777 S.E.2d 176 (2015) [hereinafter *Janssen*].

[4] 426 S.C. 453, 827 S.E.2d 570 (2019).

interchangeably, including "continuing breach," "continuing wrong," and "continuing accrual." The federal court further referenced the "continuing claims doctrine" and provided the blackletter definition:

> The "continuing claim doctrine" operates to save parties who have pled a series of distinct events, each of which gives rise to a separate cause of action subject to its own statute of limitations, as a single continuing event; in such cases, the continuing claims doctrine operates to save later arising claims even if the statute of limitations has lapsed for earlier events. That is, the doctrine allows [a] plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period.

54 C.J.S. *Limitations of Actions* § 131 (2020) (footnotes omitted). We conclude that this definition of the continuing claims doctrine is what the Fourth Circuit intended by the phrase continuing breach theory.

South Carolina has not adopted the continuing breach theory in *Janssen*, *Marshall*, or otherwise.

A.

The federal court correctly concluded our holding in *Janssen* is limited to the South Carolina Unfair Trade Practices Act (SCUTPA). The State sued Janssen under SCUTPA for improper prescription-drug labeling and sought to recover civil penalties of up to "five thousand dollars *per violation*," as provided in SCUTPA. S.C. Code Ann. § 39-5-110 (1976) (emphasis added). Based on the "per violation" language and legislative intent of SCUTPA, we rejected Janssen's argument that the statute of limitations barred the entire labeling claim. *Janssen*, 414 S.C. at 77, 777 S.E.2d at 199. Instead, "[w]e adopt[ed] the view that aligns with legislative intent as reflected in section 39-5-110," and held SCUTPA's statute of limitations begins to run anew with each violation. *Id.* at 79, 777 S.E.2d at 200. Accordingly, we limited the State's recovery to a period coextensive with the three-year limitations period. *Id.*

In so holding, we explained that "the language of SCUTPA itself contemplates that an unlawful method, act, or practice may result in multiple statutory violations, and it is the violations themselves that cause the statute of limitations to begin to run." *Id.* Nothing in *Janssen* suggests the Court adopted what Poly-Med argues is a

generalized legal concept for courts to apply outside the statutory context of SCUTPA.

Likewise, the majority in *Marshall* in no way promulgated a new rule applicable to the statute of limitations for a breach of contract claim. *Marshall* involved a tort action. *See Marshall*, 426 S.C. at 455, 827 S.E.2d at 571. In *Marshall*, we interpreted the statute of repose for medical malpractice claims, which requires an action be brought within "six years from the date of occurrence." S.C. Code Ann. § 15-3-545(A) (2005). The majority held that claims based on acts within the repose period were actionable, while acts that occurred beyond the six-year period were barred. 426 S.C. at 465, 827 S.E.2d at 576. *Marshall* concluded that "[s]ection 15-3-545(A) begins to run after each occurrence," which "honors the purpose behind the statute of repose." *Id.* at 465, 467, 827 S.E.2d at 576–77. In reaching this decision, the majority explained: "[t]o hold otherwise would require us to rewrite our statute of repose and superimpose 'first occurrence' into section 15-3-545(A) rather than merely interpret what the provision actually says—'the date of occurrence.'" *Id.* at 466, 827 S.E.2d at 576–77.

Poly-Med argues the distinction between a statute of limitations and a statute of repose is immaterial in this case. We disagree. *See, e.g.*, *Columbia/CSA-HS Greater Columbia Healthcare Sys., L.P. v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 411 S.C. 557, 560, 769 S.E.2d 847, 848 (2015) (distinguishing statutes of limitations, which have the benefit of being tolled under appropriate circumstances, from statutes of repose, which typically may not be tolled for any reason); *Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993) (stating "[a] statute of repose constitutes a substantive definition of rights," while a statute of limitations provides only "a procedural limitation" (citation omitted)). To apply *Marshall*'s rationale to breach of contract claims where the limitations period does not involve a statute of repose would extend *Marshall* far beyond its reach.

Moreover, embedded in South Carolina's approach to the statute of limitations is a discovery rule. "The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist." *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 439, 661 S.E.2d 73, 80 (2008). A statute of repose does not involve the discovery rule. *See* 51 Am. Jur. 2d *Limitation of Actions* § 127 (2021) (stating statutes of repose do not incorporate the discovery rule, and thus the repose period begins running when a specific event occurs, regardless of whether an action has accrued or whether any

injury has resulted). In jurisdictions that have a discovery rule like South Carolina, the clear majority rule rejects the continuing breach theory.[5]

We therefore reject Poly-Med's reliance on *Janssen* and *Marshall*. *Janssen* and *Marshall* concern the application of statutory language to effectuate the intent of the South Carolina legislature, not the adoption of a generalized continuing breach theory in contract actions.

B.

We elect to go further and answer the second certified question. The answer, especially the analysis, may be helpful in more fully understanding the appropriate framework for determining if separate breaches trigger separate limitation periods.

The second certified question asks, "Does it matter if the breaches are of the same character or type as the previous breaches now barred?" The answer is that it could matter greatly whether the breaches are of the same character or type. The ultimate answer depends on whether the contracting parties intend for multiple alleged breaches to constitute a single breach or separate breaches. While the principle is easily stated, such a determination may not be as straightforward. We begin with a clear example, as Poly-Med provides a hypothetical in its brief that is easily answered:

> A builder enters a contract to build a building in accordance with certain plans and specifications. The plans and specifications are generally incorporated into the contract. The contractor paints the building butter yellow instead of sunshine yellow as called for in the contract. Research shows this difference in color has an impact on the resale value of the building. There is a breach of contract, but perhaps the owner, for business, personal, or whatever reasons, decides not to sue for the breach. Three years and one day later, the roof starts leaking because the plans were not followed by the contractor.

Poly-Med continues, attributing a position to Novus it has never made:

> The contractor will argue it breached the contract when it painted the building a color other than the one specified in the contract. As such,

[5] In support of the continuing breach theory, Poly-Med primarily relies on case law from jurisdictions that do not apply the discovery rule to breach of contract claims.

> under Novus's proposed answer to the certified question, any issues with the roof leaks are barred, as the owner knew or should have known about the potential claim against the contractor. The same would hold true for any breaches of contract later discovered with the building.

In fairness to Poly-Med, it admits its example is "far-fetched." There is no intellectually honest argument that the running of the statute of limitations for painting the building the wrong color somehow time bars a claim for the leaking roof. Novus admits Poly-Med's hypothetical presents separate breaches, each governed by a separate statute of limitations. In such a situation, the owner most assuredly could bring the roof leak claim although the statute of limitations would bar an action on the wrong color of paint. These are two entirely different—indeed separate—contractual duties and requirements. An analogy would be equating a breach of the hernia-only provision with a breach of the patent-application provisions, and claiming the running of the statute of limitations on the hernia-only breach time bars a claim for breach of the patent-application provisions. Such an argument would be a nonstarter. The case before the Court presents a more nuanced situation, primarily because an executory contract is involved, with continuing and ongoing duties, and the breaches (either hernia-only or patent-application) are perhaps of the same character.

With respect to the hernia-only provision, Poly-Med asserts that Novus violated the Agreement on multiple occasions by selling, using, and manufacturing the mesh for purposes beyond hernia repair. Poly-Med contends that each discrete act by Novus constitutes a distinct and separate breach of the hernia-only provision. Conversely, Novus maintains its actions effectively operate as a single breach—a breach of the hernia-only provision. In support of its position, Novus points to internal Poly-Med documents from 2010 discussing the possibility that Novus was testing or promoting the mesh for use beyond hernia repair. Novus asserts that these documents confirm Poly-Med was on notice of the hernia-only breach of contract claim by 2010 and chose not to file suit within the limitations period.

Poly-Med next argues that Novus violated the Agreement's patent-application provisions by filing and prosecuting numerous patent applications in its own name, failing to advise or consult with Poly-Med regarding those applications, and asserting ownership rights over patents that contractually belong to Poly-Med. As with the hernia-only claims, Poly-Med maintains that Novus violated the patent-application provisions in distinct ways, each constituting a separate breach of the

Agreement. Novus disagrees and offers evidence that it put Poly-Med on notice in 2010 that Novus had filed patent applications in its name and without consulting Poly-Med. Consequently, Novus argues Poly-Med had been on notice since 2010 of a patent-application breach of contract claim, rendering those and subsequent patent-application breach claims also time-barred.

We acknowledge the obvious—an executory contract with continuing rights and obligations may result in separate breaches and give rise to separate causes of action for breach of contract subject to a new statute of limitations period.[6] Thus, it may be that each hernia-only and each patent-application alleged breach of contract claim is, respectively, separate and distinct from another. Conversely, it may be that the alleged breaches of the hernia-only and patent-application provisions constitute, respectively, a single breach. Poly-Med argues the former, while Novus insists upon the latter. *Compare* 54 C.J.S. *Limitations of Actions* § 130 ("[I]f independent acts cause independent injuries, each act is separately actionable, and the statute of limitations begins to run separately with each alleged breach."), *with Maher v. Tietex Corp.*, 331 S.C. 371, 383–84, 500 S.E.2d 204, 210–11 (Ct. App. 1998) (rejecting the "continuing wrong" doctrine and finding the case presented "a single wrong with continuing effects" and thus "[t]he objective test in South Carolina's discovery rule [was] sufficient to allow plaintiffs the opportunity to discover and act upon the original breach"). The resolution of the dispute is not controlled by whether South Carolina has adopted the continuing breach doctrine, but rather by a determination of what the contracting parties intended.

Fundamentally, parties are generally free to contract as they desire. It is the role of a court to give effect to the contracting parties' intentions. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). In most contracts, based on the terms of the agreement and the context in which it was reached, each breach of a distinct and separate duty gives rise to a separate right of action. On the other hand, as we recently recognized, "the parties to a contract may set forth limitations on the remedies available to enforce the contract." *Beverly v. Grand Strand Reg'l Med. Ctr., L.L.C.*, 435 S.C. 594, 602, 869 S.E.2d

[6] While the decisions in *Janssen* and *Marshall* are properly viewed as statutory construction decisions, a breach of contract action necessarily involves a determination of the terms of the contract to ascertain and give legal effect to the parties' intentions. An executory contract, by definition, entails an ongoing relationship.

812, 817 (2022). These fundamental principles apply equally whether considering breaches of separate and distinct obligations or multiple breaches of a single obligation. Here, if the terms of this contract indicate the parties intended that a series of alleged breaches of the hernia-only or patent-application provisions constitute only one breach with a single remedy, then it would appear Novus is correct. That, however, is a factual question for the federal court to answer; it is not a question of law for this Court. *See* 17B C.J.S. *Contracts* § 840 (2020) ("Whether a contract's obligations are divisible or indivisible for statute of limitations purposes is a matter of contract interpretation in which the task is to discern the parties' intention as expressed by them in the words they have used.").

In answering the certified questions, we have purposefully avoided the skirmish into the competing facts advanced by the parties. In addition, it would seem that the parties' intent may be gleaned from the Agreement, provided the Agreement unambiguously addresses the matter. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) (explaining that "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language," and if the language is unambiguous, "the language alone determines the contract's force and effect"). While parts of the Agreement are cited in the record, we have not been provided a copy of the entire Agreement. Accordingly, we offer no opinion on the ultimate outcome and viability of Poly-Med's claims. That determination is for the federal court.

IV.

South Carolina does not recognize the continuing breach theory in applying the statute of limitations to breach of contract claims. Yet, we do not answer the ultimate question presented in the dispute between Poly-Med and Novus. While the parties have pressed this Court with a presentation of facts in a light most favorable to their respective desired outcomes, we offer no opinion on the viability of Poly-Med's claims. Ultimately, the dispositive question is whether the parties intended through their Agreement for separate breaches to give rise to new claims with a new statute of limitations period.

CERTIFIED QUESTIONS ANSWERED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

South Carolina Public Interest Foundation and John Crangle, individually and on behalf of all others similarly situated, Appellants,

v.

Alan Wilson, Attorney General for the State of South Carolina; Willoughby & Hoefer, P.A.; and Davidson, Wren & DeMasters, P.A., Respondents.

Appellate Case No. 2021-000343

Appeal from Richland County
R. Kirk Griffin, Circuit Court Judge

Opinion No. 28112
Heard April 6, 2022 – Filed September 14, 2022

REVERSED AND REMANDED

James Mixon Griffin, Badge Humphries, and Margaret Nicole Fox, all of Griffin Humphries LLC, of Columbia, and James G. Carpenter, of The Carpenter Law Firm, of Greenville, for Appellants.

John S. Simmons, of Simmons Law Firm, LLC, of Columbia, Gerald Malloy, of Malloy Law Firm, of Hartsville, and James Todd Rutherford, of Rutherford Law Firm, LLC, of Columbia, for Respondent Willoughby & Hoefer, P.A.; William H. Davidson II and Kenneth P.

Woodington, both of Davidson, Wren & DeMasters, P.A., of Columbia, for Respondent Davidson, Wren & DeMasters, P.A.; Attorney General Alan McCrory Wilson, Solicitor General Robert D. Cook, and Deputy Solicitor General J. Emory Smith Jr., all of Columbia, for Respondent Alan Wilson.

JUSTICE JAMES: South Carolina Attorney General Alan Wilson retained Respondents Willoughby & Hoefer, P.A., and Davidson, Wren & DeMasters, P.A., (collectively, the Law Firms) to represent the State in litigation against the United States Department of Energy (DOE). Wilson and the Law Firms executed a litigation retention agreement, which provided that the Law Firms were hired on a contingent fee basis. When the State settled its claims with the DOE for $600 million, Wilson transferred $75 million in attorneys' fees to the Law Firms. Appellants challenged the transfer, claiming it was unconstitutional and unreasonable. The circuit court dismissed Appellants' claims for lack of standing, and we certified the case for review of the standing issue. The merits of the underlying case are not before us.

Background

In 2002, the State brokered an agreement with the DOE concerning the storage of weapons-grade plutonium at the Savannah River Site in Aiken, South Carolina. *See* 50 U.S.C. § 2566. The agreement required the DOE to achieve a certain mixed-oxide fuel production objective by January 1, 2016. § 2566(d)(1). When the DOE failed to meet this objective, Wilson retained the Law Firms to pursue recovery of statutory damages.

Wilson's litigation retention agreement (Fee Agreement) with the Law Firms contains three provisions relevant to this appeal. The first provision states the Law Firms will be reimbursed for certain costs and expenses. The second provision sets forth varied contingency percentages based on the State's gross recovery, the type of representation provided, and the court in which the matter was heard. The third provision requires Wilson to seek judicial approval of attorneys' fees and costs "[w]hen possible[.]"

The Law Firms continued to litigate on the State's behalf for more than four years. On August 28, 2020, litigation ended with the execution of a settlement

agreement (the Settlement Agreement). The Settlement Agreement required the DOE to immediately pay the State $600 million, "inclusive of interest, with each party to bear its own costs, attorney fees, and expenses." Three days later, Wilson announced he would pay the Law Firms $75 million in attorneys' fees pursuant to the Fee Agreement. This amount included costs and expenses and represented 12.5% of the State's gross recovery.

Seeking to enjoin payment to the Law Firms, Appellants filed a complaint and motion for preliminary injunction against Wilson. Appellants alleged that because attorneys' fees were not awarded by court order or settlement, South Carolina Code subsection 1-7-150(B)[1] requires the entire $600 million settlement to be deposited in the State's General Fund. Appellants also argued the attorneys' fee amount was patently unreasonable and, therefore, requires court approval. When Appellants learned Wilson had already disbursed the $75 million,[2] they amended their complaint to name the Law Firms as defendants and filed another motion for preliminary injunction.

Judge Alison Lee denied Appellants' motion and found they lacked public importance standing. Specifically, Judge Lee concluded the critical element of a "need for future guidance" was absent:

> Any judicial ruling on this matter would be entirely limited to the [Fee Agreement] and payment for services performed pursuant to this single contract. . . . Public importance standing is inappropriate here because there is no ruling the Court might make that would assist other courts resolving future arguments regarding outside litigation.

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[1] Subsection (B) provides, "All monies, except investigative costs or costs of litigation awarded by court order or settlement, awarded the State of South Carolina by judgment or settlement in actions or claims brought by the Attorney General on behalf of the State or one of its agencies or departments must be deposited in the general fund of the State[.]" (2005).

[2] The fact that the fee has already been paid is irrelevant to the issues on appeal. Likewise, the amount of the fee has no bearing on our analysis.

Judge Lee also found Appellants lacked so-called "derivative standing" because unlike Wilson, who has authority to represent the State as its chief legal officer, Appellants "have no authority to represent the State['s] interests in this proceeding."

Respondents promptly moved to dismiss Appellants' complaint for lack of standing. Judge Kirk Griffin granted the motion, ruling "Judge Lee's findings [as to standing] are dispositive and require dismissal. . . . Nonetheless and in the alternative, this Court . . . concurs with and adopts Judge Lee's well-reasoned analysis and findings." Appellants appealed, and we certified the case for review.

