THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEE COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Appellate Case No. 2007-065159

Abbeville County School District, *et al.*,

Appellants-Respondents,

vs.

The State of South Carolina, *et al.*, of whom Hugh K. Leatherman, as President Pro Tempore of the Senate and as a representative of the South Carolina Senate, and James H. Lucas, as Speaker of the House of Representatives and as a representative of The South Carolina House of Representatives,
are

Respondents-Appellants,

and

State of South Carolina, Nikki R. Haley, as Governor of the State of South Carolina,
are

Respondents.

PETITION TO VACATE SUPPLEMENTAL ORDER

Introduction

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Respondents-Appellants Hugh K. Leatherman, in his representative capacity and as President Pro Tempore of the South Carolina Senate, James H. Lucas, as Speaker of the South Carolina House of Representatives (hereinafter "the Senate and the House"), Nikki R. Haley, as Governor of the State of South Carolina, and the State of South Carolina hereby petition this Court to vacate its Order dated September 24, 2015.

Following this Court's decision in *Abbeville County School District v. State*, (*Abbeville II*) 410 S.C. 619, 654, 767 S.E.2d 157, 175 (2014), *reh'ing denied* (Jan. 23, 2015), the General Assembly began to immediately address the constitutional deficiencies identified by the Court's majority. Specifically, the House created the House Education Policy Review and Reform Task Force (hereinafter the "Task Force"). The Speaker charged the Task Force to submit a report to the Speaker by January 12, 2016, the very first day of the session.[1] This Task Force is a seventeen-member group including legislators,

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[1] *See* Press Release, Speaker of the S.C. House of Representatives, **Speaker Lucas Creates Task Force to Advance Education Reform** *Appoints Legislators, Educators, and Working Professionals* (January 20, 2015) (on file with the Office of the Speaker)). The press release states in part:

> The task force will be **required to submit a report** to the Speaker by the first day of next year's legislative session (Tuesday, January 12, 2016) with their findings and suggestions for reform. Speaker Lucas has **highlighted a list of specific reforms** he would like to see addressed in the report's findings:
>
> 1) **Structural** - After reevaluating the current policy, the task force must develop a structural framework that allows every individual school district to provide the opportunity for a twenty-first century education for all students.

educators, the State Superintendent of Education, the president/executive director of the South Carolina Technical College System, and a former chief education advisor to the United States Secretary of Education including five members selected by the Plaintiff Districts at their discretion.[2] The Task Force met February 23, March 23, April 27, and June 1, 2015. *Id.* Subcommittees were also created. The subcommittee for Transportation and Facilities Infrastructure met on August 31, 2015 and will be rescheduled to meet again in the near future.[3] The subcommittee for Accountability (Academic and Financial), Continuous Improvement, and Leadership (District, School and Community) met on August 12 and September 28, 2015. The subcommittee for Educator Recruitment, Retention, Effectiveness and Professional Development met July 29 and September 2, 2015

> 2) **Curriculum Standards**- Highlight the workforce needs, particularly familiarity and access to technology, of the state's private sector employers and develop recommended updates to the statewide curriculum standards that emphasize the needs for increased math and science education. Curriculum guidelines should be reevaluated from the early, formative years when students enter the state's public education system all the way through high school.
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> 3) **Programmatic Review** - Conduct a thorough review of all current statewide requirements to determine what can be eliminated, consolidated or updated in order to increase available resources for classroom instruction.
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> 4) **Work Force Development and/or Tech College** – With an emphasis on creating a job ready workforce, develop methods to enhance access and availability of current technical college resources.

(Emphasis in the original).

[2] *See* www.scstatehouse.gov/committeeinfo/HouseEducationPolicyReviewandReform Task Force/HouseEducationPolicyReviewandReformTaskForce.php (last visited Oct. 12, 2015).

