

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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**ORIGINAL JURISDICTION**

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ChangeSCNow, LLC, ..... Petitioner,

v.

The South Carolina Budget & Control Board, and  
the ex officio members of the South Carolina Budget  
and Control Board in their official capacities  
as ex officio members, to wit: Governor Mark Sanford;  
Comptroller General Richard Eckstrom;  
Treasurer Converse Chellis; Senator Hugh Leatherman,  
Chairman of the South Carolina Finance Committee; and  
Representative Daniel Cooper, Chairman of the  
House Ways and Means Committee, ..... Respondents,

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**PETITION TO PROCEED IN THE ORIGINAL  
JURISDICTION OF THE SOUTH CAROLINA  
SUPREME COURT AND INCORPORATED  
MEMORANDUM OF LAW**

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ChangeSCNow, LLC (“ChangeSCNow”), files this Petition requesting that this Court exercise its original jurisdiction under Rule 229, SCACR, to resolve important issues greatly affecting the public interest arising with regard to the composition and operation of the South Carolina Budget & Control Board (“Budget & Control Board”). Petitioner expressly incorporates by reference its Complaint and the exhibits attached thereto. In further support hereof, Petitioner would show unto the Court as follows:

## ISSUES

1. Whether the existence and/or composition of the Budget & Control Board is constitutional under the South Carolina Constitutional Doctrine of Separation of Powers (Article I, Section 8, of the South Carolina Constitution).
2. Whether the constitutionality of the Budget & Control Board is conditioned on the following constitutional precepts, outlined by the Court in State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406, 408-09 (1977):
  - a. That the General Assembly act carefully to ensure that it affects only a minority influence on the Board; and
  - b. That the General Assembly refrain from any act that usurps a function of the executive department.
3. Whether the General Assembly has violated these preconditions for constitutionality through the composition of and/or specific grants of authority to the Budget & Control Board.
4. If the General Assembly has violated the conditions for constitutionality of the Budget & Control Board, whether the South Carolina Supreme Court should find unconstitutional the existence or composition of the Budget & Control Board, in total, because of the difficulties of policing the General Assembly's encroachments on the executive branch and preserving checks and balances between the executive and legislative branches.
5. Whether the conditions for constitutionality of the Budget & Control Board conflict with the General Assembly's statutory power to elect individuals to fill vacated state offices, such that the General Assembly is prohibited from electing a Legislator to replace a State Officer who serves as an ex officio member of the Budget & Control Board.
6. Whether, in order to fulfill the conditions for constitutionality of the Budget & Control Board, the South Carolina Constitution prohibits the legislative members of the Budget & Control Board from being members, or, at a minimum, restricts them to being non-voting members.
7. Whether the current legislative members of the Budget & Control Board should forfeit their voting rights until January 2011 as a result of electing a member of the General Assembly to fill the vacated Treasurer's Office, thereby violating the conditions for constitutionality of the Budget & Control Board.

## FACTUAL BACKGROUND

Plaintiff ChangeSCNow, LLC (“ChangeSCNow”), is a grassroots non-profit organization dedicated to promoting state government that is responsive and accountable to the citizens of South Carolina. This includes pursuing appropriate legal action, as with its previous involvement in fighting the unconstitutional logrolling of unrelated legislation in the Life Sciences Bill. ChangeSCNow is a limited liability company organizing and existing under the laws of the State of South Carolina. Its members and backers are comprised of South Carolina citizens interested in promoting responsive and accountable state government for themselves and all other similarly situated South Carolina citizens.<sup>1</sup>

Defendant South Carolina Budget & Control Board (hereinafter referred to as the “Budget & Control Board,” the “Board” or the “B&CB”) is a board principally exercising executive branch duties and authority, and comprised of ex officio executive branch and legislative branch officials, as set forth in S.C. Code § 1-11-10. The ex officio members are the Governor, Comptroller General, Treasurer, Chairman of Senate Finance Committee and Chairman of House Ways and Means Committee.

The South Carolina Budget & Control Board is an “executive body” dealing primarily with the administrative affairs of the state government. Pursuant to S.C. Code § 1-11-20, it performs its broad executive functions through three very broad divisions:

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<sup>1</sup> Although members and backers change over time, the core purposes of ChangeSCNow have remained consistent. In 2004, in support of ChangeSCNow’s position against logrolling legislation, some 70 South Carolina citizens became educated on the issues and signed up in support of the brief. ChangeSCNow expects a similar response with regard to its brief in this case.

The Finance Division, embracing the work of the State Auditor, the former State Budget Commission, the former State Finance Committee and the former Board of Claims for the State of South Carolina;

The Purchasing and Property Division, embracing the work of the former Commissioners of the Sinking Fund, the former Board of Phosphate Commissioners, the State Electrician and Engineer, the former Commission on State House and State House Grounds, the Central Purchasing Function, the former Surplus Procurement Division of the State Research, Planning and Development Board, and the Property Custodian; and

The Division of Personnel Administration, embracing the work of the former Retirement Board known as the South Carolina Retirement System and the administration of all laws relating to personnel. These very broad divisions were established in 1950 and have been supplemented over time with expanded and new powers and functions enacted by the General Assembly (e.g., S.C. Code 1-11-470).