We previously declined to exercise original jurisdiction over the merits of Appellants' claims. Therefore, our review is limited to (1) whether Judge Lee's finding that Appellants lack standing constitutes the law of the case and (2) whether Appellants have standing. We express no view as to the merits of Appellants' claims.

Standard of Review

A motion to dismiss for lack of standing challenges the court's subject matter jurisdiction. *See Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). Whether subject matter jurisdiction exists is a question of law, which this Court is free to decide with no particular deference to the circuit court. *Id.* (quoting *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 631 (Ct. App. 1993)); *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Therefore, on appeal, we review the circuit court's findings de novo. *See Capital City*, 382 S.C. at 99, 674 S.E.2d at 528; *Catawba Indian Tribe*, 372 S.C. at 524, 642 S.E.2d at 753.

Discussion

I. Law of the Case

"The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (quoting *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989)). The doctrine does not, however, generally apply to "an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case[.]" *Id.* (quoting *Weil*, 299 S.C. at 89, 382 S.E.2d at 473). Therefore, despite the "long-standing rule in this State that one judge of the same court cannot overrule another[,]" *Charleston Cnty. Dep't of Social Servs. v. Father*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995),

interlocutory orders "may be reconsidered and corrected by the court before entering a final order on the merits." *Shirley's Iron Works*, 403 S.C. at 573, 743 S.E.2d at 785 (quoting *Weil*, 299 S.C. at 89, 382 S.E.2d at 473).

If a plaintiff lacks standing, he does not have the right to proceed to the merits of his claim against the defendant. Therefore, when a circuit court finds that a party lacks standing and includes that finding in an order, the order determines a substantial right. In this regard, Judge Lee's order does more than "merely decide[] some point or matter essential to the progress of the cause, collateral to the issues in the case[.]" *Id.* at 573, 743 S.E.2d at 785. However, because an order denying a motion for preliminary injunction is interlocutory, *see* S.C. Code Ann. § 14-3-330(4) (2017), Judge Lee's order did not finally determine a substantial right of Appellants. *Id.*; *see* Rule 54(b), SCRCP; *cf. Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."). Therefore, we decline to invoke the law of the case doctrine. *See State v. Hewins*, 409 S.C. 93, 113 n.5, 760 S.E.2d 814, 824 n.5 (2014) (stating the law of the case doctrine "is a discretionary appellate doctrine with no preclusive effect on successive trial proceedings").

II. Standing

This Court has consistently acknowledged that even without an allegation of particularized injury, "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. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004); *see S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 524 (2013); *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008); *Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999); *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741-42 (2007); *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.* (*SCDOT*), 421 S.C. 110, 118-19, 804 S.E.2d 854, 859 (2017).

"The key to the public importance analysis is whether a resolution is needed for future guidance." *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341; *see SCDOT*, 421 S.C. at 119, 804 S.E.2d at 859; *Vicary v. Town of Awendaw*, 425 S.C. 350, 359, 822 S.E.2d 600, 604 (2018). Courts must cautiously balance competing interests—the citizenry's need to hold public officials accountable for alleged injustices and "the concomitant integrity of government action"—to determine whether the issue

presented is "inextricably connected to the public need for court resolution for future guidance." *SCDOT*, 421 S.C. at 118-19, 804 S.E.2d at 858 (quoting *Sloan v. Greenville Cnty.*, 356 S.C. 531, 551, 590 S.E.2d 338, 349 (Ct. App. 2003)); *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341; *see Sanford*, 357 S.C. at 434, 593 S.E.2d at 472. Only then can the issue "transcend[] a purely private matter and rise[] to the level of public importance." *ATC S.*, 380 S.C. at 199, 669 S.E.2d at 341.

By claiming Wilson improperly disbursed state settlement funds, Appellants indisputably allege an issue of public importance. *See, e.g.*, *SCDOT*, 421 S.C. at 119, 804 S.E.2d at 859; *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 303 (Ct. App. 2000). Therefore, the linchpin of our analysis is whether a need for future guidance exists.

Appellants' complaint presents a threshold issue of the Attorney General's statutory authority to enter contingency fee agreements with private law firms. This issue will inevitably arise again in the future because Wilson has seven other litigation retention agreements with private attorneys. These agreements are currently listed on the Attorney General's website, and five contain contingency fee provisions.[3] Although the agreements differ in some respects, all contingency fee provisions persist. For example, Wilson recently announced a $300 million settlement with opioid distributors.[4] The litigation retention agreement in that case contains a contingency fee provision identical to the one here. There is a need for future guidance as to whether subsection 1-7-150(B) authorizes the Attorney

[3] *Litigation Retention Agreements*, S.C. Att'y Gen., https://www.scag.gov/litigation-retention-agreements/ (last visited July 28, 2022) (listing contingency fee agreements for Opioid Manufacturers, Pharmacy Benefit Managers, Opioid Distributors, Insulin Pricing, and Google Advertising Technology).

[4] *See Attorney General Alan Wilson: Drug Distributors and Johnson & Johnson Commit to $26 Billion Opioid Agreement*, S.C. Att'y Gen. (Feb. 25, 2022), https://www.scag.gov/about-the-office/news/attorney-general-alan-wilson-drug-distributors-and-johnson-johnson-commit-to-26-billion-opioid-agreement/.

General to enter into contingency fee agreements. We therefore hold Appellants have public importance standing.[5]

Conclusion

We reverse the circuit court's finding that Appellants lack public importance standing and remand for the circuit court to consider the merits of Appellants' claims. We reiterate that nothing in this opinion should be construed as a comment or conclusion on the merits.

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur.

[5] Because we decide this appeal on public importance grounds, we need not address derivative standing. *See Futch v. McCallister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jimmy A. Richardson, II, Solicitor for the 15th Judicial Circuit, on behalf of the 15th Circuit Drug Enforcement Unit, Appellant,

v.

Twenty Thousand Seven Hundred Seventy-One and 00/100 Dollars ($20,771.00), U.S. Currency and Travis Green, Respondents.

Appellate Case No. 2020-000092

Appeal from Horry County
Steven H. John, Circuit Court Judge

Opinion No. 28113
Heard January 13, 2021 – Filed September 14, 2022

REVERSED AND REMANDED

James Richard Battle II, of Battle Law Firm, LLC, of Conway, for Appellant.

Benjamin Alexander Hyman, of The Hyman Law Group, P.A., of Conway, and Daniel L. Alban and Robert Frommer, both of Arlington, VA, for Respondent.

Susan King Dunn and Shirene Carole Hansotia, both of Charleston; Jeremiah Williams and Jonathan Ference-Burke, both of Washington, DC; Caitlin M. Giaimo,

Amreeta Susy Mathai, Olga Akselrod, Rodkangyil O. Danjuma, and Leah M. Watson, all of New York, NY; and Jay Curran and Michael Hanify, both of Boston, MA, for Amici Curiae American Civil Liberties Union Foundation, American Civil Liberties Union of South Carolina Foundation, National Federation of Independent Business, The South Carolina Appleseed Legal Justice Center, South Carolina for Criminal Justice Reform, Root & Rebound, and Project Not a Statistic.

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Attorney General Alan McCrory Wilson, Chief Deputy Attorney General W. Jeffrey Young, Solicitor General Robert D. Cook, Deputy Assistant Attorney General Harley Littleton Kirkland, and Assistant Attorney General Leon David Leggett III, all of Columbia, for Amicus Curiae Attorney General Alan Wilson.

Alan D. Clemmons, of Clemmons Law Firm, LLC, of Myrtle Beach, and Daniel C. Posner and Ari M. Herbert, both of Los Angeles, CA, for Amici Curiae The Southern Poverty Law Center and the National Police Accountability Project.

JUSTICE JAMES: Travis Green presents a facial challenge to our civil asset forfeiture statutory scheme following law enforcement's seizure of cash and contraband during the execution of a search warrant. The circuit court concluded sections 44-53-520 and -530 of the South Carolina Code (2018) are facially unconstitutional under both the Excessive Fines Clause and the Due Process Clause of the federal and state constitutions. We reverse the circuit court and remand for a jury trial on the merits.

Background

In the fall of 2017, the Fifteenth Circuit Drug Enforcement Unit ("police" or "law enforcement") received information that Green was selling narcotics in the Myrtle Beach area. Police used a confidential informant to conduct three drug buys; in those buys, Green sold the informant approximately 28 grams of cocaine for a total of $1,400. Law enforcement subsequently obtained an arrest warrant for Green and a search warrant for his residence. During the execution of these warrants, police seized 132 grams of crack cocaine; 32 grams of cocaine; 319 grams of marijuana; 27 Morphine tablets; $20,771 in U.S. Currency ($971 from Green's wallet, and $19,800 from an outdoor garage closet); and two digital scales with white powder residue. Officers charged Green with seven counts of various drug offenses, and about a year later, he pled guilty to distribution of cocaine, 2nd offense, and possession with intent to distribute marijuana, 1st offense. Green was sentenced to concurrent prison terms of fifteen years on the cocaine charge and five years on the marijuana charge.

Eight days after Green's arrest, the Solicitor[1] filed a forfeiture petition in the court of common pleas seeking an order forfeiting the $20,771 seized. Green was served and answered the petition. He admitted to the amount of cash seized and requested dismissal or, alternatively, a jury trial. The circuit court requested the parties to brief the relevance of *Timbs v. Indiana*, 139 S. Ct. 682 (2019), and the constitutionality of our statutory civil forfeiture scheme. Thereafter, the circuit court determined sections 44-53-520 and -530 violated both the federal and state constitutions. Specifically, the circuit court concluded these two provisions facially violated (1) the Due Process Clause in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the South Carolina Constitution and (2) the Excessive Fines Clause in the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution. In dismissing the action, the circuit court held sections 44-53-520 and -530 facially violated due process by placing a burden on the property owner to prove he is an innocent owner, institutionally incentivizing officials to pursue forfeiture actions, and failing to provide for judicial review or authorization prior to or subsequent to the seizure. The circuit court denied the Solicitor's motion for reconsideration, and the Solicitor appealed.

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[1] Appellant contracts with a private law firm to pursue forfeiture actions. For ease of reference, we refer to Appellant as "the Solicitor."

Issues

I. Did the circuit court err in determining that sections 44-53-520 and -530 are facially unconstitutional because they violate the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the South Carolina Constitution?

II. Did the circuit court err in determining that sections 44-53-520 and -530 are facially unconstitutional because they violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution?

Standard of Review

Our precedent imposes a high threshold for finding a statute unconstitutional. "All statutes are presumed constitutional and will, if possible, be construed so as to render them valid." *State v. Harrison*, 402 S.C. 288, 292-93, 741 S.E.2d 727, 729 (2013). Stated differently, "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). We begin by presuming the validity of our statutory scheme governing civil forfeitures. Because Green chose to assert a facial challenge and not an as-applied challenge, he must demonstrate this scheme is unconstitutional in all its applications. *Knotts v. S.C. Dep't of Nat. Res.*, 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002) (noting the party asserting a constitutional challenge bears the burden); *State v. Legg*, 416 S.C. 9, 13-14, 785 S.E.2d 369, 371 (2016) ("A facial challenge is 'the most difficult . . . to mount successfully,' as it requires the challenger show the legislation at issue is unconstitutional in all its applications." (quoting *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015))). Thus, "[u]nless the statute is unconstitutional in all its applications, an as-applied challenge must be used to attack its constitutionality." *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 109 n.11, 705 S.E.2d 28, 39 n.11 (2011) (quoting *Williams v. Pryor*, 240 F.3d 944, 953 (11th Cir. 2001)).

These principles guide us as we navigate the waters of constitutionality, and as we recently acknowledged, "We begin our analysis . . . with the fundamental, firmly-established principle that 'in the General Assembly rests plenary legislative power, limited only by the constitutions, State and Federal. Legislation not expressly or impliedly inhibited by one or the other of these documents may be

validly enacted.'" *Pinckney v. Peeler*, 434 S.C. 272, 285, 862 S.E.2d 906, 913 (2021) (quoting *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 96, 44 S.E.2d 88, 97 (1947)).

Discussion

Our civil asset forfeiture statutes originate from the Uniform Controlled Substances Act of 1970. *See* 21 U.S.C. § 881; David R. Fine, *Bennis v. Michigan and Innocent Owners in Civil Forfeiture: Balancing Legitimate Goals with Due Process and Reasonable Expectations*, 5 Geo. Mason L. Rev. 595, 605 & n.91 (1997). Forty-eight states adopted this model statute, which was created by the National Conference of Commissioners on Uniform State Laws. Although our statutory scheme essentially implemented the comparable federal scheme, the earliest tenets of civil asset forfeiture date back to biblical times and were expanded during the early English common law period. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974) (recounting a brief history of civil asset forfeiture).

Here, the circuit court ruled two statutes in our civil forfeiture scheme violate due process: (1) section 44-53-520, which lists the property subject to seizure and the process for law enforcement to make a seizure, and (2) section 44-53-530, which sets forth the process for the solicitor to carry out a forfeiture and disburse forfeited property. Significantly, this statutory scheme is civil in nature. *See Mims Amusement Co. v. S.C.L. Enf't Div.*, 366 S.C. 141, 150 n.4, 621 S.E.2d 344, 348 n.4 (2005) ("The critical difference between civil forfeiture and criminal forfeiture is the identity of the defendant." (quoting *United States v. Croce*, 345 F. Supp. 2d 492, 494 (E.D. Pa. 2004))). In civil forfeiture proceedings, the state proceeds against a thing (rem) whereas in criminal forfeiture, it proceeds against a human being (personam). *Id.* Our forfeiture statutes address two types of property: (1) contraband per se, which is property illegal to possess (such as cocaine, heroin, and other illegal narcotics), and (2) derivative contraband, which is property normally legal to possess (such as cash or vehicles) but which becomes contraband when used for illegal purposes. *Id.* at 149-50, 621 S.E.2d at 348.

After the solicitor commences forfeiture proceedings, "[n]otice of hearing or rule to show cause must be directed to all persons with interests in the property listed in the petition[.]" § 44-53-530(a). At the hearing, the State has the initial burden of demonstrating "it had probable cause for believing a substantial connection exists between the property to be forfeited and the criminal activity." *Gowdy v. Gibson*,

391 S.C. 374, 379, 706 S.E.2d 495, 497 (2011). If the State meets this threshold, the burden shifts to the property owner "to show by a preponderance of the evidence that the property was innocently owned." *Id.* at 379, 706 S.E.2d at 497-98. If the circuit court grants the petition, the first $1,000 of forfeited cash goes to the law enforcement agency that effected the seizure. § 44-53-530(f). All cash above $1,000 is distributed as follows: (1) 75% to the law enforcement agency, (2) 20% to the prosecuting agency, and (3) 5% to the State Treasurer. § 44-53-530(e). Vehicles, boats, equipment, and real property that are not reduced to proceeds go to the law enforcement agency or prosecuting agency. *See* § 44-53-530(a). Sections 44-53-520 and -530 also limit how forfeiture proceeds may be used, including that they may not be used for personal use. *See, e.g.*, § 44-53-520(k). Law enforcement may use forfeited money only for "drug enforcement activities, or for drug or other law enforcement training or education." § 44-53-530(g). We now turn to the merits of the parties' constitutional arguments.

I. Due Process

The Solicitor contends the circuit court erred in determining that sections 44-53-520 and -530 violate due process under the federal and state constitutions. The circuit court concluded these two sections violated due process by: (1) placing a burden on the property owner to prove he is an innocent owner, (2) institutionally incentivizing officials to pursue forfeiture actions, and (3) failing to provide for judicial review or authorization prior to or subsequent to the seizure. In reaching this decision, the circuit court applied the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The *Mathews* test examines the procedural due process of a legal proceeding by considering: (1) the private interest affected by the proceeding; (2) the risk of error created by the chosen procedure; and (3) the countervailing governmental interest supporting the challenged procedure. Though we agree with the circuit court that the *Mathews* test applies, we conclude sections 44-53-520 and -530 do not violate due process. We now address each factor of the *Mathews* test as it applies to the circuit court's ruling.

A. Burden to Prove Innocent Ownership

The Solicitor argues the circuit court erred in finding that our statutory scheme unconstitutionally places the burden on a defendant to prove the items seized were not connected to criminal activity—in other words, that the seized items are not derivative contraband. Green asserts the circuit court properly found the burden component placed an unacceptable risk that forfeiture proceedings will be used to

punish innocent parties. He contends that because the government's initial burden is low, the risk is simply too great that an innocent person will be unable to regain his property in a forfeiture proceeding. Although Green raises legitimate concerns with the practical effect of our forfeiture scheme, we do not believe he satisfies the high threshold for establishing the facial unconstitutionality of a statute.

There is no dispute that an individual has a legitimate interest in his property; thus, the first *Mathews* factor weighs in favor of Green. The parties disagree, however, on the outcome of the second and third *Mathews* factors. Concerning the second factor, the Solicitor contends the statutory scheme sufficiently guards against an unconstitutional risk of erroneous deprivation of property. Green argues the State's low initial probable cause burden, combined with the lack of the property owner's right to appointed counsel, renders the risk of erroneous deprivation too great.