[3] The subcommittee for Transportation and Facilities Infrastructure was scheduled to meet again on October 8, 2015 but has to be rescheduled due to recent weather related events.

and will be rescheduled to meet again in the near future.[4] The subcommittee on College and Career Pathways of High Quality Learning Opportunities in Elementary, Middle, and High Schools met on September 15, 2015 and will be rescheduled to meet again in the near future.[5] Finally, the High Quality Early Childhood Education and Family Engagement Early Childhood subcommittee met on August 13 and September 30, 2015.

In the Senate, President Pro Tempore Hugh K. Leatherman formed the Senate Special Subcommittee for Response to *Abbeville II* ("Special Committee"), which consists of five Senators dedicated to addressing the constitutional violation identified in *Abbeville II*. The Special Subcommittee met April 23 and August 24, 2015. A third meeting was scheduled for October 6, but was cancelled due to recent weather related events. The Special Subcommittee is scheduled to meet again on October 28, 2015. At the first meeting, the Special Subcommittee focused its attention on ascertaining the full scope of the issues arising from the *Abbeville II* decision. The second meeting, held in Plaintiff District Lexington 4's Early Childhood Development Center, focused on the transportation challenges faced by the Plaintiff Districts. The Special Subcommittee received testimony from affected districts concerning, among other matters, the need for additional bus drivers and the challenges they face with regards to bus driver certification. The next meeting of the Special Subcommittee will focus on the *Profile of the South Carolina Graduate* with specific attention paid to the manner in which the associated goals identified in the *Profile*

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[5] The subcommittee on College and Career Pathways of High Quality Learning Opportunities in Elementary, Middle, and High Schools was scheduled to meet again on October 12, 2015 but has to be rescheduled due to recent weather related events.

may be achieved in the Plaintiff Districts and how achieving those goals will meet the needs identified in *Abbeville II*. Before the next legislative session, the Special Subcommittee will hold a series of meetings focused on the particular issues identified in *Abbeville II* with a goal of having recommendations ready to present to the Senate as expeditiously as possible.

In her 2015-16 Executive Budget, the Governor requested for the Department of Education a $189,215,575 or 4.7% increase over 2014-2015 appropriations. This request included, in part, the following: $79.6 million to increase base student cost; $8.5 million to support structural funding for districts; $29.3 million for distribution to districts for technology initiatives; more than $14.5 million to support the growth in the Public Charter School District and expand the Education Department's virtual education program; nearly $14 million in support of various reading initiatives, including reading coaches, summer reading camps, reading professional development; $1.5 million to fund a rural teacher initiative at CERRA; and $10 million for the lease or purchase of school buses.

In addition, she has met with many of the stakeholders to solicit feedback and ideas about how to reform education in South Carolina. On February 3, 2015, she met with S.C. Future Minds regarding education in rural areas of the State. On March 5, 2015, she met with Dr. Barbara Nielsen, former education superintendent regarding education issues. On August 21, 2015, she met with rural school district superintendents. And, on September 30, 2015, she met with colleges of education deans and rural superintendents.

Notwithstanding this demonstrable progress in the legislative process, this Court's majority granted, as amended, Appellants'-Respondents' ("Plaintiff Districts") Motion for

Entry of a Supplemental Order. The Court's Order (1) requires that the parties engage a panel of three experts by October 15, 2015 that will identify the educational needs of students in the Plaintiff Districts; (2) requires the Defendants to draft legislation and present a "plan" for implementing a constitutionally compliant education system to the expert panel by February 1, 2016; (3) requires the Plaintiff Districts to present their reaction to the Defendants' plan by March 1, 2016; (4) requires the expert panel to present a written assessment of the Defendants' plan by March 15, 2016; (5) invests this Court with legislative power to conduct a de novo review of the Defendants' plan and the expert panel's report and recommendations; and (6) permits the Court to issue an order declaring whether the plan proposed by the Defendants is a rational means of bringing the system of public education in South Carolina into constitutional compliance. In sum, the Order issued by the Court's majority requires Defendants to obtain *pre-approval* from a non-governmental panel and from this Court[6] for legislation to be adopted by the General Assembly and approved by the Governor. Never in the history of this state has the Court attempted such a complete usurpation of the legislative and executive branches' constitutionally conferred rights and privileges. Moreover, the Order requires Defendants to resolve a complex set of variables that affect student achievement, including the one variable that this Court acknowledges has the greatest impact on achievement in the Plaintiff Districts—poverty—within a matter of five months. *See Abbeville II*, 410 S.C. at 654, 767 S.E.2d at 175 ("The Record unequivocally supports [the conclusion that poverty is significantly related to student achievement], as all of the expert testimony combined to