In 1977, the South Carolina Attorney General, Daniel R. McLeod (“Att. Gen. McLeod”), filed an action in the original jurisdiction of the South Carolina Supreme Court to have the composition of the Budget & Control Board declared unconstitutional.

The South Carolina Supreme Court took original jurisdiction of Att. Gen. McLeod’s Complaint and analyzed the constitutionality of the composition of the Budget & Control Board. See, State ex rel. McLeod v. Edwards, 269 S.C. 75, 236 S.E.2d 406 (1977).

In 1977, the South Carolina Supreme Court essentially side-stepped the constitutional issue through the application of uncontrolling precedent and generalized judicial doctrines. First, the 1977 Court relied on Elliot v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967), in which the Plaintiff attacked, among other issues, the inclusion of the

legislative members on the Budget & Control Board. However, in Elliot, the South Carolina Supreme Court limited its analysis to determining that the participation of the legislative members on the Budget & Control Board did not violate the constitutional dual office holding prohibition. Then, in Mims v. McNair, 252 S.C. 64, 165 S.Ed.2d 355 (1969), the South Carolina Supreme Court disposed of a subsequent attack on the composition of the Budget & Control Board in a single paragraph and without any analysis (merely citing the Elliot case, which related to dual office holding). The South Carolina Supreme Court similarly disposed of this issue again without any discussion or analysis in Harper v. Schooler, 258 S.C. 486, 189 S.E.2d 284 (1972). Consequently, the “controlling” cases cited in the State ex rel. McLeod v. Edwards case have little precedential value to the issues raised in this Petition or related Complaint.

The State ex rel. McLeod v. Edwards Court also relied on the general doctrine that if a law is questioned and the Supreme Court gives the law a particular interpretation, then the subsequent reenactment of the law is a tacit acceptance of the Court’s prior interpretation. Therefore, the 1977 Court reasoned if the Legislature did not modify this language when it drafted revisions to other sections of the Constitution, then ratification of the changes (by the legislature) necessarily includes re-affirmation of the non-changes (along with prior judicial interpretations). However, this doctrine of judicial construction should have no application to the issues raised in this Petition because the restriction of legislative encroachment cannot be left in the hands of the offending Legislature without violating the fundamental principles of checks and balances.<sup>2</sup> Moreover, whether the Legislature intended

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<sup>2</sup> That would be the equivalent to finding an objectionable application for costs and fees to be reasonable merely because the submitting party said they were reasonable.

to give itself certain authority within the realm of the Executive Branch is irrelevant as to whether having that authority comports with the South Carolina Constitution's separation of powers mandate. (Art. I, § 8, "the legislative, executive and judicial powers of the government shall be forever separate and distinct.").

Because the 1977 Court found itself bound by the above-referenced cases and doctrine, it did not fully analyze the issue of whether the composition or activities of the legislative members of the Budget & Control Board ran afoul of the separation of powers doctrine in the South Carolina Constitution.<sup>3</sup>

After deciding the issue based on questionably applicable precedent and doctrines of judicial construction, the 1977 Court continued, *in dicta*, to discuss some justifications for the conclusion. It suggested that significant considerations were:

. . . the fact that the General Assembly has been careful to put the legislative members in a minority position on the Board . . . [and that the] composition of the Board does not represent an attempt to usurp the functions of the executive department, but apparently<sup>4</sup> represents a cooperative effort by making available to the executive department the special knowledge and expertise of the chairman of the two finance committees in the fiscal affairs of the State and the legislative process in general.

(emphasis added).

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<sup>3</sup> The Court specifically noted that it was controlled by the prior case interpretation, "regardless of what our views might have been as a matter of first impression." The Court also expressly noted that it was not addressing "the wisdom of the enactments increasing its functions." These comments indicate that the Court harbored some misgivings about the role of the legislative members' involvement with what it described as "an executive body."

<sup>4</sup> It is significant to note that the 1977 Court did not actually find that the legislative participation in the Board is a cooperative effort, but merely that it "apparently represents a cooperation effort." (emphasis added).

In a very real sense, the 1977 Court sent two “shots across the bow” as a warning to the General Assembly that navigating within the waters of the executive branch was constitutionally dangerous unless the General Assembly (1) was careful to maintain its minority influence, and (2) conducted itself as a cooperative assistant to the executive branch and not a usurper of executive function. Looking beyond form to substance, it appears that the General Assembly has not been careful to keep its influence on the Board in the minority. In addition, events since 1977 call into question the assumption that the participation by the members of the General Assembly on the Budget & Control Board (an executive body) are merely cooperative.