It is clear the State has the initial burden of establishing probable cause that the seized items are substantially connected to a criminal purpose. *Gowdy*, 391 S.C. at 379, 706 S.E.2d at 497. While this burden is low, this does not render the entire statute facially unconstitutional. Likewise, the burden-shifting provision in the statute does not render the entire statute facially unconstitutional. The burden-shifting aspect is in keeping with similar statutory schemes across the country, though some state statutes require a heightened preponderance of the evidence standard. *See State v. Timbs*, 134 N.E.3d 12, 27 n.6 (Ind. 2019) ("Many jurisdictions impose comparable burdens, though some state statutes impose more stringent requirements on the government."). Historically, this burden-shifting paradigm tracked federal law, which initially imposed only a probable cause burden on the government before Congress elevated the burden to a preponderance of the evidence. *See State v. Bergstrom*, 710 N.W.2d 407, 412 & n.1 (N.D. 2006) (explaining that North Dakota includes a burden-shifting mechanism once the state establishes probable cause and noting this scheme is identical to the federal law that existed before Congress raised the government's burden to a preponderance of the evidence).

Additionally, the General Assembly has codified other protections designed to guard against an erroneous deprivation of property. Although law enforcement may immediately seize suspected items, the solicitor must file a forfeiture petition within a reasonable period of time thereafter. § 44-53-530(a). The forfeiture petition serves to notify all interested persons that the solicitor intends to seek forfeiture of the seized items. Those with an interest in the seized property are entitled to a jury trial in which they can cross-examine the State's witnesses and

present evidence if they choose. *Medlock v. 1985 Ford F-150 Pick Up*, 308 S.C. 68, 72, 417 S.E.2d 85, 87 (1992) (holding that "defendant owners possess a right to a jury trial where the property subject to forfeiture under sections 44-53-520 and -530 is property normally used for lawful purposes").

The circuit court relied on two decisions in finding the burden-shifting component violates due process—*Nelson v. Colorado*, 137 S. Ct. 1249 (2017), and *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145 (D.N.M. 2018). We do not believe either decision compels a finding that Green has overcome the presumption of constitutional validity. The statute addressed in *Nelson* did not involve forfeitures; instead, it involved the recoupment of costs associated with a subsequently overturned criminal conviction. Indeed, at least one other state supreme court has determined *Nelson* does not apply in a forfeiture proceeding. *See Commonwealth v. Martinez*, 109 N.E.3d 459, 475-76 (Mass. 2018) (noting *Nelson*, which concerned criminal matters, does not apply to civil forfeiture proceedings). Further, unlike our forfeiture scheme, the statute in *Nelson* placed the initial burden on the individual and did not require the government to make any showing to retain the costs.

Additionally, *Harjo* appears to be an outlier in this arena. In *Harjo*, the New Mexico federal district court found an Albuquerque ordinance allowing vehicle seizures violated due process. The ordinance allowed law enforcement to seize a vehicle if it was operated by a person arrested for his second driving while intoxicated offense. When a vehicle was seized, the owner had ten days to pay a $50 fee and request an administrative hearing. If the owner did not request a hearing, the vehicle was deemed abandoned and sold at auction (i.e., automatically forfeited). The district court held placing the burden of proof on an innocent owner created "such a risk of erroneous deprivation that it violate[d] procedural due process." 326 F. Supp. 3d at 1207. The district court also found that treating the seized vehicle as a defendant was constitutionally inadequate because it did not require the city to prove anything about the owner. *Id.* at 1208. ("[P]roving that the City of Albuquerque has probable cause to seize a vehicle does not reveal anything about what the vehicle's owner could or could not have reasonably foreseen.").

Notwithstanding *Harjo*, numerous courts, as well as ours, have upheld civil forfeiture statutes. *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442, 446 (1996) ("[A] long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use."); *Logan v. United States*, 260 F. 746,

748-49 (5th Cir. 1919) ("The long history of forfeitures in this country . . . repels the idea that such forfeitures conflict with the owner's right to due process of law."); *Myers v. 1518 Holmes St.*, 306 S.C. 232, 237, 411 S.E.2d 209, 212 (1991) (upholding our civil asset forfeiture scheme in the face of a due process challenge). The utter dearth of case law invalidating these statutes based on a facial challenge is telling because nearly every state currently has some form of civil asset forfeiture. This lack of case law supports the notion that our scheme is not facially invalid, especially given the threshold presumption of constitutional validity. *Weaver v. Recreation Dist.*, 431 S.C. 357, 363, 848 S.E.2d 760, 762 (2020) ("A possible constitutional construction must prevail over an unconstitutional interpretation." (quoting *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009))). Accordingly, though Green may prefer a heightened standard, that decision is for the General Assembly to make, not this Court.

As to the third *Mathews* factor—the countervailing governmental interest supporting the challenged procedure—the Solicitor argues civil asset forfeiture prevents public harm by deterring further illicit use of the property and imposing an economic penalty. Green asserts the government has no interest in depriving an individual of property when that individual is not personally culpable, even if the property was connected to criminal activity.

We have held civil asset forfeiture is a legitimate exercise of the State's police powers. *Myers*, 306 S.C. at 235, 411 S.E.2d at 211 ("We find that forfeiture is directed to the prevention of serious public harm, and is within the legitimate exercise of the police power."). We have also concluded "forfeiture serves a deterrent purpose both by preventing the further illicit use of the property and by imposing an economic penalty, thereby rendering the illegal behavior unprofitable." *Mims Amusement Co.*, 366 S.C. at 147, 621 S.E.2d at 347. Accordingly, the government has a strong, legitimate interest in forfeiting property connected to criminal activity. Nevertheless, Green advances a narrower argument—that the government does not have an interest in depriving an innocent person of his property. If the property is not connected to criminal activity, Green's remedy under our statutory scheme is to contest the forfeiture. *See Pope v. Gordon*, 369 S.C. 469, 476, 633 S.E.2d 148, 152 (2006) (affirming the court of appeals' holding that the State failed to satisfy its initial burden of probable cause where law enforcement seized $25,341.09 from the defendant's bank account in connection with a drug trafficking charge because the defendant owned a legitimate car detailing business and bank records demonstrated the seized money was not substantially connected to illegal

drug activity). Even if seized property is connected to criminal activity but the owner is innocent, the circuit court must weigh that fact in determining whether forfeiture would violate the owner's constitutional rights. In other words, the appropriate challenge in such a case would be an as-applied challenge. As one state supreme court has noted, "because the procedural due process balancing under *Mathews* is so fact-intensive, it makes sense that in most cases asserting a due process violation based on a deprivation of property . . . a constitutional challenge will and should be decided on an as-applied basis." *Olson v. One 1999 Lexus*, 924 N.W.2d 594, 607 n.8 (Minn. 2019).

We acknowledge some courts and many commentators have criticized the fairness of civil asset forfeiture laws, specifically addressing burden shifting and the potential for an innocent owner to lose his property. In response, several states have amended their statutory schemes to impose more stringent requirements on the government; however, the fact that certain states have legislatively altered their civil forfeiture laws provides no support for judicially changing ours. Legislative alteration might be a good thing, but we are not called upon to decide whether a change in the law would be wise. We are instead called upon to decide whether these statutes are facially unconstitutional. In doing so, we cannot encroach upon the General Assembly's constitutional exercise of legislative power.[2]

B. Incentivization to Pursue Forfeiture Actions

The circuit court also ruled sections 44-53-520 and -530 are facially unconstitutional because they incentivize officials to commence forfeiture actions. The circuit court based this conclusion on the percentage allocations of forfeiture proceeds set forth in section 44-53-530(e). The Solicitor contends the circuit court improperly weighed into legislative policy decisions and erroneously assumed certain facts in concluding the financial incentive to pursue forfeiture overcomes the

[2] In addition to finding sections 44-53-520 and 530 do not facially violate the federal constitution, we find these provisions do not facially violate the state constitution. We disagree with the dissent that article I, section 4 of our state constitution is implicated in the first instance, as sections 44-53-520 and 530 do not impose an automatic forfeiture. Although law enforcement may immediately seize items subject to potential forfeiture, and while the statute deems forfeiture occurs at the moment of illegal use, our statutory scheme permits interested parties to contest the forfeiture, and a court, not law enforcement or a solicitor, ultimately determines whether the seized items are permanently forfeited.

presumption of constitutional validity. Green contends the statutory scheme imposes an unconstitutional incentive because the majority of forfeited property is retained by law enforcement and the prosecuting agency.

It is a fundamental tenet of due process that a person is entitled "to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). This neutrality requirement "safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Id.* Additionally, impartiality serves to promote "both the appearance and reality of fairness[.]" *Id.*

Here, the circuit court relied on *Flora v. Southwest Iowa Narcotics Enforcement Task Force*, 292 F. Supp. 3d 875 (S.D. Iowa 2018), to support its conclusion that sections 44-53-520 and -530 are facially invalid. However, a close reading of *Flora* reveals the district court upheld Iowa's forfeiture statute under a similar facial challenge because the challenger could not demonstrate the funding scheme was unconstitutional in all circumstances. *Id.* at 905-06. Nor can Green.

While the percentage allocations in subsection 44-53-530(e) might cast a shadow on the fairness of any given civil asset forfeiture, this is not enough to overcome the strong presumption of constitutional validity that envelops Green's facial challenge. Some of the facts relied upon by the circuit court appear to track the analysis in *Harjo*.[3] However, as we previously noted, the decision in *Harjo* was an outlier. Moreover, the *Harjo* court was presented with a full record containing

[3] The circuit court concluded that (1) forfeiture revenues in each agency are directed to a designated special revenue fund; (2) this fund is used to pay expenses directly associated with the forfeiture program, to pay for discretionary items that would otherwise be unavailable to law enforcement agencies, and to pay for recurring expenses, creating a secondary budget within each agency that is not subject to legislative approval and that results in agency dependence on forfeiture funds; (3) the existence of forfeiture programs in each agency depends on the revenue generated by forfeitures; (4) forfeiture revenue is used to justify the salaries of forfeiture officials, and declines in that revenue may require termination of such officials; (5) declines in forfeiture revenue will require the elimination of significant discretionary spending; and (6) in practice, officials involved in forfeiture programs control how income is budgeted and spent with little to no legislative oversight. The record before us does not provide sufficient detail to support these findings.

depositions and other evidence. The precise point at which a funding scheme tips the scales toward a finding of unconstitutionality is at best blurry and is factually dependent. *Compare Rose v. Vill. of Peninsula*, 875 F. Supp. 442, 451 (N.D. Ohio 1995) (stating the annual collection of funds amounting to more than 10% of a city's general revenue was "substantial"), *with Wolkenstein v. Reville*, 694 F.2d 35, 43 (2d Cir. 1982) (finding fees imposed sporadically or occasionally and representing slightly more than 0.5% of the budget were not substantial). Overall, the record before us lacks the foundation sufficient for this Court to facially invalidate our civil asset forfeiture scheme.

C. Pre-Seizure or Post-Seizure Hearing

The Solicitor contends the circuit court erred in finding sections 44-53-520 and -530 facially invalid for lack of provisions allowing for a pre-seizure or prompt post-seizure hearing. Green asserts the circuit court correctly determined these provisions were facially invalid because the current statutory scheme does not provide a timely, meaningful review. We agree with the Solicitor.

Due process requires notice, an opportunity to be heard, and an opportunity for judicial review. *Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). As for a pre-seizure hearing, we reiterate what this Court stated thirty years ago—a pre-seizure hearing is not required to pass constitutional muster. *Myers*, 306 S.C. at 236, 411 S.E.2d at 212 ("We find no authority that seizure of real property requires *pre*-seizure notice and hearing."). Turning to whether the current post-seizure hearing provisions are sufficient, both subsections 44-53-520(c) and -530(a) require that a forfeiture proceeding be commenced "within a reasonable time." By requiring the solicitor to commence proceedings within a reasonable time, the General Assembly has balanced an owner's right to reclaim his property with the government's desire to obtain forfeiture of contraband. Although "reasonable time" is not defined, due process does not require perfect process or even the best process. *See generally id.* ("[C]ourts have consistently held that *post*-seizure procedures are sufficient."). Our inquiry does not turn on whether we think the law should impose a specific time period, as that is a policy question for the General Assembly.

Moreover, if a state official fails to timely commence forfeiture proceedings, that failure is a defect involving a particular seizure and should be redressed in that particular case, but it does not allow us to hold the statutory scheme is unconstitutional under all its applications. *Legg*, 416 S.C. at 13-14, 785 S.E.2d at

371. In such a case, a property owner may bring his or her own action based on an innocent owner defense. Accordingly, the circuit court erred in facially invalidating sections 44-53-520 and -530 based on the absence of provisions requiring a pre-seizure or prompt post-seizure hearing.

II. Excessive Fines Clause

The Solicitor argues the circuit court erred in concluding sections 44-53-520 and -530 facially violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution and Article I, Section 15 of the South Carolina Constitution. Green contends sections 44-53-520 and -530 authorize forfeiture absent a showing of personal culpability, meaning any forfeiture would be excessive. We agree with the Solicitor.

The Excessive Fines Clause applies in a civil forfeiture proceeding. *See Austin v. United States*, 509 U.S. 602, 604 (1993) (holding the Excessive Fines Clause applies to forfeiture proceedings brought under federal law); *Timbs*, 139 S. Ct. at 687 ("The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment."). However, the circuit court's conclusion that our statutory scheme does not survive *Timbs* was error. The Supreme Court in *Timbs* concluded the Excessive Fines Clause applies to states by virtue of the Due Process Clause of the Fourteenth Amendment. *Timbs* did not categorically bar civil asset forfeiture or render any statute unconstitutional; instead, it dealt with incorporation under the Fourteenth Amendment. Because a claim that forfeiture violates the Excessive Fines Clause is inherently fact-intensive, it fits well within the scope of an as-applied challenge, not within the scope of a facial challenge.

In its order, the circuit court set forth a hypothetical scenario in which law enforcement could seize unlimited amounts of money and subject the money to forfeiture. That hypothetical is a classic example of why, under the proper set of facts, an as-applied challenge to the forfeiture statutes—not a facial challenge—would be appropriate. Just as one could hypothetically envision unlimited amounts of money or multiple vehicles being subject to forfeiture, other scenarios would most certainly survive a constitutional challenge, such as the forfeiture of a smaller amount of cash connected to selling contraband.

The circuit court's hypothetical does raise the issue of the proper test for determining when a seizure constitutes an excessive fine. We currently use the *Medlock* test, and both parties request we update this test to better align with current

Supreme Court jurisprudence. Under *Medlock*, the court must weigh "(1) the nexus between the offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder." 322 S.C. at 132, 470 S.E.2d at 377. Following *Medlock*, the Supreme Court determined that a forfeiture violates the Excessive Fines Clause "if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Accordingly, we follow numerous other courts that have updated their tests for whether a forfeiture constitutes an excessive fine, and we modify the *Medlock* test to expressly require an inquiry into whether a forfeiture is grossly disproportionate to the underlying criminal offense. *See, e.g.*, *Timbs*, 134 N.E.3d at 26 (citing several cases for the proposition that "courts deciding this issue have almost uniformly held that the Excessive Fines Clause includes a proportionality limitation"). However, because proportionality is equally as fact-intensive as the traditional *Medlock* test, we decline to provide additional factors for courts to consider when analyzing proportionality.

Conclusion

An undercurrent of this case is Green's claim that the civil forfeiture process is ripe for abuse. To an extent, this is true of any legal proceeding—civil or criminal. In the civil forfeiture arena, solicitors who commence forfeiture proceedings are entrusted with the solemn duty to pursue relief in accordance with the law. If abuse occurs in any legal proceeding, including civil forfeiture cases, our circuit courts are capable of ruling accordingly. We encourage our circuit courts to continue very careful examination of the issues presented in civil forfeiture proceedings.[4] Of

[4] The facts before may well present a textbook case for the proper—and uncontroversial—application of the forfeiture statutes. Green was convicted of distribution of cocaine, 2nd offense, and possession of marijuana with the intent to distribute, and Green does not contend the solicitor did not comply with the statutes. A common criticism in forfeiture proceedings is the solicitor's implicit merging of the criminal case with the civil forfeiture proceeding and leveraging one proceeding against the other. To be sure, there may be situations in which an innocent owner faces unnecessary delays and hurdles in reclaiming possession of seized property. We express no opinion as to whether any of those concerns are present here, and we certainly do not express an opinion as to whether Green was an innocent owner of the seized cash.

course, if the General Assembly believes our state's civil asset forfeiture laws should be amended to address the potential for abuse or be updated to align more closely with federal law, it may do so. In the case before us, however, we reverse the circuit court's order because Green failed to overcome the high threshold for finding a statute facially unconstitutional.