[6] The Plaintiff Districts also get to comment on the proposed legislation, but their power to reject it is unclear.

reveal that a focus on poverty within the Plaintiff Districts likely would yield higher dividends than a focus on perhaps any other variable.").

The Court's Order is an egregious violation of separation of powers. The Court's majority attempts to subjugate the Senate and the House to the dictates of an unelected, non-representative "super-panel" of "experts" in fashioning education policy for the State of South Carolina, imposes arbitrary deadlines and procedures that are legally and logistically impossible to meet, and creates an unprecedented constitutional crisis in this state. Moreover, the Court's majority turns a blind eye to the on-going efforts by the Senate and the House to address the constitutional violation identified in *Abbeville II* since this Court issued its opinion. None of this is necessary.

This case began in 1993. Following an appeal to this Court and remand, a non-jury trial commenced in this matter on July 28, 2003 and ended on December 9, 2004. In 2007, this case was once again appealed to this Court. This Court held oral argument for the first time following trial on June 25, 2008. Four years later, this Court issued an order directing this matter be reargued on September 18, 2012. Two years after the case was reargued and six years after the case was first argued before this Court, this Court issued its *Abbeville II* opinion in which, in a 3-2 decision, it identified a constitutional violation. It took the Court seven years to decide whether a constitutional violation existed. The Court now demands a remedy in a matter of months. There can be no doubt that the issues relating to the needs of the students in the Plaintiff Districts are serious and must be addressed. But as the Senate and the House have repeatedly pointed out, there are no quick fixes, and better achievement cannot simply be legislated. This Court should not sacrifice the very structure of our government on the altar of expediency. Accordingly, this Court should vacate its order

dated September 24, 2015 and defer to the constitutional prerogative of the General Assembly to enact meaningful legislation addressing the needs of students in the Plaintiff Districts.

I. The Court's Order Presents a Myriad of Logistical Difficulties.

As an initial matter, it is important that the Court understand the practical impossibilities of complying with the Order and the harms this Order creates by setting arbitrary deadlines that eliminate the legislative process.

The Senate and the House cannot propose a "plan" to address the *Abbeville II* decision that would be binding on either body, much less the General Assembly as a whole. The only plan that the General Assembly can propose would necessarily be embodied in actual legislation. No person can bind either the House or the Senate to enact specific legislation, and any proposed "plan" likely would not look anything like final legislation passed by the Senate and the House and signed by the Governor. The Court cannot enjoin the General Assembly to conform legislation to any proposed plan. Moreover, any enacted legislation would still be subject to challenge in court.

Further, under this Court's Order, the super-panel must be selected by October 15, 2015. The State of South Carolina, the Governor, the Senate, and the House of Representatives collectively have one appointee for the super-panel. Two branches of government—one of which is responsible for drafting the laws of the state and one that is responsible for executing those laws and who holds the veto power—must somehow select one person. This presents several problems. First, this is a logistical impossibility for the state, the Governor, the Senate, and the House to agree and select one representative. No one person can represent the views of all of these entities and the individuals who make up

these entities. Second, no process exists to select the appointee and none can constitutionally be created by this Court. Only the General Assembly may create the committees from which any legislation ultimately results. But these committees are not—and cannot be—binding or controlling on the legislative process. They are legislative creations that provide valuable information to assist the process of creating legislation to be considered by the General Assembly—not super-panels that unconstitutionally pre-approve legislation.