**Failure to Maintain Minority Influence on the Board:**

In the 2006 statewide election, the citizens of South Carolina elected a new State Treasurer, defeating the former treasurer, who had held that position for most of the last 35 years. All three statewide executive branch officers (the Governor, the Treasurer and the Comptroller General) included changes at the Budget & Control Board as significant campaign planks. For example, the Spartanburg Herald-Journal reported on July 26, 2007, that “[Thomas] Ravenel and Comptroller General Richard Eckstrom ran for office on promises to work with Gov. Mark Sanford to reform state government.”

In January 2007, the executive branch officers promptly began to fulfill their commitments and make changes at the Budget & Control Board (an executive body).<sup>5</sup> This included the hiring of a new executive director for the Board and the issuance of an

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<sup>5</sup> On July 26, 2007, the Myrtle Beach Sun News reported that “as a candidate for treasurer last year, Ravenel promised to vote Sanford’s way on the board. Upon his arrival in office in January, he provided Sanford that critical third vote.”

executive order establishing the Government Efficiency and Accountability Review Committee (“GEAR”). The GEAR Committee was tasked with “analyzing the systems and services within and provided by the South Carolina State Budget & Control Board in an effort to propose changes which will reduce costs, increase accountability, improve services, consolidate similar functions, return functions to the private sector and help South Carolina become more competitive in a world economy.” Chad Walldorf was selected to chair the GEAR Committee.

In June 2007, South Carolina State Treasurer Thomas Ravenel was indicted on felony charges. He was suspended and subsequently resigned his position as Treasurer. Ravenel resigned on July 24, 2007, and the South Carolina General Assembly scheduled an election for the very next week to fill the vacated term of the State Treasurer. Only two candidates were nominated, both from within the ranks of the General Assembly. Governor Sanford sought the nomination of a qualified candidate from outside the General Assembly; however, he was unable to find anyone among the 170 members of the General Assembly to even nominate a candidate from outside the chambers of the General Assembly.

Within days of Ravenel’s resignation, it was widely reported that Representative Converse Chellis was the clear frontrunner to fill the vacated Treasurer’s position. For example, the Post & Courier (Charleston) reported on July 25, 2007 (the day after Ravenel resigned) that Legislator Converse Chellis “already has the seat sewn up.” It was further reported that there was reason to believe that once the General Assembly elected the new

Treasurer from its ranks, the newly composed Budget & Control Board would oust the recently appointed Budget and Control Board Executive Director, Henry White.<sup>6</sup>

The day before the special election in the General Assembly, Henry White resigned effective August 13, 2007 (two days before the first available meeting of the newly comprised Budget & Control Board). Mr. White's sudden resignation stands in marked contrast to his long-term vision of the Budget & Control Board in January 2007 when he was appointed. At that time, he stated that: "Leading the Budget & Control Board will be an incredibly challenging task and it is a challenge I am eager to meet." Clearly, Mr. White's resignation was driven by the desire to avoid being publicly ousted by the newly comprised and legislatively controlled Budget & Control Board. This fact also did not go unobserved by the press. On August 13, 2007, the Post & Courier reported that the previous director, Frank Fusco, resigned after Ravenel was elected because "he knew that his days were numbered since the balance of power had shifted to the Governor" and that the speculation was that Mr. White also "decided to resign rather than be forced out." See also the Sun News (Myrtle Beach) article *Legislative Power Grab Disgusting*, dated August 9, 2007,

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<sup>6</sup> Henry White had previously served as Governor Sanford's Chief of Staff and General Counsel.

noting that “the Board’s Executive Director, Henry White, seeing the handwriting on the wall, submitted his resignation last week, before the legislature elected Chellis.”<sup>7</sup>

Immediately after the election of Representative Chellis to fill the vacated Treasurer’s position, The State newspaper reported that “Chellis’ election likely gives the General Assembly firm control over the State Budget & Control Board.” (emphasis added). So well understood is the effect of electing a Treasurer from the ranks of the General Assembly that it even inspired this political cartoon in the Greenville News on August 8, 2007.<sup>8</sup>



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<sup>7</sup> On August 15, 2007, the Budget & Control Board met for the first time with Representative Chellis replacing Treasurer Thomas Ravenel. The first item of business for the newly composed Board was the selection of an executive director. Governor Sanford nominated Chad Walldorf, the former Chair of the Government Efficiency and Accountability Review Committee and former Budget Director for the Governor’s Office. The Board refused to select Chad Walldorf as the Executive Director. Instead, the Board reappointed Frank Fusco as the Executive Director. Votes were divided directly down government branch lines with the three legislative members (including the newly elected Chellis) voting to return Frank Fusco to the position he had lost only six months before when the Board was comprised of executive branch members elected by the people of South Carolina, and not the General Assembly. Afterwards, Tim Smith of the Greenville News reported the Governor’s response as “this just validates that it’s a farce to think this is an executive branch agency.”

<sup>8</sup> This cartoon is understood as criticizing the process and not intended as any disrespect to Converse Chellis, individually. That same should be understood of this Petition.