Green has answered the Solicitor's petition and demanded a jury trial. The circuit court considered and ruled upon the constitutionality of the forfeiture statutes in the very early stages of this litigation. We remand this case to the circuit court for further proceedings.

REVERSED AND REMANDED.

KITTREDGE, HEARN and FEW, JJ., concur. BEATTY, C.J., concurring in part and dissenting in part in a separate opinion.

CHIEF JUSTICE BEATTY: The Solicitor challenges a circuit court order finding South Carolina's civil forfeiture statutes[5] are facially unconstitutional because they violate provisions in the state and federal constitutions concerning (1) due process and (2) excessive fines. Today, the majority reverses the circuit court on both findings. I respectfully concur in part and dissent in part, as I would affirm the circuit court's ruling regarding due process. I agree with the circuit court that the current statutory scheme places an undue burden on property owners, many of whom are never charged with a crime, to prove they are not guilty of any wrongdoing in order to reclaim their property. This procedure is premised on the antiquated legal fiction that the in rem action is against the property itself and not the property owner, thereby depriving individuals of many of the safeguards that have historically protected their fundamental property interests. I will address the circuit court's rulings in reverse order from the majority, as I will first summarize the points where I concur with the majority, before focusing on the points where I differ.

I. EXCESSIVE FINES

The circuit court concluded the statutes violate the prohibitions on excessive fines by permitting the government to seize unlimited amounts of cash and other property without regard to the proportionality of the crime that may have been committed. *See* U.S. Const. amend. VIII; S.C. Const. art. I, § 15. I agree with the majority that the Excessive Fines Clause of the Eighth Amendment applies to the states; that Green has not proven his contention the civil forfeiture statutes facially violate the prohibitions on excessive fines in the state and federal constitutions; and that Green's contention is more appropriate for an as-applied challenge to the statutes, which Green did not allege here. Green's contention of excessiveness inherently requires a fact-specific analysis that goes beyond a facial challenge to the validity of the statutes. *See generally Doe v. State*, 421 S.C. 490, 502, 808 S.E.2d 807, 813 (2017) ("[I]n analyzing a facial challenge to the constitutional validity of a statute, a court 'considers only the text of the measure itself and not its application to the particular circumstances of an individual.'" (quoting 16 C.J.S. *Constitutional Law* § 163, at 161 (2015))). As a result, Green has not established,

[5] *See* S.C. Code Ann. §§ 44-53-520, -530 (2018). Section 44-53-520 sets forth the property that is subject to civil forfeiture, and section 44-53-530 outlines the procedures for civil forfeiture.

in this proceeding, that the statutes violate the constitutional prohibitions on excessive fines.

In addition, I agree with the majority's conclusion that South Carolina's three-part "instrumentality" test for determining when a seizure constitutes an excessive fine, as articulated in *Medlock v. One 1985 Jeep Cherokee VIN 1JCWB7828FT129001*, 322 S.C. 127, 130, 470 S.E.2d 373, 376 (1996), should be modified in light of subsequent authority on this topic from the United States Supreme Court in *United States v. Bajakajian*, 524 U.S. 321 (1998). In *Bajakajian*, the Supreme Court held that the "gross proportionality" standard is a necessary component of an Eighth Amendment analysis. *See Bajakajian*, 524 U.S. at 334 ("Until today, [] we have not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive. We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."). Accordingly, I agree the *Medlock* test should be modified to require an examination of whether the civil forfeiture is grossly disproportionate to the underlying criminal offense.

II. DUE PROCESS

I turn now to the circuit court's finding that South Carolina's civil forfeiture statutes violate state and federal constitutional provisions regarding due process. *See* U.S. Const. Amends. V, XIV, § 1; S.C. Const. art. I, § 3. Specifically, the circuit court concluded the statutes violate due process by (1) placing a burden on the property owner to prove his or her innocence, (2) institutionally incentivizing forfeiture officials to pursue forfeiture actions because, under the statutes, these officials retain 95% of the proceeds, and (3) failing to provide for judicial review or authorization prior to or subsequent to the seizure.

I agree with the majority that Green has not proven the existence of a facial invalidity based on the second and third points. In addition, I agree the circuit court correctly cited the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) as the proper standard for evaluating the sufficiency of due process in a particular proceeding. I depart, however, as to the conclusion to be reached from application of the *Mathews* test because I believe the circuit court correctly determined a facial invalidity exists based on the first point enumerated above—that the statutory scheme violates due process by improperly shifting the burden of proof to property owners. In reaching this conclusion, it is helpful to consider the history of civil forfeiture before analyzing the circuit court's ruling.

A. HISTORY OF CIVIL FORFEITURE

South Carolina's current civil forfeiture scheme, like that of many jurisdictions, is premised on an ancient fiction that the forfeiture action is against the property itself, not the alleged wrongdoer. Reliance on this convenient, but inaccurate, legal fiction has been the critical factor in the way courts have historically analyzed the sufficiency of due process in forfeiture cases. More recently, however, this legal fiction has been criticized as an untenable concept that is not compatible with the reality of modern forfeiture proceedings.

"Civil asset forfeiture traces back to biblical times when it was common practice to relinquish anything connected to one's wrongdoing over to God." Luis Suarez, *Guilty Until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense*, 5 Tex. A&M J. Prop. L. 1001, 1004 (2019). Many believed that an object could be involved in wrongdoing and should itself be held responsible. *Id.* Scholars point to the Book of Exodus, which instructs that when an ox gores a person to death, the ox is to be killed, but its owner escapes liability. Lydia E. Ellsworth, *Pennies from Heaven or Excessive Fines from Hell? Commonwealth v. 1997 Chevrolet Keeps Civil Asset Forfeiture's Threat to Homeownership in Purgatory*, 63 Vill. L. Rev. 125, 130 (2018) ("The guilt of the ox itself seems to be the first recorded instance of 'guilty property'--the legal fiction upon which civil forfeiture is based.").

Early English common law further developed this line of thought with the deodand procedure, by which any property that caused the death of an English citizen was forfeited to the King as a deodand. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680–81, 681 n.16 (1974) ("Deodand" derives from the Latin term "Deo dandum," meaning to be "given to God."); Suarez, *supra*, at 1004. Originally, the property seized under the deodand procedure was used for religious purposes, but the procedure evolved into a source of revenue for the Crown. Suarez, *supra*, at 1004. Later, deodands were "justified as a penalty for carelessness." *Calero-Toledo*, 416 U.S. at 681.

In addition to the deodand procedure, English law relied on two other theories of forfeiture. The second kind of common-law forfeiture, known as forfeiture of estate, fell only upon those convicted of a felony or of treason. *Austin v. United States*, 509 U.S. 602, 611–12 (1993) (explaining those convicted of a felony "forfeited his chattels to the Crown and his lands escheated to his lord" and those convicted of treason "forfeited all of [their] property, real and personal, to the

Crown"). This was not an in rem proceeding, so the forfeiture attached only upon the conviction of the offender. *The Palmyra*, 25 U.S. 1, 14 (1827).

A third kind of forfeiture existed by statute. "English law provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws." *Austin*, 509 U.S. at 612 (citation omitted). The most notable of these were the Navigation Acts of 1660. *Id.* Violations generally resulted in the forfeiture of illegally carried goods and the ship that transported them, regardless of the owner's knowledge of the misconduct. *Id.*; *see also Phile v. The Ship Anna*, 1 U.S. (1 Dall.) 197, 207–08 (C.P. Phila. Cnty. 1787) (justifying the ship's forfeiture on the principle that employers were liable for the acts of employees).

During its formation, the United States considered these English legal theories in developing its admiralty law. The United States did not embrace common law forfeiture, i.e., forfeiture upon conviction for a felony or treason, or the deodand procedure. Rather, it relied on statutory civil forfeiture, which was usually more narrowly tailored.[6] *See generally Pennsylvania v. Irland*, 153 A.3d 469, 475 (Pa. Commw. Ct. 2017) ("Statutory civil forfeiture, as the name suggests, arises by acts of legislatures, state or federal, which ascribe certain criminal character to property, not persons, and provide for their forfeiture to the government." (citation omitted)), *aff'd*, 193 A.3d 370 (Pa. 2018).

Applying concepts from English admiralty law, the United States invoked forfeiture proceedings against ships that committed crimes on the high seas. The United States Supreme Court determined the seizure of ships "was the only adequate means of suppressing the offense or wrong." Suarez, *supra*, at 1004 (citing *Harmony v. United States*, 43 U.S. 210, 233 (1844)). Additionally, another earlier court held that a forfeiture proceeding could be against the ship instead of the ship's owner, "thereby disregarding the will of the owner and the innocent owner defense." *Id.* (citing *United States v. The Little Charles*, 26 F. Cas. 979, 982 (1818)). The logic

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[6] *See Calero-Toledo*, 416 U.S. at 682 ("Deodands did not become part of the common-law tradition of this country."); *Farley v. $168,400.97*, 259 A.2d 201, 204 (N.J. 1969) (observing forfeiture of estate never took hold in the United States). *Washington v. Alaway*, 828 P.2d 591, 593 (Wash. Ct. App. 1992) (noting that, since colonial times, forfeiture in this country has existed only by statute).

used in these early decisions in admiralty law created the framework for future civil asset forfeiture proceedings. *Id.*

While the harshness of statutory, in rem forfeitures upon innocent property owners was recognized by early courts, constitutional concerns were not the centerpiece of the analyses at that time; thus, some courts simply deferred to their legislatures. *See, e.g.*, *Phile*, 1 U.S. (1 Dall.) at 207 (stating it would apply the law as written by the legislature "however unjust it seems"). Most individuals sought relief from forfeiture through a means outside the court system—a discretionary remission process created by Congress that was overseen by the executive branch of government—and innocent owners who did appear in court did not advance constitutional claims. Kevin Arlyck, *The Founders' Forfeiture*, 119 Colum. L. Rev. 1449, 1505–06 (2019).[7]

When the specter of possible constitutional infirmity was eventually raised, forfeiture was initially upheld based not on any one unified theory, but often due to adherence to existing practice based on a belief that forfeiture had already become too firmly entrenched in American law to be changed. *See Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) ("But whether the reason for section 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.").

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[7] Arlyck researched more than 500 unpublished federal forfeiture cases from 1789 to 1807 and found forfeiture during the Founding Era was significantly constrained by Congress, but it was done so through a remission procedure implemented by the Treasury Secretary in the Executive Branch, not judges, a point Arlyck states has been overlooked by many courts and commentators. Arlyck, *supra*, at 1449, 1482–84. Congress considered remission essential because forfeiture law imposed a harsh penalty for a violation regardless of intent, and judges had little latitude in reviewing a forfeiture, whereas Treasury Secretaries had the discretion to remit all or part of a forfeiture if they were persuaded there was no intent to defraud the government, and their decisions were final. *Id.* at 1482–86. Arlyck contends the existence of meaningful constraints on forfeiture in the Founding Era calls into question key historical propositions underlying modern jurisprudence and supports the conclusion "that the Constitution imposes some constraints on civil forfeiture's exercise in the present." *Id.* at 1449–50, 1518.

Forfeiture remained relatively rare in the United States until the twentieth century, as it "was generally confined to cases involving admiralty, piracy, and customs." Christine A. Budasoff, *Modern Civil Forfeiture Is Unconstitutional*, 23 Tex. Rev. L. & Pol. 467, 474–75 (2019). Observers have noted that forfeiture was not limited to certain subjects due to any overt restrictions; rather, those happened to be the areas of the federal government's primary authority in the Founding Era. Arlyck, *supra*, at 1481–82. During the prohibition era of the 1920s, state and federal governments began utilizing civil forfeiture as a means to combat domestic criminal enterprises. *Id.* at 475; *see also* Ellsworth, *supra*, at 131.

Modern day civil asset forfeiture did not become common until the "war on drugs" beginning in the 1970s and 1980s. *See generally* Budasoff, *supra*, at 475; Suarez, *supra*, at 1004. In the 1980s, Congress expanded civil asset forfeiture by amending the Comprehensive Drug Abuse and Prevention Act of 1970. Suarez, *supra*, at 1004. The amendments authorized the forfeiture of proceeds from drug related offenses, as well as forfeiture of any property that facilitated drug offenses. *Id.* at 1005; *see also* Budasoff, *supra*, at 475 ("Starting in 1984 with the passage of the Comprehensive Crime Control Act, federal law enforcement agencies could keep or sell any property confiscated through civil forfeiture." (footnote omitted)).

The expanding reach of civil forfeiture resulted in corresponding concerns about the fairness of the procedure. *See* Suarez, *supra*, at 1005. Jurisdictions differed as to whether their forfeiture provisions applied to innocent property owners or only those with varying degrees of culpability, and court decisions began to reflect this divide. *Compare United States v. U.S. Coin & Currency*, 401 U.S. 715, 720–21 (1971) ("Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a 'superstition' inherited from the 'blind days' of feudalism. And this Court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment." (footnote omitted)); *with Calero-Toledo*, 416 U.S. at 688–89 (upholding the forfeiture of an owner's yacht when a lessee, without the owner's knowledge, brought a marijuana cigarette on board but stating, "This is not to say, however, that the 'broad sweep' of forfeiture

statutes remarked in *Coin & Currency* could not, in other circumstances, give rise to serious constitutional questions.").[8]

In *Austin v. United States*, the Supreme Court observed that, "[i]n light of the historical understanding of forfeiture as punishment," the clear focus of federal forfeiture provisions on the culpability of the owner, and the evidence that Congress understood the forfeiture scheme served both to deter and to punish, it was compelled to conclude that forfeiture is, in large part, a "payment to a sovereign as punishment for some offense." *Austin*, 509 U.S. at 621–22 (citation omitted). It expressly held, therefore, that forfeiture is limited by the Eighth Amendment's Excessive Fines Clause. *Id.* at 622.

In response to these concerns, Congress passed the Civil Asset Forfeiture Reform Act ("CAFRA") in 2000 to "provide a more just and uniform procedure for federal civil forfeitures." Suarez, *supra*, at 1005 & n.35 (quoting CAFRA, Pub. L. No. 106-185, 114 Stat. 202 (2000)). Among other things, CAFRA created the "innocent owner defense." *Id.* at 1005. However, CAFRA placed the burden on the claimant to prove by a preponderance of the evidence that he or she was actually innocent. *Id.*

"Until [this] curative legislation was promulgated twenty years ago, innocence was no defense to forfeiture" under federal law. *United States v. Thompson*, 990 F.3d 680, 686 (9th Cir. 2021) (footnote omitted). In *Thompson*, the United States Court of Appeals for the Ninth Circuit recently commented that the Supreme Court's decision in *Calero-Toledo*, which rejected innocence as a defense in reliance on a long line of cases, "illustrates the injustice to innocent owners prior to the Civil Asset Forfeiture Reform Act." *Id.* at 687.

Since the adoption of CAFRA, civil forfeiture has increased exponentially at both the federal and state levels, "long past its biblical roots." Suarez, *supra*, at 1006. "Across the United States, federal and local law enforcement agencies collectively amass billions of dollars by seizing property deemed to be an instrumentality of illegal activity." Ellsworth, *supra*, at 126; *see also* Budasoff, *supra*, at 475 ("Once an unusual practice, civil forfeiture is now ubiquitous . . . . Nearly every state now

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[8] The majority in *Calero-Toledo* acknowledged Chief Justice John Marshall had raised constitutional concerns about forfeiture "over a century and a half ago" in *Peisch v. Ware*, 8 U.S. 347, 363 (1808). 416 U.S. at 689.

has its own body of forfeiture law. Those state laws allow for the forfeiture of a wide range of property, including houses, cars, and bank accounts." (footnotes omitted)). "The changes to civil forfeiture in the twentieth century fundamentally altered civil forfeiture from a tool used rarely and when other remedies were impracticable, to a regular practice depended upon to generate revenue." Budasoff, *supra*, at 476. "Accordingly, reliance on historical forfeiture practices must be closely scrutinized to determine whether those practices support the broad scope and frequent use of modern civil forfeiture." *Id.*

B. ANALYSIS OF THE CIRCUIT COURT'S DUE PROCESS RULING

In the current matter, the circuit court concluded South Carolina's forfeiture scheme is invalid because it is burden-shifting on its face. The circuit court explained, "Because S.C.'s forfeiture statutes do not require meaningful proof of any wrongful act by the defendant, they unconstitutionally shift the burden of proof to defendants who, in some cases, are not even charged with a crime."

(1) FACIAL CHALLENGE TO FORFEITURE STATUTES UNDER THE SOUTH CAROLINA CONSTITUTION

Green made a facial challenge to the South Carolina civil forfeiture scheme under both the United States Constitution and the South Carolina Constitution. The South Carolina Constitution provides a parallel due process provision to that contained in the United States Constitution. *Cf. State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) (observing the South Carolina and United States Constitutions have parallel search and seizure safeguards). "The relationship between the two constitutions is significant because '[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution.'" *Id.* (alteration in original) (citations omitted). Consequently, "state courts can develop state law to provide their citizens with a second layer of constitutional rights." *Id.* "This relationship is often described as a recognition that the [F]ederal Constitution sets the floor for individual rights while the state constitution establishes the ceiling." *Id.* Accordingly, this Court can interpret our state's constitution to provide greater protection than the Federal Constitution. *See id.*

It was previously noted in discussing the development of civil forfeiture that the English common law theory of forfeiture of estate—by which convicted felons and traitors forfeited their property to the Crown—has been roundly rejected in the

United States. *See Austin*, 509 U.S. at 611–12. In South Carolina, our state constitution specifically prohibits the automatic forfeiture of property rights upon conviction for a criminal offense:

> *[N]o conviction shall work . . . forfeiture of estate.*

S.C. Const. art. I, § 4 (emphasis added).