Instead of allowing the legislative process to work, the Court requires that the General Assembly must seek the blessing of the super-panel on February 1, 2016, a mere nineteen days after the General Assembly convenes for session. This deadline hijacks the legislative process. For legislation to become law, it must pass both chambers of the General Assembly and each chamber may amend, alter, or reject any bill introduced. S.C. Const. art. III, § 15; House Rules 5.7 & 5.8. This cannot happen under this Court's Order. Instead, the General Assembly must somehow present a joint plan to the super-panel by February 1, 2016. Then the plan will be reviewed by the Plaintiff Districts, the super-panel, and this Court.

Further, this Order contradicts this Court's ruling in *Abbeville II*. The Court specifically stated that "it is the Defendants who must take the principal initiative, as they bear the burden articulated by our State's Constitution." *Abbeville II*, 410 S.C. at 662, 767 S.E.2d at 180. However, under the Order, not only is the current work obviated, but the Defendants do not have the opportunity to move a bill through the legislative process. Although theoretically possible, it is unrealistic to think legislation of this magnitude, importance, and complexity can be introduced in one chamber, go through the committee

process where the public could provide invaluable input, pass the originating chamber, repeat the process in the other chamber, have the chambers agree on any amendments, and then be considered by the Governor by the February 1 deadline.

Simply stated, the court-imposed time frame and super-panel evaluation of a proposed plan is meaningless. The Court cannot require the General Assembly to leave a bill unamended as it goes through the legislative process. Nevertheless the Court's Order either envisions: (1) binding the legislative branch with some "plan" that must then be enacted without amendments; or (2) conducting a meaningless review and pre-approval of a likely already out-of-date plan as the actual solution goes through the legislative process.

The Plaintiff Districts are permitted to review the "plan" by March 1, 2016. This type of review normally happens during the traditional legislative process when the public testifies before subcommittees on the introduced legislation. This step in the Order is not necessary because under the traditional legislative process, legislators have the opportunity for feedback from the public, including the Plaintiff Districts. Beyond being unnecessary, however, this provision in the Court's Order invests a subset of the public with special prerogative with respect to the remedy. It is bad enough for the General Assembly to lose its autonomy to another branch of government, but even worse to subordinate legislative power to the opposing parties.

Just two weeks later, the super-panel is required to review the plan. Again, during this time, actual legislation may be working through the process. Moreover, the Court-ordered process authorizes an intervention by the Court in the legislative process while the "plan" is still in the legislative process and not yet subject to judicial review. The logistical problem that the "plan" may differ from the legislation going through the legislative

process is heightened by the premature introduction of judicial review—review by the super-panel, the opposing party in a lawsuit, and the Court—before a bill is even enacted and presented to the Governor for her required review and consideration. These are not merely logistical errors, but rather are infringements on the legislative process, time-honored constitutional doctrines, and the constitution itself.

Despite the General Assembly's ongoing work since the Court issued its *Abbeville II* opinion, this Court's Order preempts the legislative branch's work by imposing its own arbitrary deadlines, and by replacing the legislature with a non-governmental super-panel that lacks legislative power. By contrast, the House Task Force and Senate subcommittee are composed of legislators who can guide legislation through the process, educators who add invaluable experience and information to this review, and members directly representing the specific interests of the Plaintiff Districts. These groups have been working together to find solutions and draft legislation for the 2016 legislative session. Under the Court's Order, all of this cooperative work is lost, and the constitutionally mandated separation of powers has been violated.

II. The Court's Order Violates Separation of Powers.

The Court's Order violates the fundamental rule succinctly stated by Justice Legge in *Page v. Winter*: "[I]t is the function of the legislature, not the courts to make, amend or repeal laws." 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962). A brief overview of this Court's many decisions protecting separation of powers and respecting the constitutional powers and prerogatives of the General Assembly, particularly in the area of education, demonstrates why the Court's order is so anomalous.

The South Carolina Constitution establishes three branches of government and "requires the branches . . . be 'forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.'" *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 649, 744 S.E.2d 521, 525-26 (2013) (quoting S.C. Const. art. I, § 8). "This delineation of powers amongst the branches 'prevents the concentration of power in the hands of too few, and provides a system of checks and balances.'" *S.C. Pub. Interest Found.*, 403 S.C. at 649, 744 S.E.2d at 526 (quoting *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982)). For more than 200 years, this Court has protected, preserved, and honored this constitutional principle. Time after time, the Court has recognized the longstanding constitutional rule that "'[o]ne of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government.'" *S.C. Pub. Interest Found.*, 403 S.C. at 649, 744 S.E.2d at 526 (quoting *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 304 (1975)). Thus, under our state constitutional system, "'[t]he legislative department makes the laws[,] the executive department carries the laws into effect, and the judicial department interprets and declares the laws.'" *Id.* Yet in the Court's September 24, 2015 Order, the Court's majority ignores this time-honored principle of keeping these powers separate by not only taking upon itself the role of declaring what the constitution says, but also of the legislative department in enacting legislation. Moreover, the Court's majority impermissibly delegates the legislative power to a "super-panel" of experts.

The doctrine of separation of powers is deeply entrenched in this state's judicial history. As long ago as 1873, this Court recognized the limits of its jurisdiction vis-à-vis

the legislative branch. *State v. Cnty. Treasurer*, 4 S.C. 520, 526-27 (1873) (holding that that Court's power to issue writs does not inhibit the legislature from excluding that remedy in particular cases). Since then, consistent with separation of powers, this Court has concluded that its power is limited in a variety of contexts.

Most importantly, this Court has consistently refrained from intruding upon the powers of the General Assembly in fashioning a remedy even where there is a violation of law. In *Gregory v. Rollins*, 230 S.C. 269, 95 S.E.2d 487 (1956), the circuit court issued a mandamus to require issuance and payment of warranty in order to satisfy claims of accounting and an attorney for Grand Jury related services. The court issued the mandamus even though county appropriations were, at that time, controlled by the County Supply Act, enacted by the General Assembly. No funds had been appropriated by the legislature for such services. This Court reversed the order of the circuit court, explaining as follows:

> [t]he court may, by mandamus require the proper officials of a county . . . to include a proper claim against the County in their next budget for county expenses, to be submitted to the General Assembly. . . . And they may also, by mandamus, require the Board of Commissioners and the County Treasurer to pay a claim out of funds in the hands of County Treasurer belonging as a matter of law to the claimant and not to the county. . . . *But they may not by mandamus or otherwise, direct the appropriation of public funds, for to do so would be to trespass on the legislative domain.*

230 S.C. at 275, 95 S.E.2d at 491 (internal citations omitted) (emphasis added).

In *Culbertson v. Blatt*, the Court explained that "[j]ust as it is not within the power of the General Assembly to reverse a judicial decision by retroactive legislation, or to otherwise interfere with or nullify the judicial process, so it is not within the power of this court to impinge upon the exercise by the Legislature of a power vested in that body, *merely*

because in the exercise of or failure to exercise that power some constitutional provision has been violated." 194 S.C. 105, 9 S.E.2d 218, 220 (1940) (emphasis added).

Additionally, this Court has acknowledged that it cannot compel the General Assembly, through mandamus or otherwise, to enact laws. In *Knight v. Salisbury*, 262 S.C. 565, 206 S.E.2d 875 (1974), the Court confronted the failure of the General Assembly to enact a Home Rule statute in accordance with the requirements of Art. VIII of the Constitution. Yet, in *Knight* the Court acknowledged that "there is *no method* by which any court can mandamus the General Assembly to enact laws." *Id.* at 571, 206 S.E.2d at 877 (emphasis added). The Court went on to say that recognizing the critical role of the General Assembly in making new law:

> [t]he special legislative committees are already working in obedience to the mandate of Section 7 [of Art. VIII]. Once the General Assembly acts in keeping with this mandate, problems such as these will vanish. Quite obviously, county government will function at the county level in such a way that it may provide all necessary governmental services heretofore effected through the special purpose district created by the General Assembly.