I make this observation at the outset because in examining due process, this Court should not neglect or underestimate the importance of the "second layer of constitutional rights" provided by our own state constitution. South Carolina forfeiture statutes are based upon a presumption of criminality, be it criminal purpose or conduct. Any consideration of the validity or invalidity of the statutory scheme must account for article I, section 4 of the South Carolina Constitution. Further, the Solicitor may not circumvent South Carolina's constitutional protections by simply labeling the confiscation of property a civil forfeiture. The fact that protection from an indiscriminate forfeiture procedure is expressly included in the South Carolina Constitution evidences its significance. Because a *conviction* for a drug-related offense cannot automatically sever an individual's fundamental property interests under our state constitution, something even less than a conviction is clearly insufficient to result in an automatic forfeiture, and due process must be afforded in all instances to prevent an unlawful deprivation. *Cf. Last v. MSI Constr. Co*. 305 S.C. 349, 409 S.E.2d 334 (1991) (holding article I, section 4 of the South Carolina Constitution prohibits the deprivation of an inmate's property interest in workers' compensation benefits without due process of law).

As the decision in *Last* illustrates, this provision in the South Carolina Constitution has previously informed this Court's analysis of due process questions, even in civil cases. Moreover, to the extent the majority argues this constitutional provision is not implicated because our civil forfeiture scheme does not impose an "automatic forfeiture," I disagree. On its face, our statutory scheme states that property "is *forfeited and transferred* to the government *at the moment of illegal use*," and "[s]eizure and forfeiture proceedings confirm the transfer." *See* S.C. Code Ann. § 44-53-520(d) (2018) (emphasis added). Accordingly, I believe our state constitution is properly referenced for the proposition that South Carolina has constitutionally recognized the importance of protecting an individual's fundamental property rights, and for my conclusion that South Carolina's civil forfeiture scheme fails to afford due process because it is burden-shifting, thereby effectively rendering many seizures final.

(2) THREE-PART DUE PROCESS FRAMEWORK

Decisions of the United States Supreme Court "indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors": (1) the private interest that will be affected by the action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest in the challenged procedure, considering the burdens an additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

(a) FACTOR 1: The Interest at Stake

I begin by identifying the central principle informing this analysis: An individual's ownership of property is a fundamental right recognized prior to our nation's formation and adopted by our nation's founders. *See, e.g.*, John Adams, *A Dissertation on the Canon and the Feudal Law* (1765) ("Property is surely a right of mankind as real as liberty."); John Locke, *Two Treatises of Government*, Book II, ch. 7, § 87 (1690) (stating an individual is born with inalienable and natural rights, among them the right to property, defined as life, liberty, and estate).

This principle was later echoed in the decisions of the United States Supreme Court, which has characterized the right to property as equal to, and inextricably intermingled with, an individual's fundamental right to liberty. *See Lynch v. Household Fin. Corp*., 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.").

As discussed above, the South Carolina Constitution recognizes the fundamental importance of an individual's property rights by specifically affording a layer of protection against unlawful deprivations through its prohibition on the automatic forfeiture of a person's property in the event of a criminal conviction. *See* S.C. Const. art. I, § 4 ("[N]o conviction shall work . . . forfeiture of estate."). Consequently, an individual clearly has an important interest in private property that

may be subject to unlawful deprivation under South Carolina's civil forfeiture scheme, a point the majority acknowledges.

(b) FACTOR 2: Risk of Erroneous Deprivation of Property Rights & Need for Additional Safeguards

The majority also acknowledges that the Solicitor's burden to establish only probable cause for a seizure of private property is "admittedly a low threshold" and that it has a "burden-shifting aspect." However, it appears to justify this procedure on the basis there are safeguards in place to protect an innocent property owner. It also notes similar schemes exist in other jurisdictions: "The burden-shifting aspect is in keeping with similar statutory schemes across the country, though some state statutes require a heightened preponderance of the evidence standard." In my view, we should not conclude the "burden shifting aspect" of South Carolina's statutory scheme is acceptable because it has methods to recover wrongly taken property or simply because this is the way things have always been done. Instead, I would find there is an unacceptable risk of an erroneous deprivation of an individual's property rights and a need for additional safeguards. This is particularly true in light of the growing alarms raised by constitutional scholars and some courts that (1) the fiction that a forfeiture action is against the property itself—and not its owner—has been used far beyond its original purpose, and (2) the safeguards in place in many jurisdictions provide only the illusion of an innocent owner defense.

(i) Fiction of In Rem Actions Expanded Beyond Original Purpose

A key difference between a civil and a criminal forfeiture proceeding is the identity of the defendant. *See generally Mims Amusement Co. v. S.C. Law Enf't Div.*, 366 S.C. 141, 150 n.4, 621 S.E.2d 344, 348 n.4 (2005). In a civil forfeiture, the government proceeds against the property, a thing (*rem*), whereas in a criminal forfeiture proceeding, the government proceeds against a human being (*personam*). *Id.* A criminal forfeiture proceeding generally arises during the criminal prosecution of a person. *Id.*

At its core, the civil forfeiture process that developed in this country is purely a legal fiction. *See Horner v. Curry*, 125 N.E.3d 584, 597 (Ind. 2019) ("Civil forfeiture 'is a device, a legal fiction, authorizing legal action against inanimate objects for participation in alleged criminal activity, regardless of whether

the property owner is proven guilty of a crime—or even charged with a crime.'" (citation omitted)).

Civil forfeitures began as a matter of jurisdictional convenience and were narrower in their application than modern forfeiture laws. *See* Stefan Herpel, *Toward a Constitutional Kleptocracy: Civil Forfeiture in America*, 96 Mich. L. Rev. 1910, 1924 (1998) (Civil "forfeiture was used to redress violations of maritime and revenue law, and to facilitate the confiscation of enemy property in wartime. Civil forfeiture, then, was viewed as a narrow exception to the basic requirement that criminal proceedings (with all of the procedural protections that have come to be associated with such proceedings) be used to enforce the criminal law."). Significantly, historical forfeiture laws were limited to only a few specific subject matters, such as customs and piracy. *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., respecting the denial of certiorari). "Proceeding *in rem* in those cases was often justified by necessity, because the party responsible for the crime was frequently located overseas and thus beyond the personal jurisdiction of United States courts." *Id.* Historical laws were also narrow as to the type of property they encompassed, as "they typically covered only the instrumentalities of the crime (such as the vessel used to transport the goods), not the derivative proceeds of the crime (such as property purchased with money from the sale of the illegal goods)." *Id.*

As a result, it has been argued that founding-era precedents do not actually support the use of modern forfeiture practices. *See id.* at 848 ("The Court has justified its unique constitutional treatment of civil forfeiture largely by reference to a discrete historical practice that existed at the time of the founding."); *id.* at 849 ("I am skeptical that this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice . . . ."); *see also* Herpel, *supra*, at 1925–26 (arguing founding-era precedents do not support the use of forfeiture against purely domestic offenses when the owner is plainly within the personal jurisdiction of both state and federal courts), *cited in Leonard*, 137 S. Ct. at 849.

Reliance on this legal fiction has allowed courts to dispense with the normal safeguards that would prevent the government from taking the property of its citizens, often when they have not been convicted of wrongdoing, because this legal fiction affects the burden of proof and the rights to counsel and a jury trial. *See* Note, *How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement*, 131 Harv. L. Rev. 2387, 2395 (2018) [hereinafter *How Crime Pays*] ("Because civil forfeiture is not a criminal

proceeding, constitutional protections that attach only to criminal prosecutions are inapposite. These include the Confrontation Clause, the Sixth Amendment right to counsel, and 'the due process requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt.'" (footnotes omitted)); *Leonard*, 137 S. Ct. at 847–48 ("Civil proceedings often lack certain procedural protections that accompany criminal proceedings, such as the right to a jury trial and a heightened standard of proof.").

The expansion of this in rem procedure has gone far beyond the use that was originally contemplated in customs and admiralty law, and it has been described as "an ancient form without substantial modern justification":

> In *Burnham v. Superior Court* [495 U.S. 604 (1990)], Justice Scalia quoted from *Schaffer v. Heitner* [433 U.S. 186 (1977)]: "[t]he fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." While in the context of *Burnham* the Court was discussing *quasi in rem* jurisdiction, the same principle applies to *in rem* jurisdiction in civil asset forfeiture actions. American civil asset forfeiture law is nothing other than an ancient form filtered through customs and admiralty law. The ancient theology of expiation of guilty property is no more than ancient superstition. Moreover, the fiction of personification has fallen into disrepute in admiralty law.

David Benjamin Ross, Comment and Note, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 Regent U. L. Rev. 259, 264 (2000-2001) (footnotes omitted).

The convenience of the fiction of in rem proceedings to reduce drug offenses "does not justify allowing law enforcement officials to circumvent fundamental constitutional due process rights," particularly where this procedure deprives individuals of substantial assets each year. *Id.* "Continuing to base jurisdiction on the legal fiction of personification, while perhaps convenient, is merely the perpetuation of an ancient form that ignores present reality—depriving individuals of cars, houses, and bank accounts is a significant punishment, more than can be inflicted in many criminal proceedings." *Id.*

Legal commentators have noted, furthermore, that the United States Supreme Court has itself recently abandoned the legal fiction that the property, rather than the owner, is guilty of wrongdoing and has recognized that it is the owner who suffers the consequences of the deprivation of property through forfeiture. *See How Crime Pays*, *supra*, at 2396–97 ("While civil forfeiture was historically justified on the grounds that the forfeited property itself was guilty and thus forfeiture served to hold the property rather than the owner accountable, the Court has abandoned this legal fiction." (footnote omitted)); *see also id.* at 2397 n.15 ("Distinguishing between in rem and in personam punishments does not depend upon, or revive, the fiction alive in [*Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931)], but condemned in *Austin* [509 U.S. at 615 n.9], that the property is punished as if it were a sentient being capable of moral choice. It is the owner who feels the pain and receives the stigma of the forfeiture, not the property." (quoting *United States v. Usery*, 518 U.S. 267, 295 (1996) (Kennedy, J., concurring) (alterations in original) (emphasis omitted in original))).

If the current "jurisprudential shift" recognizes forfeiture is implemented because an owner who allows his property to be used in an illegal manner is somehow negligent or culpable and is being punished, at least in part, for a misuse of the property, then it is arguable that the higher safeguards that normally correspond to an evaluation of culpable conduct become more relevant. *How Crime Pays*, *supra*, at 2397. The inclusion of the innocent owner defense in modern statutes like CAFRA, which instituted reforms to federal forfeiture law, also supports the inference that there now exists "an intent to hold owners accountable only where scienter exists." *Id.*

Commentators have noted that the collapse of the guilty property justification is not the only change that suggests civil forfeiture has become heavily punitive; law enforcement practices have also changed. *Id.* They point to the statement of Justice Kennedy, "[w]e would not allow a State to evade its burden of proof by replacing its criminal law with a civil system in which there is no presumption of innocence." *Id.* & n.110 (alteration in original) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 94 (1992) (Kennedy, J., dissenting)). They argue the use of criminal law enforcement techniques that have a goal of obtaining a forfeiture, rather than obtaining an arrest, demonstrates civil forfeiture has become a replacement for criminal law enforcement. *Id.* at 2397. Just as plea deals offer defendants fewer charges and a potentially lessened punishment for foregoing the trial process, "cash-for-freedom" waivers now guarantee certain criminal charges will not be filed in exchange for not

contesting the forfeiture of personal property. *Id.* at 2397–98. These practices tie the seizure to the criminal punishment process in a way that was never contemplated historically. *Id.* at 2398. At its most egregious, the use of pretextual traffic stops to obtain forfeitures similarly substitutes civil forfeiture for criminal punishment while serving as a fund-raising mechanism for law enforcement.[9] *See generally id.* at 2397.

Although the forfeiture process is characterized as civil, some early cases recognized forfeiture as being analogous to a penalty and referenced the "beyond a reasonable doubt" burden of proof. *See United States v. Brig Burdett*, 34 U.S. 682, 690 (1835) (stating a forfeiture for violation of a revenue law should be established beyond a reasonable doubt); *see also Boyd v. United States*, 116 U.S. 616, 633–634 (1886) (finding "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal"). Later cases continued to point out this dichotomy. *See Austin*, 509 U.S. at 621–22 (observing civil forfeiture has both remedial and punitive aspects but concluding forfeiture is, in large part, punishment, so it is limited by the Eighth Amendment).

(ii) Illusion of Innocent Owner Defense

Although an innocent owner defense has now been included in the forfeiture law under federal procedures and under many state statutes, including South Carolina's, its presence presents merely the illusion of due process when, with usually only a showing of *probable cause*, the government places the burden of proof upon property owners to establish sufficient grounds to reclaim their property. *See, e.g.*, S.C. Code Ann. § 44-53-586(b)(1) (2018) (providing if probable cause for the seizure is first shown by the state, the burden shifts to the innocent property owner

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[9] In South Carolina, for example, law enforcement agencies conduct broad sweeps, such as "Operation Rolling Thunder" and "Operation Strike Force," which annually target drivers for traffic violations on heavily-travelled interstates to provide probable cause for searches and, thus, civil forfeiture, with 95% of the proceeds going to law enforcement and prosecutors. *See* Nathaniel Cary, *Inside Look: How SC Cops Swarm I-85 and I-26, Looking for "Bad Guys*," Greenville News (Feb. 3, 2019, updated Apr. 22, 2020), https://www.greenvilleonline.com/in-depth/news/2019/02/03/operation-rolling-thunder-sc-civil-forfeiture-interstate-95-interstate-26/2458314002/.

to demonstrate, by a *preponderance of the evidence*, "that the person or entity was not a consenting party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture").

An innocent owner faces a difficult burden of proving a negative. Because the proceeding is deemed civil, property owners are not entitled to counsel. Consequently, they must either represent themselves or try to obtain counsel at their own expense, which in some cases could exceed the value of the property they are trying to reclaim. *See* Suarez, *supra*, at 1006–07; Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 6, 20–21 (Inst. for Just., 3d ed. 2020).

An investigation by Greenville News and Anderson Independent Mail reporters, with assistance from the USA Today Network, found forfeiture cases in South Carolina overwhelmingly ended in the government's favor.[10] Their review of cases showed more than 70% of the cases filed against individual property owners in South Carolina were won by default, nearly 20% of people who had assets seized were not charged with a related crime, and roughly the same number were charged with an offense but were not convicted. Anna Lee et al., *Exclusive: How Civil Forfeiture Errors, Delays Enrich SC Police, Hurt People*, Greenville News (Jan. 30, 2019, updated Apr. 22, 2020), https://www.greenvilleonline.com/in-depth/news/taken/2019/01/29/civil-forfeiture-south-carolina-errors-delays-property-seizures-exclusive-investigation/2460107002/.

Some innocent owners give up their claims in the face of the procedural hurdles, including the lack of legal representation and the costs involved in challenging the seizure. *See generally* William Ramsey, *What's in the TAKEN Civil Forfeiture Investigation*, Greenville News (Jan. 27, 2019, updated Jan. 17, 2020),

[10] A team of journalists examined all civil forfeitures in South Carolina's forty-six counties during the period from 2014 to 2016, a total of more than 3,000 cases. They noticed that, demographically, almost two-thirds of people who had their property taken were black men; further, poor individuals often could not pursue the return of their property or ward off a threatened seizure. *See* William Ramsey, *How We Brought TAKEN to Life*, Greenville News (Jan. 27, 2019, updated Jan. 17, 2020), https://www.greenvilleonline.com/story/news/taken/2019/01/27/taken-civil-forfeiture-investigation-greenville-news-anderson-usa-today-network-journalism/2458361002/ (discussing the methodology of the investigation).

https://www.greenvilleonline.com/story/news/taken/2019/01/27/guide-taken-investigative-series-greenville-news-journalism/2638405002/. This is also the trend nationally:

> The innocent owner defense creates the illusion that individuals are afforded proper redress to retain their property when it is taken by the government. Initiating the procedure can be costly and time consuming. When and if the individual actually gets to litigation, the difficulty in proving one's innocence is a task that even our nation's founders believed would never have to be surmounted. As James Madison once said, "[t]he personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right." Proving one's innocence to retain one's right to property is a burden that is extremely difficult to prove . . . . Therefore, it is not surprising that 90% of forfeitures are uncontested while considering that only 8% of cash seizures made by the DEA between 2007 and 2016 were eventually returned to their owners. Individuals know that the likelihood of regaining possession of property is slim to none, and if they are able to retrieve their property, it may be cost-prohibitive.