Id. at 574, 206 S.E.2d at 879. As this Court stated in *Foster v. Taylor*, "[t]he Court will not attempt to compel the legislature by mandamus to perform a legislative duty or function." 210 S.C. 324, 333, 42 S.E.2d 531, 536 (1947). Yet, here for the first time in our history, it has done so.

This Court has held that the General Assembly has the sole authority over appropriations and this Court is powerless to appropriate funds. *State ex rel. Hunt v. Pinckney*, 34 S.C.L. 400, 402 (1849) ("Even if the State were unquestionably liable to pay these indents, this Court has no jurisdiction to enforce the payment. If in any case this Court can interfere, by mandamus, on behalf of a creditor of the State, to compel payment

of his demand, *it can only be when the Legislature has directed an officer, on possession of the funds, for that purpose.*" (Emphasis added)); *Edwards v. State*, 383 S.C. 82, 95, 678 S.E.2d 412, 419 (2009) ("Under South Carolina Law, the General Assembly has the sole authority to direct the appropriation of funds and, therefore, is the entity which decides whether the State desires to receive the funds."); *State ex rel. Condon v. Hodges*, 349 S.C. 232, 244, 562 S.E.2d 623, 630 (2002) ("The General Assembly, as part of its law-making responsibilities, has 'the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies should be spent.'"); *Hampton v. Haley*, 403 S.C. 395, 405, 743 S.E.2d 258, 263 (2013) (finding that "where the General Assembly directs that appropriated funds be treated in a particular manner, executive agencies must comply with those directions").

This Court has often observed in accordance with separation of powers that it does not sit as a super-legislature. *See Horry Cnty. Sch. Dist. v. Horry Cnty.* 346 S.C. 621, 636, 552 S.E.2d 737, 744 (2001) (concluding that notwithstanding its sympathy with the school district, it could not "under the guise of statutory construction," alter the statutes as written, because "the Court does not sit as a super-legislature"); *Abbeville Cnty. Sch. Dist. v. State*, (*Abbeville I*) 335 S.C. 58, 69, 515 S.E.2d 535, 541 (1999) (emphasizing "that the constitutional duty to ensure the provision of a minimally adequate education to each student in South Carolina rests with the legislative branch of government[]" and therefore this Court "do[es] not intend the courts of this State to become super-legislatures or super-school boards"); *Abbeville II*, 410 S.C. at 653, 767 S.E.2d at 175 (noting that "[t]he constitutional duty to ensure the provision of a minimally adequate education to each

student in South Carolina rests with the Defendants. To that end, the General Assembly is charged with identifying the issues preventing the State's current efforts from providing the requisite constitutional opportunity"); *see also Am. Petroleum Inst. v. S.C. Dept. of Revenue*, 382 S.C. 572, 578, 677 S.E.2d 16, 19 (2009) (concluding that "to sever only part of the unconstitutional act would require this Court to go beyond its proper role and to intrude into the province of the legislature").

Other decisions of this Court throughout the years are in accord. At every step of the way in this Court's history, the Court has shown steadfast respect for the legislative power of the General Assembly. Each decision carefully delineates the line between the constitutionally valid role of other branches of government and that of the General Assembly. *See Rainey v. Haley*, 404 S.C. 320, 326, 745 S.E.2d 81, 84 (2013) (noting that "the South Carolina Constitution and this Court have expressly recognized and respected the Legislature's authority over the conduct of its own members"); *Wingfield v. S.C. Tax Commission*, 147 S.C. 116, 126, 144 S.E. 846, 849 (1928) (observing that the reasons for the enrolled bill rule, which prevents the Court from exploring whether legislation received three readings or not as the Constitution commands, is based upon "respect due by the courts to the wisdom and integrity of the Legislature, a co-ordinate branch of government"); *Boiter v. S.C. Dept. of Transp.*, 393 S.C. 123, 131, 712 S.E.2d 401, 405 (2011) ("[E]ven taking all of their evidence into account, it cannot overcome the great deference this Court must give to the General Assembly's stated classification."); *Phillips v. W. Union Tel. Co.*, 194 S.C. 317, 9 S.E.2d 736, 740 (1940) ("To so extend the statute by construction would be to exercise the power of the Legislature, which this court cannot do."); *Thayer v. S.C. Tax Comm'n*, 307 S.C. 6, 14, 413 S.E.2d 810, 815 (1992) ("This Court