Suarez, *supra*, at 1015–16 (alteration in original) (footnotes omitted).

While the onerous nature of the burden on property owners might not have caused alarm bells when the items subject to forfeiture were illegal drugs and paraphernalia related to trafficking, the vastly expanded use of this procedure to seize cash, cars, boats, and even family homes on the basis they are drug-associated "contraband" has triggered warnings regarding the erosion of due process. *See* Stephen J. Moss, Comment, *Clear and Convincing Civility: Applying the Civil Commitment Standard of Proof to Civil Asset Forfeiture*, 68 Am. U. L. Rev. 2257, 2259 (2019) ("The abuses of civil asset forfeiture are well-known, well-documented, and well-ridiculed."); *see also* Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 2 (Inst. for Just., 2d ed. 2015) ("Civil forfeiture threatens the constitutional rights of all Americans. Using civil forfeiture, the government can take your home, business, cash, car or other property on the mere

suspicion that it is somehow connected to criminal activity—and without ever convicting or even charging you with a crime.").

Courts and commentators are beginning to express concern as to the sweeping changes in the use of in rem forfeiture proceedings that have been upheld under existing precedent and the increasing potential for abuse as escalating sums of property are forfeited each year. *See generally Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) ("Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's 'civil' penalties include . . . forfeiture provisions that allow homes to be taken . . . ."); *Leonard*, 137 S. Ct. at 848 ("This system—where police can seize property with limited judicial oversight and retain it for their own use—has led to egregious and well-chronicled abuses."); Robert Lieske, *Civil Forfeiture Law: Replacing the Common Law with a Common Sense Application of the Excessive Fines Clause of the Eighth Amendment*, 21 Wm. Mitchell L. Rev. 265, 267 & n.18 (1995) (asserting civil forfeiture would be deemed unconstitutional if not for the reliance on ancient doctrines that are no longer viable in modern society and the tendency of courts to simply reiterate that forfeiture statutes "have always been permitted in the past").

For these reasons, we should not rely on a blind recitation of prior case law—premised on a questionable legal fiction—that finds no impropriety when a civil forfeiture law places a higher burden on innocent owners to recover their property than the burden the state faces to seize it. In the opinion of many legal scholars, this legal fiction should not be retained simply because it is deemed too firmly fixed in our jurisprudence to be replaced. *Cf. Bennis v. Michigan*, 516 U.S. 442, 453 (1996) (admitting the "argument that the Michigan forfeiture statute is unfair because it relieves prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners . . .[,] in the abstract, has considerable appeal," but stating, "We conclude today, as we concluded 75 years ago, that the cases authorizing actions of the kind at issue are 'too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.'" (quoting *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 511 (1921)); *id.* at 454 (1996) (Thomas, J., concurring) ("One unaware of the history of forfeiture laws and 200 years of this Court's precedent regarding such laws might well assume that such a scheme is lawless—a violation of due process.").

In my view, the majority clings to precedent regarding an ancient legal fiction, despite its misgivings, because this is the way things have always been, and then it

insulates the fiction from further scrutiny behind an unassailable presumption of constitutionality. I believe, however, that an in-depth analysis of the historical antecedents discredits the fundamental basis for this antiquated precedent, and current sensibilities should compel us to conclude otherwise. The majority dismisses the authority cited by the circuit court, finding it to be either distinguishable or an unpersuasive "outlier." For example, the circuit court relied on *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), in which the United States Supreme Court held that Colorado's legislation by which "a defendant must prove her innocence by clear and convincing evidence to obtain the refund of costs, fees, and restitution paid pursuant to an invalid conviction" did "not comport with due process." *Id.* at 1255. Applying the *Mathews* test, the Supreme Court stated the petitioners "have an obvious interest in regaining the money they paid to Colorado" and, once their "convictions were erased, the presumption of their innocence was restored." *Id.* As a result, "Colorado may not retain funds taken from [the petitioners] solely because of their now-invalidated convictions, . . . for Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." *Id.* at 1256. The Supreme Court found there is a risk of an erroneous deprivation of the petitioners' interest in the return of their funds, where the law conditioned refunds on the petitioners' proof of their innocence by clear and convincing evidence. *Id.* While the majority dismisses *Nelson* as distinguishable, at its core *Nelson* involves the application of the *Mathews* framework, which is present here, and any dissimilarity does not vitiate the essential truth contained in the Supreme Court's conclusion: "[T]o get their money back, [petitioners] *should not be saddled with any proof burden*." *Id.* (emphasis added). The Supreme Court's admonition is no less true in the context of this appeal than it is in *Nelson*.

A growing recognition that civil forfeiture does not satisfy constitutional due process requirements has resulted in many states abolishing civil forfeiture or reforming their procedures. According to statistics compiled by the Institute for Justice, just since 2014, thirty-seven states and the District of Columbia have reformed their laws governing civil forfeiture. *Civil Forfeiture Reforms on the State Level*, Institute for Justice, https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/ (last visited Aug. 15, 2022). Four states have abolished civil forfeiture in its entirety. *Id.* (indicating "four states—North Carolina (1985), New Mexico (2015), Nebraska (2016) and Maine (2021)—have abolished civil forfeiture entirely and only use criminal law to forfeit property").

The specific problem as to the burden of proof is one that exists in many jurisdictions because it is a common component of the procedures for civil forfeiture. A sizable minority of states has now removed the burden from innocent owners and placed it on the government. *See id.* ("Fifteen states and the District of Columbia require the government to bear the burden of proof for innocent-owner claims," including Alabama, Arizona, California, Colorado, Connecticut, Florida, Iowa, Mississippi, Montana, New Mexico, New York, Oregon, Pennsylvania, Utah, and Wisconsin.). Further, another sizable minority require a criminal conviction. *See id.* ("Sixteen states require a conviction in criminal court to forfeit most or all types of property in civil court. However, these conviction provisions are not the same as ending civil forfeiture."). I find South Carolina's placement of a burden of proof upon an innocent owner that outweighs the burden placed upon the state to seize the property creates an unacceptable risk of an erroneous deprivation of an individual's property rights.

(c) FACTOR 3: Government's Interest

I further find the government does not have a strong interest in the current procedure and should bear the burden of additional requirements because, as the circuit court observed, the government has "zero legitimate interest in seizing or withholding money or other property when the defendant has not been convicted of a crime, and the government has not proven that the property was connected to a crime."

It is important to distinguish the types of property at issue because it has a bearing on the strength of the government interest at stake. As the majority notes, our civil forfeiture statutes address two types of property that are subject to civil forfeiture: (1) contraband per se (property such as narcotics and smuggled goods, the possession of which, by itself, is a crime), and (2) derivative contraband (property used in the commission of a crime or traceable to the proceeds of criminal activity, such as tools or cash). *Mims Amusement Co. v. South Carolina Law Enforcement Division*, 366 S.C. 141, 149–50, 621 S.E.2d 344, 348 (2005).

The government has an obvious remedial interest in removing pure contraband from public circulation, so whether the property owner is blameless or unknowing does not affect a state's power to seize them. *See generally Bennis v. Michigan*, 516 U.S. 442, 459 (1996) (Stevens, J., dissenting) (discussing the types of property subject to seizure and distinguishing the government interest at stake). Justice Stevens noted "[f]orfeiture is more problematic for [derivative contraband],

both because of its potentially far broader sweep, and because the government's remedial interest in confiscation is less apparent." *Id.* at 460. Justice Stevens noted many of the earliest cases of seizure involved ships that engaged in piracy on the high seas, in the slave trade, or in smuggling goods into the United States; because the entire mission of the ship was unlawful, admiralty law treated the ship as the offender and the cargo was seized despite the absence of fault by the owner. *Id.* at 460–61 (footnotes omitted). The key difference, however, is that "under 'the maritime law of the Middle Ages the ship was not only the source, but the limit, of liability.'" *Id.* at 461 (citation omitted). Without question, the government can have no legitimate interest in compelling the forfeiture of property from an innocent owner or one who has not been afforded due process.

(d) RESULT OF APPLYING *MATHEWS* FRAMEWORK

Civil forfeiture has expanded far beyond its historical roots and far beyond the contemplations of our nation's founders and earlier decisions justifying its use. Over time, the lack of normal safeguards through use of the in rem process, the exponential increase in the amount of property seized, and the documented instances of abuse have created a national crisis.

Several years ago, a bipartisan group of over 100 members of the South Carolina General Assembly expressed concerns over our state's civil forfeiture procedures. Several bills were proposed and lengthy discussions ensued over the perceived need for reform. *See* Nathaniel Cary, *Sweeping Changes to SC's Civil Asset Forfeiture Stalled for the Year*, The State (Apr. 16, 2019) (written by a reporter for The Greenville News), https://www.thestate.com/news/politics-government/article229313124.html (indicating changes in the forfeiture statutes are needed but would have an impact on related provisions that must also be addressed, necessitating further scrutiny by the legislature). I agree that changes are needed and that the enactment of laws is solely within the purview of the General Assembly. *See generally Townsend v. Richland Cnty.*, 190 S.C. 270, 274, 2 S.E.2d 777, 779 (1939) (observing the law-making authority of the government rests with the legislature).

Until changes are made in this regard, however, I am compelled to agree with the circuit court that South Carolina's civil forfeiture scheme, *as currently formulated*, unconstitutionally places a burden on individuals to prove their innocence in violation of due process requirements under our state and federal constitutions, thus rendering it facially invalid. As a result, I would affirm the circuit

court on this point. *See* U.S. Const. Amends. V, XIV, § 1; S.C. Const. art. I, § 3. Because even a conviction for a drug-related offense cannot automatically sever an individual's fundamental property rights under our state constitution, *see* S.C. Const. art. I, § 4, a statutory scheme that places an undue burden upon an individual to retain his or her property based on something even less than a conviction cannot withstand constitutional scrutiny.[11]

The majority acknowledges that the burden-shifting nature of civil forfeiture laws has been widely criticized in recent years, yet maintains this Court is "not called upon to decide whether a change in the law would be wise" and expresses concern that this Court should not infringe upon legislative authority. The majority's concern is misplaced. This Court does not intrude upon legislative authority when it simply fulfills its appellate role of reviewing the constitutionality of existing legislation and expressly leaves any future statutory changes to the General Assembly. For all of the foregoing reasons, I concur in part and dissent in part.

[11] Although I find our current civil forfeiture scheme is unconstitutional because it is burden-shifting, I do not believe criminal forfeiture is unconstitutional unless it is grossly disproportional to the gravity of the offense and is not connected to the offense. *See generally United States v. Bajakajian*, 524 U.S. 321, 334 (1998). For this reason, I invite the General Assembly to consider replacing the current civil forfeiture scheme with a forfeiture procedure that is predicated on a conviction, as a number of states have already done, instead of probable cause.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually, Defendants,

of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

and

Lennar Carolinas, LLC, Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction

Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

of whom Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena

Lucas, and Danny and Ellen Davis Morrow are the Petitioners.

Appellate Case No. 2020-001048

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Berkeley County
J.C. Nicholson Jr., Circuit Court Judge

Opinion No. 28114
Heard February 1, 2022 – Filed September 14, 2022

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jesse Sanchez, of The Law Office of Jesse Sanchez, John Calvin Hayes IV, of Hayes Law Firm, LLC, and Catherine Dunn Meehan, of The Steinberg Law Firm, LLP, all of Charleston; and Michael J. Jordan, of The Steinberg Law Firm, LLP, of Goose Creek, all for Petitioners.

James Lynn Werner, Jenna Brooke Kiziah McGee, and Katon Edwards Dawson Jr., all of Parker Poe Adams & Bernstein LLP, of Columbia, for Respondent Lennar Carolinas, LLC; Robert Trippett Boineau, Heath McAlvin Stewart III, and John Adam Ribock, all of McAngus, Goudelock & Courie, LLC, of Columbia, for Respondent Spring Grove Plantation Development, Inc.; Carmen Ganjehsani, James H. Elliott Jr., and Francis Heyward Grimball, all of Richardson, Plowden, & Robinson, of Columbia, for Respondents Manale

Landscaping, LLC and Decor Corporation; Samia Hanafi Nettles, of Richardson Plowden & Robinson, PA, of Charleston, for Respondent Decor Corporation; Theodore L. Manos, of Robertson Hollingsworth Manos & Rahn, LLC for Respondent Super Concrete of SC; David Cooper Cleveland and Trey Matthew Nicolette, both of Clawson and Staubes, LLC, of Charleston, for Respondent Myers Landscaping, Inc.; Rogers Edward Harrell III, of Murphy & Grantland, PA, of Columbia, for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.; Steven L. Smith and Zachary James Closser, both of Smith Closser, of Charleston, and Samuel Melvil Wheeler, of Whitfield-Cargile Law, PLLC, of Brevard, NC, all for Respondent Knight's Concrete Products, Inc.; Brent M. Boyd and Timothy J. Newton, both of Murphy & Grantland, PA, of Columbia, for Respondents Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC; Alan Ross Belcher Jr. and Elizabeth Wieters, both of Hall Booth Smith, PC, of Mount Pleasant, and Christine Companion Varnado, of Siebels Law Firm, of Charleston, all for Respondent Guaranteed Framing, LLC; Erin DuBose Dean, of Tupper, Grimsley, Dean & Canaday, PA, of Beaufort, for Respondents LA New Enterprises Construction, Inc. and Raul Martinez Masonry; Stephen Lynwood Brown and Catherine Holland Chase, both of Clement Rivers, LLP, of Charleston, and Preston Bruce Dawkins Jr., of Aiken Bridges Elliott Tyler & Saleeby, PA, of Florence, all for Respondent Alpha Omega Construction Group, Inc.; and Jenny Costa Honeycutt, of Best Honeycutt, PA, of Charleston, for Respondent South Carolina Exteriors, LLC; Clarke W. DuBose, of Haynsworth Sinkler Boyd, PA, of Columbia, for Respondent Southern Green, Inc.; Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent Builders Firstsource-Southeast Group, LLC; Ronald G. Tate Jr., of Gallivan, White & Boyd, PA, and Robert Batten Farrar, of Rogers Townsend, LLC, both of Greenville, for Respondent Volkmar Consulting Services, LLC; Sidney Markey

Stubbs, of Baker Ravenel & Bender, LLP, of Columbia, for Respondent DVS, Inc.; David Shuler Black, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent TJB Trucking/Leasing, LLC; Shanna Milcetich Stephens and Wade Coleman Lawrimore, both of Anderson Reynolds & Stephens, LLC, of Charleston, for Respondent A.C.&A. Concrete, Inc.; John Elliott Rogers II, of Ward Law Firm, PA, of Spartanburg, for Respondent Land/Site Services, Inc.; David Starr Cobb, of Turner Padget Graham & Laney, PA, of Charleston, for Respondent Construction Applicators Charleston, LLC; Kathy Aboe Carlsten, of Copeland, Stair, Valz & Lovell, LLP, and N. Keith Emge Jr., of Resnick & Louis, PC, both of Charleston, for Respondent Civil Site Environmental, Inc.; Scott Harris Winograd, Jeffrey A. Ross, and Philip Paul Cristaldi III, all of Ross & Cristaldi, LLC, of Mount Pleasant, for Respondent Ozzy Construction, LLC.

JUSTICE KITTREDGE: This case arises out of a construction defect suit brought by a number of homeowners (Petitioners) against their homebuilder and general contractor, Lennar Carolinas, LLC (Lennar). Lennar moved to compel arbitration, citing the arbitration provisions in a series of contracts signed by Petitioners at the time they purchased their homes. As we will explain, those contracts were contracts of adhesion. Petitioners pointed to purportedly unconscionable provisions in the contracts generally and in the arbitration provision specifically. Citing a number of oppressive terms in the contracts, and without delineating between the contracts generally and the arbitration provision specifically, the circuit court denied Lennar's motion to compel, finding the contracts were grossly one-sided and unconscionable and, thus, the arbitration provisions contained within those contracts were unenforceable. The court of appeals reversed, explaining that the United States Supreme Court's holding in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* forbids consideration of unconscionable terms outside of an arbitration provision (the *Prima Paint* doctrine).[1] *Damico v. Lennar Carolinas, L.L.C.*, 430 S.C. 188, 844 S.E.2d 66 (Ct.

[1] *See generally Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–06 (1967) (explaining that under the Federal Arbitration Act, courts may

App. 2020). The court of appeals found the circuit court's analysis ran afoul of the *Prima Paint* doctrine as it relied on the oppressive nature of terms outside of the arbitration provisions.