cannot create an exemption by reading something into the statute which the Legislature did not intend.").

In summary, the Court should bear in mind the words of Justice Littlejohn in *State v. Byrd*: "When a court is called upon to determine the constitutionality of a legislative enactment, it must be careful not to usurp the legislative function." 267 S.C. 87, 91-92, 226 S.E.2d 244, 246 (1976). "'[A] usurpation of powers exists, for purposes of [the] constitutional separation of powers doctrine, when there is a significant interference by one branch of government with the operation of another branch.'" *State v. Langford*, 400 S.C., 421, 735 S.E.2d 471 (2012) (quoting 16A Am. Jur. 2d *Constitutional Law* § 246). "Included within the legislative power is the *sole prerogative* to make policy decisions; to exercise discretion as to what the law will be." *Hampton*, 403 S.C. at 403, 743 S.E.2d at 262 (emphasis added) (citing cases). While it is true that "some degree of overlap between the branches has been a feature of our government since the founding of the Republic[]" and South Carolina's "rich and unique constitutional history has resulted in a system of government which does not lend itself to a neat, compartmentalized, or 'cookie-cutter' approach[]" allowing instead "certain 'power fusion devices' [to] develop[] . . . enabl[ing] the branches to work together in a cooperative fashion[,]" *S.C. Pub. Interest Found.*, 403 S.C. at 649-51, 744 S.E.2d at 526-27, the Court's Order significantly interferes with the legislative function of government, which belongs exclusively to the General Assembly, by both requiring that branch to enact laws and delegating the legislative authority to a body of non-legislative substitutes.

Judicial deference to the separate power of the legislative branch is especially notable in matters relating to education. This Court has always assumed a limited role in

such matters, recognizing that our constitution "places very few restrictions on the power of the General Assembly in the general field of public education . . . *the details are left to its discretion.*" *Richland Cnty. v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470, 472 (1988) (emphasis added); *see also Horry County Sch. Dist.*, 346 S.C. at 632, 552 S.E.2d at 743 ("The legislature has wide discretion in determining how to go about accomplishing its duty to 'provide for the maintenance and support of a system of free public schools.'"); *Washington v. Salisbury*, 279 S.C. 306, 308, 306 S.E.2d 600, 601 (1983) ("The plain language of [the education clause] places the responsibility for free public education with the General Assembly . . . ."); *Moseley v. Welch*, 209 S.C. 19, 34, 39 S.E.2d 133, 140 (1946) ("The development of our school system in South Carolina has demonstrated the wisdom of the framers of the Constitution in leaving the General Assembly free to meet changing conditions."). *Abbeville I* affirmed and bolstered this long-standing precedent. Yet the Court's Order curtails legislative discretion in the education policymaking arena by placing the details of education policy in the hands of the Plaintiff Districts, a non-elected super-panel, and ultimately this Court.

III. The Court's Order Violates the Non-Delegation Doctrine.

Article III, § 1 of the South Carolina Constitution states:

> The legislative power of this State shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives' and both together the 'General Assembly of the State of South Carolina.'

S.C. Const. art. III, § 1.