While we agree with the court of appeals that the circuit court violated the *Prima Paint* doctrine, we nonetheless agree with Petitioners and find the arbitration provisions—standing alone—contain a number of oppressive and one-sided terms, thereby rendering the provisions unconscionable and unenforceable under South Carolina law. We further decline to sever the unconscionable terms from the remainder of the arbitration provisions for two reasons. First, doing so would require us to blue-pencil the agreement regarding a material term of the contract, a result strongly disfavored in contract disputes. Second, as a matter of policy, we find severing terms from an unconscionable contract of adhesion (in this case, an arbitration provision) discourages fair, arms-length transactions. Rather, were we to honor the severability clause in contracts such as these, it would encourage sophisticated parties to intentionally insert unconscionable terms—that often go unchallenged—throughout their contracts, believing the courts would step in and rescue the party from its gross overreach. This is not to say severability clauses in general should not be honored, because of course we are constrained to enforce a contract in accordance with the parties' intent. Rather, we merely recognize that where a contract would remain one-sided and be fragmented after severance, the better policy is to decline the invitation for judicial severance. We therefore affirm in part and reverse in part the court of appeals' decision and reinstate the circuit court's denial of Lennar's motion to compel.

I.

The Abbey is a subdivision in the Spring Grove Plantation neighborhood located in Berkeley County and consists of sixty-nine single-family homes constructed between 2010 and 2015. The lots in the Abbey were originally owned and developed by Spring Grove Plantation Development, Inc. (Spring Grove), which

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"consider only issues relating to the making and performance of the agreement to arbitrate," rather than those affecting the contract as a whole); *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) (holding *Prima Paint* applied not only to claims of fraud in the inducement of an arbitration agreement, but to all contract defenses, including unconscionability, and stating that "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause").

graded the area and constructed the storm drainage system and roads. Spring Grove in turn sold the partially-developed subdivision to Lennar, which completed construction with the help of a number of subcontractors and sold all sixty-nine homes.

In the course of development, Petitioners contracted with Lennar to build new homes to their specifications in The Abbey.[2] As part of those transactions, Lennar and Petitioners executed individual form contracts (the purchase and sale agreement) containing an arbitration provision. Section 16 of the purchase and sale agreement, titled "Mediation/Arbitration of Disputes," contains ten, numbered paragraphs setting forth the arbitration agreement. In relevant part, paragraph 1 states:

> The parties to this [purchase and sale a]greement specifically agree that this transaction involves interstate commerce and that any Dispute . . . shall first be submitted to . . . binding arbitration as provided by the Federal Arbitration Act . . . . "Disputes" (whether contract, warranty, tort, statutory or otherwise)[] shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this [purchase and sale a]greement, the Property, the Community or any dealings between Buyer and [Lennar]; (2) arising by virtue of any . . . warranties alleged to have been made by [Lennar] or [Lennar's] representatives; and (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the Property, or in the Community. Buyer has executed this [purchase and sale a]greement on behalf of his or her children and other occupants of the Property with the intent that all such parties be bound hereby.

Paragraph 4 further provides "that [Lennar] may, at its sole election, include [Lennar's] contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration" and "that the mediation and arbitration will be limited to the parties specified herein." Finally, paragraph 5 states, "Buyer and [Lennar] further agree that no finding or stipulation

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[2] We note Petitioner Lenna Lucas bought a pre-owned home built by Lennar in the Abbey, so there is no direct contract between Petitioner Lucas and Lennar.

of fact, no conclusion of law, and no arbitration award in any arbitration hereunder shall be given preclusive or collateral estoppel effect in any other arbitration, judicial, or similar proceeding unless there is mutuality of parties."

After closing on their new homes, Petitioners became aware of damage to their properties, which they attributed to Spring Grove, Lennar, and the subcontractors (collectively, Respondents). As a result, they filed a construction defect suit against Respondents for, among other things, negligence, breach of contract, and breach of various warranties.

Subsequently, Lennar moved to compel arbitration under either the Federal Arbitration Act (FAA)[3] or the South Carolina Uniform Arbitration Act (SCUAA).[4] As is relevant to this appeal, Lennar argued Petitioners were required to arbitrate under two different contracts: (1) the purchase and sale agreement; and (2) a limited home warranty agreement (the limited warranty booklet). The arbitration provisions within both contracts are virtually identical, so for ease of reference, we will refer only to the terms in the purchase and sale agreement unless otherwise noted. Petitioners opposed Lennar's motion to compel arbitration, claiming, among other things, that the arbitration agreement was unconscionable.

Ultimately, the circuit court denied Lennar's motion to compel. Initially, the circuit court found the "arbitration agreement" consisted of the entirety of the purchase and sale agreement and the limited warranty booklet, explaining the extensive cross-references between the two contracts combined them into a single agreement akin to that found in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016) (holding an arbitration agreement was not merely a standalone provision but was instead embedded in multiple contract terms, including ones dealing with a limited home warranty). Likewise, the circuit court held the contracts were unconscionable, citing a number of oppressive, one-sided provisions. The court declined to sever the unconscionable provisions because the oppressive terms pervaded the entirety of the contracts, "thereby rendering 'severability' impractical, if not impossible."[5]

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[3] 9 U.S.C. §§ 1–16 (2021).

[4] S.C. Code Ann. §§ 15-48-10 to -240 (2005).

[5] The circuit court additionally held arbitration could not be compelled under federal or state law. Specifically, the court determined the contracts involved

Lennar appealed, and the court of appeals reversed. In relevant part, the court of appeals found the arbitration agreement between Petitioners and Lennar consisted only of Section 16 of the purchase and sale agreement. Relying on the *Prima Paint* doctrine, the court of appeals held the circuit court wrongly considered terms outside of the actual arbitration agreement. In particular, the court of appeals distinguished the "intertwined" arbitration agreement in *D.R. Horton* from the "distinct, separate" arbitration agreement in the purchase and sale agreement, and found the circuit court impermissibly considered the terms found in the limited warranty booklet. However, the court of appeals ended its analysis upon concluding that the arbitration agreement was composed entirely of Section 16 of the purchase and sale agreement.

While we agree with the court of appeals in that regard, we find it necessary to continue the analysis to determine whether any terms within Section 16 of the purchase and sale agreement were unconscionable in and of themselves. We therefore granted Petitioners' petition for a writ of certiorari.

II.

As an initial matter, Petitioners argue the contracts at issue do not involve interstate commerce, and therefore Lennar cannot compel Petitioners to arbitrate under federal law, namely, the FAA. We disagree. The transactions here manifestly involve interstate commerce, as they involved the construction of new homes built to Petitioners' specifications rather than the purchase of pre-existing homes. *See, e.g.*, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458 n.8, 730 S.E.2d 312, 318 n.8 (2012) ("[O]ur appellate courts have consistently recognized that contracts for construction are governed by the FAA."); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (explaining that contracts requiring the construction of a new building implicate interstate commerce because it would be "virtually impossible" to construct the building "with materials, equipment[,] and supplies all produced and manufactured solely

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intrastate commerce, rather than interstate commerce, and therefore the FAA did not apply. Further, the circuit court determined the arbitration agreement did not comply with the SCUAA, specifically, section 15-48-10(a). *See* S.C. Code Ann. § 15-48-10(a) ("Notice that a contract is subject to arbitration pursuant to [the SCUAA] shall be typed in underlined capital letters . . . on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration [pursuant to the SCUAA].").

within the State of South Carolina"). Because federal law preempts state law in this instance, we need not decide whether Lennar could also compel arbitration under the SCUAA.

III.

Petitioners present two challenges to the court of appeals' opinion. First, Petitioners defend the circuit court's reliance on *D.R. Horton*, asserting the court of appeals erred in limiting the scope of the arbitration agreement to Section 16 of the purchase and sale agreement alone. Specifically, Petitioners claim the purchase and sale agreement and the limited warranty booklet expressly incorporate one another by reference and extensively cross-reference one another such that one cannot be read without the other. Petitioners therefore contend the two contracts should be read as one large arbitration agreement rather than two separate contracts. We agree with the court of appeals and reject Petitioners' first argument.

Pursuant to the *Prima Paint* doctrine, the FAA requires courts to separate the validity of an arbitration clause from the validity of the contract in which it is embedded. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint*, 388 U.S. at 395). The validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.").

As a result, as we stated in *D.R. Horton*, "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract." 417 S.C. at 48, 790 S.E.2d at 4. Necessarily, then, the Court must first define the scope of the arbitration agreement before considering whether that agreement is unconscionable. *Id.* at 48 n.4, 790 S.E.2d at 3 n.4 (explaining the scope of the arbitration agreement must first be determined "because it controls which portions of the Agreement we may properly consider in conducting our unconscionability analysis").

In *D.R. Horton*, one of the central issues involved defining the scope of the arbitration agreement. *Id.* at 48, 790 S.E.2d at 4. The plaintiff-homeowners claimed the arbitration agreement comprised the entire section of the contract titled "Warranties and Dispute Resolution"; the defendant-homebuilder claimed the arbitration agreement was contained solely within one subparagraph of that section. *Id.* A majority of the Court ultimately agreed with the plaintiffs, finding

the arbitration agreement broadly encompassed the entirety of the "Warranties and Dispute Resolution" section of the contract. *Id.* The Court explained the various subparagraphs in the "Warranties and Dispute Resolution" section "contain[ed] numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." *Id.* Therefore, the Court concluded that the section as a whole—including the subparagraphs relating to arbitration *and* those relating to warranties—"must be read [together] to understand the scope of the warranties and how different disputes are to be handled." *Id.*

Here, in contrast to *D.R. Horton*, there is a distinct section of the purchase and sale agreement that sets forth the entirety of the arbitration agreement. As correctly noted by the court of appeals, Section 16 of the agreement—titled "Mediation/Arbitration of Disputes"—deals solely with the scope of arbitration and the requisite formalities accompanying an arbitration proceeding, such as the procedural rules and the number of arbitrators required to resolve the dispute. Within Section 16, there is nothing that refers to the limited warranty booklet or incorporates it by reference. Rather, Section 16 is a standalone arbitration provision, dissimilar from that in *D.R. Horton*.

We therefore find the arbitration agreement is contained solely within Section 16 of the purchase and sale agreement.[6]

IV.

Petitioners' second argument posits that even assuming the court of appeals correctly narrowed the scope of the arbitration agreement to Section 16 of the

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[6] As noted above, the limited warranty booklet contains an arbitration agreement that uses identical language to Section 16 of the purchase and sale agreement. Because the arbitration agreements in both contracts are standalone provisions, it is legally irrelevant that the portions of the contracts outside of the arbitration agreements extensively cross-reference one another and incorporate one another by reference. *See Buckeye Check Cashing, Inc.*, 546 U.S. at 445–46 ("*Prima Paint* and *Southland* [*Corp. v. Keating*, 465 U.S. 1 (1984),] . . . establish[ed] three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity [as a whole] is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.").

purchase and sale agreement, it nonetheless erred in failing to analyze whether Section 16 contained unconscionable terms that would render the agreement to arbitrate unenforceable. Petitioners contend they lacked a meaningful choice with respect to Section 16 and that certain terms in Section 16 are so oppressive that no reasonable person would have agreed to them. We agree and now turn to the general law of unconscionability.

Section 2 of the FAA provides that any arbitration provision contained within a written contract involving interstate commerce must be enforced except for "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

At its core, unconscionability is defined "as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996); 17A Am. Jur. 2d *Contracts* § 272 (2016) (characterizing these two prongs as procedural and substantive unconscionability, respectively); *see also id.* § 271 ("Generally, the doctrine of unconscionability protects against unfair bargains and unfair bargaining practices . . . ."). This general description of unconscionability applies to all contract terms, not merely arbitration provisions. *Cf. AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011) (noting that while arbitration agreements may be invalidated by generally applicable contract defenses, including unconscionability, they may not be invalidated by "defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue"). *Compare Fanning*, 322 S.C. at 403, 472 S.E.2d at 245 (involving an unconscionability analysis of a contract that did not contain an arbitration provision), *with Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007) (involving a similar unconscionability analysis for a contract that contained an arbitration provision).

A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case. *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 614, 730 S.E.2d 862, 867 (2012) (citation omitted). Indeed, we have previously "emphasize[d] the importance of a case-by-case analysis in order to

address the unique circumstances inherent in the various types of consumer transactions." *Compare Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (holding an adhesion contract between an automobile dealership and a customer was unconscionable), *with Munoz*, 343 S.C. at 541–42, 542 S.E.2d at 365 (declining to find unconscionable an adhesion contract between a consumer and a lender). "In analyzing claims of unconscionability in the context of arbitration agreements, the [United States Court of Appeals for the] Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–69 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938–40 (4th Cir. 1999)).

As explained further below, a take-it-or-leave-it contract of adhesion is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice. *See generally* 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9 & n.9 (2020) (collecting cases). Rather, to constitute unconscionability, the contract terms must be so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Fanning*, 322 S.C. at 403, 472 S.E.2d at 245; *see also* 17A Am. Jur. 2d *Contracts* § 272 ("Although procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, both need not be present to the same degree; the agreement may be judged on a sliding scale: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. In an exceptional case, however, a court may find that a contract provision is so outrageous as to warrant holding it unenforceable on the grounds of substantive unconscionability alone." (footnotes omitted)). In this case, we do not hesitate in upholding the finding of unconscionability concerning Section 16 of the purchase and sale agreement.

A.

As noted, under South Carolina law, the same principles of unconscionability apply to contract terms and arbitration provisions alike. The touchstone of the analysis begins with the presence or absence of meaningful choice. *See Fanning*, 322 S.C. at 403, 472 S.E.2d at 245; *see also Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004), 361 S.C. at 555, 606 S.E.2d at 758 (explaining that a party seeking to prove an arbitration

agreement is unconscionable must allege he lacked a meaningful choice as to the arbitration clause specifically, not merely that he lacked a meaningful choice as to the contract as a whole). "Whether one party lacks a meaningful choice . . . typically speaks to the fundamental fairness of the bargaining process." *D.R. Horton*, 417 S.C. at 49, 790 S.E.2d at 4 (citation omitted). Thus, in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts must consider, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669; *see generally* 17A Am Jur. 2d *Contracts* § 272 (listing a number of factors that courts may considering in conducting an unconscionability analysis); 17 C.J.S. *Contracts* § 10 (same).

Parties frequently claim they lack a meaningful choice when a contract of adhesion is involved. *D.R. Horton*, 417 S.C. at 49, 790 S.E.2d at 4 (explaining adhesion contracts are "standard form contracts offered on a take-it or leave-it basis with terms that are not negotiable" (internal alteration marks omitted) (citation omitted)). Because contracts of adhesion are non-negotiable, "[a]n offeree faced with such a contract has two choices: complete adherence or outright rejection." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (citation omitted).

Adhesion contracts are not per se unconscionable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669; 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9 & n.9 (collecting cases). However, given that one party to an adhesion contract "has virtually no voice in the formulation of the[] terms and language" used in the contract, *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901, courts tend to view adhesive arbitration agreements with "considerable skepticism," as it remains doubtful "any true agreement ever existed to submit disputes to arbitration," *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citations omitted). *See also* 17A Am. Jur. 2d *Contracts* § 274 (noting that "[c]ontracts of adhesion are enforceable unless they are unconscionable," but "[n]evertheless, the fact that a contract is one of adhesion is a strong indicator that [there was] an absence of meaningful choice"); 17 C.J.S. *Contracts* § 9 ("A consumer transaction which is essentially a contract of adhesion may be examined by the courts with special scrutiny to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting.").

The distinction between a contract of adhesion and unconscionability is worth emphasizing: *adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***. Nevertheless, and regrettably, it is common practice for the sophisticated drafter of contracts to routinely argue that a particular contract is not one of adhesion when that is plainly untrue. Such a specious argument does not advance the party's position and instead detracts from other legitimate arguments the party may have. After all, unconscionability requires a finding of a lack of meaningful choice *coupled with* unreasonably oppressive terms. Thus, an adhesion contract with fair terms is certainly not unconscionable, and the mere fact a contract is one of adhesion does not doom the contract-drafter's case.

Here, we find it manifest that the purchase and sale agreement is a contract of adhesion given by Lennar to all of the homebuyers in the Abbey, with only a few blank spaces to fill in, including the buyer's name, the relevant property address, and the purchase price. Other than those type of minor blank spaces, the terms of the purchase and sale agreement—particularly those of any consequence to Lennar—are non-negotiable, with some terms not even applying to specific homebuyers.[7]

Moreover, the sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions. These factors combine to highlight the significant disparity in the parties' bargaining power, with Lennar enjoying a much stronger bargaining position than Petitioners. We therefore find Petitioners lacked a meaningful choice in their ability to negotiate the arbitration agreement. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989) ("We have [] taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.").

[7] For example, Section 4 of the purchase and sale agreement lists two financing options that are mutually exclusive with one another, with checkboxes to mark which of the two options applies for any particular client.

B.