"Our courts have held that by the use of this language the people of the state vested the General Assembly with the entire legislative power of the state, subject only to such restrictions upon and regulations of such power as were contained in the Constitution

itself." *Clarke v. S.C. Pub. Serv. Auth.*, 177 S.C. 427, ____, 181 S.E. 481, 485 (1935). Article III, § 1 "provides for a representative form of government in this state as opposed to a direct democracy." *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 642, 528 S.E.2d 647, 651 (1999). In *Joytime*, this Court noted with approval the following statement made by the New Hampshire Supreme Court:

> 'By the constitution, legislative power is vested . . . in the senate and the house of representatives. And without a well established ground of exception, the senate and the house are incapable of delegating their legislative power, as the governor and council are of delegating the power of the pardon, or the court of delegating the power of deciding the constitutional question raised in . . . cases. . . . And [officers of government] have not a general authority to avoid their official responsibility by relegating their duties to their assignees. If the legislative seats were filled with substitutes, it would not be claimed that a bill passed by them was law. *The vote of a body of substitutes, assembled in the state-house or elsewhere, is not legislation, unless authorized by a legal construction of the constitution. . . .*'

338 S.C. at 642-43, 528 S.E.2d at 651 (emphasis added).

Moreover, in *Joytime*, this Court noted that "[o]n a number of occasions, this Court has held that the power to legislate cannot be delegated to private persons . . . ." *Id.* at 643, 528 S.E.2d at 651 (citing *State v. Watkins*, 259 S.C. 185, 191 S.E.2d 135 (1972)). Indeed, consistent with separation of powers, this Court has repeatedly observed that "[t]he General Assembly 'has plenary power over all legislative matters unless limited by some constitutional provision.'" *Amisub of S.C., Inc. v. S.S. Dep't of Health & Envtl. Control*, 407 S.C. 583, 591, 757 S.E.2d 408, 412 (2014) (quoting *Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013)); *Clarke*, 177 S.C. at ___, 181 S.E. at 486. "[T]he General Assembly cannot delegate [its] legislative power even if it so desired." *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002) (citing *Gilstrap v. S.C. Budget*

& Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992) (holding that the General Assembly may not delegate power to make laws); *State ex rel. McLeod v. McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982) (holding that General Assembly's attempt to delegate to Joint Appropriations Review Committee power to control expenditure of state and federal funds violates separation of powers because committee was permitted to control expenditures by administration rather than by legislation)).

The judicial requirement of pre-approval from the super-panel and this Court is an impermissible delegation of power. In *Joytime*, this Court held that "Art. III, § 1 requires the legislature, not the people, to enact the general law." 338 S.C. at 641, 528 S.E.2d at 650. *Joytime* addressed referendum votes, but the case is analogous to this situation because the Court's Order removes the power to legislate from the legislature to at least one official who is not a member of the General Assembly, namely, the State Superintendent of Education. This is not simply a study committee intended to provide non-binding recommendations. Instead, the Order delegates law-making discretion to a super-panel and empowers the panel to direct the General Assembly's efforts to address the constitutional violation identified in *Abbeville II* in clear violation of Article III, § 1. This is a constitutionally impermissible delegation of legislative authority. The Court should therefore vacate its September 24, 2015 Order.

Finally, the same reasons why the Order should be vacated as to the General Assembly apply to the State of South Carolina as a Respondent. The State is the entire corporate entity of the State of South Carolina. It cannot act except through its three separate branches, and their officers and agencies. *See* S.C. Const. art. I, §8 ("In the government of this State, the legislative, executive, and judicial powers of the government

shall be forever separate and distinct from each other"); S.C. Code Ann. §1-1-10 ("[t]he sovereignty and jurisdiction of this State extends to all places within its bounds . . . ."). Therefore, because the legislature cannot be enjoined, the State, which includes the General Assembly as well as the other parts of State government, cannot be enjoined. "The State" cannot "select" an expert independently of the action of one of the other Respondents. "The State" cannot "present" a plan independently of those Respondents. The Order is void as to the State just as it is as to the House and Senate.

Conclusion

For all of the reasons set forth above, this Court should therefore vacate the September 24, 2015 Order.

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October 19, 2015