Within Section 16, Petitioners point to three provisions that are allegedly so one-sided and unreasonable as to render the agreement unconscionable. Specifically, Petitioners claim provisions in paragraphs 1, 4, and 5 require the Court to invalidate the arbitration agreement. We agree. Because paragraph 4 of Section 16 of the purchase and sale agreement contains the most egregious term, we focus our attention there.[8]

In particular, paragraph 4 states, "Seller may, *at its sole election*, include Seller's contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration; and . . . the mediation and arbitration will be limited to the parties specified herein." (Emphasis added.) It is a fundamental principle of law that the plaintiff is the master of his own complaint and is the sole decider of whom to sue for his injuries. *Myles v. United States*, 416 F.3d 551, 552 (7th Cir. 2005) ("[L]itigants are masters of their own complaints and may choose who to sue—or not to sue."); 71 C.J.S. *Pleading* § 149 (Supp. 2021) (citation omitted). Giving Lennar the "sole election" to include or exclude subcontractors in the arbitration proceeding strips Petitioners of that right and overturns a firmly entrenched legal principle. *Cf.* 17A Am. Jur. 2d *Contracts* § 272 ("Mutuality [] is a paramount consideration when assessing the substantive unconscionability of a contract term.").

It is equally concerning that paragraph 4, in conjunction with paragraph 5, creates the possibility of inconsistent factual findings that would preclude Petitioners from recovery on a purely procedural (rather than a merit) basis—a legal defense to which neither Lennar nor the other Respondents are entitled. In particular, paragraph 5 states the parties agree no factual or legal finding made in arbitration is binding in any other arbitral or judicial proceeding "unless there is mutuality of parties." However, Lennar can ensure there is never a "mutuality of parties" by exercising its "sole election" in paragraph 4 to choose the parties to the arbitration. Suppose Lennar is unable or—of more concern—unwilling to compel the other named defendants to arbitrate, instead forcing Petitioners to litigate with the remaining defendants in circuit court. In that case, it is possible for the arbitration

[8] We note Lennar made no attempt in its brief to defend paragraph 4 from Petitioners' unconscionability challenge.

defendants to blame the remaining circuit-court defendants for Petitioners' damages, and vice versa. Were the respective fact finders to agree with the defendants' arguments to that effect, Petitioners could lose in both forums merely because the fact finder believes the absent defendants to be at fault, and, critically, *it is not Petitioners' choice that those defendants are absent*. Compounding the problem, paragraph 5 prevents any findings of fact or conclusions of law in the arbitration to be binding in any subsequent arbitral or judicial proceeding instituted by Petitioners to recover their damages fully. Thus, Petitioners could not even use the fact that the arbitrator had found Lennar was not at fault when pursuing liability against the remaining circuit-court defendants, or vice versa.

This creation of a procedural defense to liability for Lennar is wholly unreasonable and oppressive to Petitioners. Moreover, the likelihood of inconsistent factual findings due to paragraphs 4 and 5 of the arbitration agreement—and the resultant, inherent unfairness to Petitioners—has become probable, rather than merely theoretically possible. We say this because, as it stands now, Spring Grove and a significant number of the subcontractors are not required to arbitrate with Lennar and Petitioners because either (1) their contracts with Lennar do not contain an arbitration provision; or (2) their contracts with Lennar (including the arbitration agreements therein) were executed after Petitioners filed their lawsuit, i.e., after the subcontractors had completed the work on Petitioners' homes and the Abbey in general; or (3) they did not have a contract with Lennar at all—much less an arbitration agreement.

As a result, we hold the arbitration agreement is unconscionable and unenforceable as written.

Ordinarily, the question of unconscionability beyond the arbitration provision would be determined in the arbitral forum. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71–72 (2010). However, in agreeing with the circuit court concerning the unconscionability of the arbitration provision, we note our additional agreement with the circuit court that unconscionability pervades the various agreements between the parties. An example of the oppressive, one-sided nature of the parties' agreement includes a provision that Petitioners "*expressly negotiated and bargained for the waiver of the implied warranty of habitability [for] valuable consideration . . .* ***in the amount of $0***." (Emphasis added.) Lennar also specifically states the "[l]oss of use of all or a portion of your Home" is not

covered by its warranty to new homebuyers.[9] Likewise, another provision of the adhesive contract states, "[T]his Agreement shall be construed as if both parties jointly prepared it"—a blatant falsehood—"and no presumption against one party or the other shall govern the interpretation or construction of any of the provisions of this Agreement." Yet another provision asserts, "Buyer acknowledges that *justice will best be served* if issues regarding this agreement are heard by a judge in a court proceeding, and not a jury." (Original emphasis omitted, new emphasis added.) This is not even to mention the fact that Lennar attempted to insert an arbitration agreement in Petitioners' deeds, characterizing the arbitration agreement as an "equitable servitude" that runs with the land in perpetuity.

We find these and other terms of the contracts to be absurd, factually incorrect, and grossly oppressive. While none of these terms factor into our unconscionability analysis for the arbitration agreement, we recognize that although the circuit court failed to honor the *Prima Paint* doctrine, it certainly hit the nail on the head in characterizing the contracts as unquestionably unconscionable.

V.

Lennar does not argue to this Court that, should we find any provision of the arbitration agreement unconscionable, we should sever that portion of the agreement in accordance with the severability clause found in the arbitration agreement.[10] However, because Lennar made a severability argument to the circuit court and court of appeals, we assume Lennar views it as an additional sustaining ground and therefore address it in the interest of judicial economy. As we will explain, we decline to sever the unconscionable provisions of the arbitration agreement.

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[9] Apparently, for Lennar to even *consider* repairing any defects in the homes they construct and sell, the defects must be minor and become apparent very quickly after the sale date. Otherwise, Lennar is off the hook for the defective housing, and the innocent homebuyers are out of luck. After all, Lennar specifically disclaims any responsibility to fix major problems to the home that result in the homebuyers losing partial or complete use of their (not-inexpensive) home.

[10] Paragraph 4 of Section 16 of the purchase and sale agreement states, "The waiver or invalidity of any portion of this Section shall not affect the validity or enforceability of the remaining portions of this Section."

If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003); *Lackey*, 330 S.C. at 397, 498 S.E.2d at 903; 17A Am. Jur. 2d *Contracts* § 313. However, severability is not always appropriate to remedy unconscionable contractual provisions. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673; 17A Am Jur. 2d *Contracts* § 314. In particular, courts are reluctant to sever the unconscionable provisions when illegality pervades the entire agreement "such that only a disintegrated fragment would remain after hacking away the unenforceable parts." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted); *see also* 17A Am Jur. 2d *Contracts* § 314. In those cases, judicial severing "look[s] more like rewriting the contract than fulfilling the intent of the parties." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted); *see also* 17A Am Jur. 2d *Contracts* § 313.

Thus, "[c]ourts have discretion [] to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive." *Doe v. TCSC, L.L.C.*, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020); *see also Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (noting there is no specific set of factual circumstances indicating when complete invalidation of the contract is a better option than merely excising the offending clauses). In exercising their discretion, courts should be guided by the parties' intent. *Doe*, 430 S.C. at 615, 846 S.E.2d at 880; 17A Am. Jur. 2d *Contracts* §§ 313–14; *see also* 17A Am. Jur. 2d *Contracts* § 273 ("To assess whether unconscionable terms can be severed from a contract or whether the entire contract should be invalidated, a court considers whether the illegality is central or collateral to the purpose of the contract.").

A.

We first note the unconscionable portion of the agreement Lennar presumably wishes us to sever from the remainder of paragraph 4 deals with the proper, "agreed upon"[11] parties to the arbitration proceeding. We decline to blue-pencil

[11] We say "agreed upon" in quotation marks to emphasize that this is an adhesion contract, making it "considerably doubtful" the agreement truly encapsulates *both* parties' intent. *See Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted). Nonetheless, because Lennar drafted the adhesion contract, we assume it does accurately represent Lennar's intent.

that provision.

It goes without saying that the clause of a contract that names the persons or entities that may properly be joined as parties to proceedings arising from any dispute involving that contract is a material term of the agreement. *Cf. Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 131–32, 678 S.E.2d 435, 439 (2009) (discussing when a term is integral to a contract, as compared to an "ancillary logistical concern," and explaining courts must look to the "essence" of the arbitration agreement; "[w]here [a particular term] has implications *that may substantially affect the substantive outcome of the resolution*, we believe that it is neither 'logistical' nor 'ancillary.'" (emphasis added)). Were we to sever such a clause from the arbitration agreement here, it would be the opposite of excising an "ancillary logistical concern." Rather, we would be materially rewriting the contract by controlling who will—or will not—participate in arbitration.

Blue-pencilling an agreement is, of course, within the Court's discretion. Here, we decline to excise a material term of the arbitration agreement and enforce the remaining, fragmented agreement. *See Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) ("A valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." (citation omitted)); *cf. id.* at 579, 762 S.E.2d at 701 (noting even when parties manifest an intent to be bound, an indefinite material term may invalidate the agreement (quoting 1 Corbin on Contracts § 2.8 (Rev. ed. 1993))); *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 478 (Fla. 2011) ("Further, if the [unconscionable] provision were severed, the trial court would be hard pressed to conclude with reasonable certainty that, with the illegal provision gone, there still remains of the contract valid legal promises on one side which are wholly supported by valid legal promises on the other—particularly[] when those legal promises are viewed through the eyes of the contracting parties." (internal quotation marks omitted) (internal citation omitted)). Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left.

B.

There are two additional, important considerations in this case that bear on severability. The first of these two considerations is that this arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion. As mentioned above, adhesion contracts "are subject to considerable skepticism upon review, due to the disparity in bargaining positions

of the parties." *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted); *see also* 17A Am. Jur. 2d *Contracts* § 274; 17 C.J.S. *Contracts* § 9. In particular, when a contract of adhesion is at issue, "there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citation omitted). Similarly, given the adhesive nature of the contract here, we find it "considerably doubtful" any true agreement ever existed to sever any oppressive provisions from the arbitration agreement, particularly given that the less sophisticated and less powerful party(s) (Petitioners) had no hand in drafting or negotiating any of the language of the arbitration agreement. *See Doe*, 430 S.C. at 615, 846 S.E.2d at 880 (explaining that when exercising its discretion to sever portions of the agreement, a court must be guided by the parties' intent).

The second additional consideration of which we take note is that this contract involves a consumer transaction. *See Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (placing emphasis on the need for a case-by-case analysis in cases involving consumer transactions so as to address the unique circumstances inherent in those types of contacts). More specifically, this contract involves the purchase of a new home. South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers. *Kennedy*, 299 S.C. at 341–44, 384 S.E.2d at 734–36 (rejecting a result in which "a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions"; and explaining that in the past, when the Court is confronted with a new scenario "not properly disposed of by our present set of rules," it "[o]nce more[] respond[s] by expanding our rules to provide the innocent buyer with protection" (citing *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976))). As we stated over thirty years ago, it is "intolerable to allow builders to place defective and inferior construction into the stream of commerce." *Id.* at 344, 384 S.E.2d at 736 (citing *Rogers v. Scyphers*, 251 S.C. 128, 135–36, 161 S.E.2d 81, 84 (1968)). Thus, the fact that the arbitration agreement contained within the purchase and sale agreement involves the construction and sale of a new home is relevant to our analysis of this consumer transaction.

Generally, courts will not enforce contracts that violate public policy. *Carolina Care Plan, Inc.*, 361 S.C. at 555, 606 S.E.2d at 758 (citation omitted).

> A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than

> focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole.

17A Am. Jur. 2d *Contracts* § 238 (Supp. 2021) (citation omitted). Public policy may be expressed in constitutional or statutory authority or in judicial decisions. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004); *see also* 17A Am. Jur. 2d *Contracts* § 238 (2016) (explaining courts may consider, *inter alia*, the subject matter of the contract, the strength of the public policy, and the likelihood that refusal to enforce the challenged term in the contract will further public policy).

Given the pervasive presence of oppressive terms in the arbitration provision, we find the severability clause here, in an unconscionable, adhesive home construction contract, is unenforceable as a matter of public policy. We are specifically concerned that honoring the severability clause here creates an incentive for Lennar and other home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer. *Cf.* Maria Kalogredis et al., *Addressing Increasing Uncertainty in the Law of Non-Competes*, Ass'n Corp. Couns. 36 (Apr. 2018), https://www.hangley.com/wp-content/uploads/2018/04/ Addressing-Increasing-Uncertainty-in-the-Law-of-Non-Competes.pdf (expressing a similar concern in the context of non-compete agreements); *Shotts*, 86 So. 3d at 478 (explaining it did not "make sense for a court to remake [the arbitration] agreement to excise the offending provisions. Given the nature of the relationship between a nursing home and its patient, the courts ought to expect nursing homes to proffer form contracts that fully comply with [the law], not to revise them when they are challenged to make them compliant. *Otherwise, nursing homes have no incentive to proffer a fair form agreement*." (emphasis added) (citation omitted)); *Richard P. Rita Pers. Servs. Int'l, Inc. v. Kot*, 191 S.E.2d 79, 81 (Ga. 1972) (declining to blue-pencil an overly restrictive non-compete agreement because it would encourage employers to "fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one's employee's cake, and eating it too." (quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 683 (1960)))[12]; *see also Howard Schultz & Assocs. of the Se., Inc. v. Broniec*, 236

[12] We note that prior to 2012, Georgia courts prohibited blue-penciling non-compete agreements under the common law. However, in 2012, Georgia's

S.E.2d 265, 269 (Ga. 1977) ("It is these very requests which are the reason for rejecting severability of employee covenants not to compete. Employers covenant for more than is necessary, hope their employees will thereby be deterred from competing, and rely on the courts to rewrite the agreements so as to make them enforceable if their employees do compete. When courts adopt severability of covenants not to compete, employee competition will be deterred even more than it is at present by these overly broad covenants against competition.").

Moreover, we do not doubt that "for every [arbitration agreement] that finds its way to court, there are thousands that exercise an *in terrorem* effect on [homebuyers] who respect their contractual obligations." Kalogredis, *supra*, at 36 (quoting Blake, *supra*, at 682). "Because most [homebuyers] simply comply with their [arbitration agreements] rather than challenging them in court, the argument goes, the law should provide a strong incentive for [home builders] not to overreach." *Id.*

C.

Given that the subject matter of the contract involves new home construction, and South Carolina has an extensive history of expanding its common law on contracts so as to protect new homebuyers, we find honoring the severability clause here—particularly because it goes to a material term of the arbitration agreement—would violate public policy. Our holding is based primarily upon two factors. First, the contract at issue is a contract of adhesion, in which it is "considerably doubtful" both parties truly intended a court to sever an unconscionable provision and

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legislature enacted sections 13-8-53 and 13-8-54, permitting—but not requiring—courts to blue-pencil such agreements. Ga. Code Ann. §§ 13-8-53(d) (2022) ("[A] court *may* modify a covenant that is otherwise void and unenforceable . . . ." (emphasis added)); *id.* § 13-8-54(b) (2022) ("[I]f a court finds that a contractually specified restraint does not comply with [the law], then the court *may* modify the restraint provision . . . ." (emphasis added)). Following the statutory enactments, Georgia courts have remained reluctant to modify overly burdensome non-compete agreements to make them enforceable, as "unreasonable restrictive covenants are against Georgia public policy." *Belt Power, L.L.C. v. Reed*, 840 S.E.2d 765, 770–71 (Ga. Ct. App. 2020) (finding significant that sections 13-8-53(d) and 13-8-54(b) gave the court discretion whether to blue-pencil an agreement, and upholding the trial court's refusal to blue-pencil the burdensome non-compete agreement in that case).

enforce the remainder of the agreement. Second, with respect to the public policy considerations inherent in this type of consumer transaction (homebuying), "the likelihood that refusal to enforce the bargain or term will further [public] policy" is, we hope, high. *See* 17A Am. Jur. 2d *Contracts* § 238.

VI.

In sum, we hold the court of appeals correctly limited the scope of the arbitration agreement to Section 16 of the purchase and sale agreement, in accordance with the *Prima Paint* doctrine. However, while the court of appeals declined to address the matter, there are several unconscionable provisions within Section 16, the most egregious of which strips Petitioners of their ability to name the parties against whom they are asserting their claims in the arbitration proceeding. Because this is a contract of adhesion, and because the transaction involves new home construction, we decline to sever the unconscionable provisions for public policy reasons. It is clear Lennar furnished a grossly one-sided contract and arbitration provision, hoping a court would rescue the one-sided contract through a severability clause. We refuse to reward such misconduct, particularly in a home construction setting. We therefore affirm in part and reverse in part the decision of the court of appeals and reinstate the circuit court's denial of Lennar's motion to compel. The matter is remanded to the circuit court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

BEATTY, C.J., HEARN, FEW, JJ., and Acting Justice Blake A. Hewitt, concur.

The Supreme Court of South Carolina

In the Matter of Debra Barry Moore, Respondent.

Appellate Case No. 2021-001473

ORDER

On January 7, 2022, Respondent was placed on interim suspension. *In re Moore*, S.C. Sup. Ct. Order dated Jan. 7, 2022 (Howard Adv. Sh. No. 2 at 19). Respondent now petitions this Court to lift interim suspension. The Office of Disciplinary Counsel does not oppose that request.

The petition is granted, and Respondent's interim suspension is hereby lifted.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina
September 6, 2022