THE DOCTRINE OF STANDING IN SOUTH CAROLINA: A SURVEY AND CRITIQUE

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"Frederick Douglass famously said that our freedoms as Americans rest in the ballot box and the jury box. So true. But when may we open each box?"[1]

I. INTRODUCTION

It is clearly the job of courts to exercise "judicial power."[2] But what does this mean? Are the courts open to anyone who wants to lodge a complaint or state an objection to another's act? Both federal and state courts have answered this question with a resounding "no." They recognize that some type of restraint must exist on who can bring an action. But what restraints exactly, and on what basis do they exist? This is the question standing seeks to answer. "[S]tanding is the key that opens access to the . . . courts."[3]

But the doctrine of standing—encompassing who can access the judicial system and under what circumstances—has been plagued by confusion since its inception. In 1988, Professor Steven Winter observed that "[i]t is almost de rigueur for articles on standing to quote Professor Freund's testimony to Congress that the concept of standing is 'among the most amorphous in the entire domain of public law.'"[4]

Over time, the Supreme Court of the United States has constructed a firm standing doctrine, which it maintains is required by the "case or controversy clause" in Article III of the Constitution.[5] A key aspect of this doctrine is its insistence that the person seeking a federal court's intervention suffer (or allege) a concrete and particularized injury.[6] In other words, "No concrete

1. John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 78 F.4th 622, 626 (4th Cir. 2023). The court added, "Douglass also said there is a third box on which our freedoms rest—the cartridge box. However, we need not open that box today." *Id.* at 626 n.1.

2. *See* S.C. CONST. art. V, § 1; *accord* U.S. CONST. art. III, § 1.

3. James W. Doggett, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing be Imported Into State Constitutional Law?*, 108 COLUM. L. REV. 839, 842 (2008).

4. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1372 (1988) (quoting Judicial Review: Hearings on S. 2097 Before the Subcomm. on Const. Rights of the Comm. on the Judiciary, 89th Cong., 2d Sess., pt. 2, at 498 (1966)).

5. *See, e.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021) ("[W]e start with the text of the Constitution. Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.' For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." (citations omitted)); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) ("The requirement of standing has been made part of American constitutional law through (for want of a better vehicle) the provision of Art. III, Sec. 2, which states that 'the judicial Power shall extend' to certain 'Cases' and 'Controversies.'").

6. *See infra* Part II.A.

[and particularized] harm, no standing."[7] This inexorable demand has been the focus of much controversy, with some arguing that it is ahistorical and unfairly limits access to the courts, and others suggesting that it is rooted in history and constitutional structure.[8]

At the same time, each state has developed its own approach to standing, as states are free to do.[9] While some states have applied the Supreme Court's model to govern the justiciability of their own disputes, others have developed distinct approaches.[10] South Carolina is one such state. Over time, South Carolina has developed three distinct grounds for standing: statutory standing, whereby a statute confers standing; "constitutional standing," whereby a plaintiff satisfies the Article III standing test elucidated by the Supreme Court; and the "public importance exception," whereby the issue itself confers standing.[11]

The public importance exception purports to allow a plaintiff who has not suffered a particularized injury to nonetheless bring suit when the issues implicated are of sufficient public importance and when resolution is needed for future guidance.[12] This doctrine is far from pellucid: both the South Carolina Supreme Court and observers have noted that it is "the subject of much confusion and misapplication."[13] Despite this, it remains in use as a basis for granting standing.[14]

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7. *TransUnion LLC*, 594 U.S. at 417, 442.

8. *Compare* Winter, *supra* note 4, at 1374–75, *with* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691–692 (2004).

9. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("[T]he state courts are not bound to adhere to federal standing requirements.").

10. For a survey of state-by-state standing doctrine, see generally Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC., & NAT. RES. L. 349 (2015) and M. Ryan Harmanis, Note, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729, 760–63 tbl.1 (2015). Note, though, that some states have changed their standing rules since these publications. *See, e.g.*, Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 853 S.E.2d 698, 727–28 (N.C. 2021) (adopting a legal injury rule); State *ex rel.* Martens v. Findlay Mun. Ct., No. 2024-0122, 2024 WL 4982624, at *1 (Ohio Dec. 5, 2024) (overruling Ohio's "public-right doctrine" exception to standing).

11. *See* S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) ("We recognize three types of standing: (1) standing conferred by statute; (2) 'constitutional standing'; and (3) public importance standing." (citing ATC S., Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)); *see also infra* Part II.B.

12. *See, e.g.*, Eidson v. S.C. Dep't of Educ., 444 S.C. 166, 177, 906 S.E.2d 345, 350 (2024) (explaining that the public interest exception is implicated "when the case involves a matter of wide public importance and resolution of the case is needed for future guidance affecting the public interest").

13. Bodman v. State, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013) (quoting Jessica Clancey Crowson & C.W. Christian Shea, *Standing in South Carolina: What is Required and Who Has It?*, S.C. LAW., July 21, 2009, at 18, 19).

14. *See, e.g.*, *Eidson*, 444 S.C. at 177, 906 S.E.2d at 351.

This Note seeks (1) to provide an updated,[15] clarified taxonomy of South Carolina public importance standing jurisprudence, and (2) to suggest that South Carolina should narrow its public importance exception to standing. Part I outlines current federal and South Carolina standing doctrine and then sketches a genealogy of the cases establishing the public importance exception. Part II raises several concerns about the public importance exception, at least in its current form. (As a preview, standing is primarily a question of proper *parties*, but South Carolina's exception focuses instead on the *merits* of the claim at issue.)[16] Finally, Part III considers several alternatives to the public importance exception, proposing a more limited and less amorphous version of standing.

This Note is not intended to provide a comprehensive or conclusive account of public importance standing. It seeks instead only to cast more light on South Carolina's standing doctrine and to meaningfully chip away at the "vastly understudied" issue of state public interest standing models[17] by suggesting that the public importance exception, as it is currently used, contains significant weaknesses.

II. UNDERSTANDING STANDING

Sections A and B review federal and South Carolina standing rules in their current form. Section C traces the development of the public importance exception in South Carolina.

A. Standing in Federal Courts—"No Concrete Harm, No Standing"[18]

As stated earlier, the Supreme Court consistently maintains that the words "case" and "controversy" in Article III contain substantive limits on who can bring a claim.[19] "The presence of a disagreement, however sharp and

15. It has been over fifteen years since South Carolina's standing jurisprudence was last scrutinized comprehensively, *see* Jessica Clancey Crowson & C.W. Christian Shea, *Standing in South Carolina: What is Required and Who Has It?*, S.C. LAW., July 21, 2009, at 18, and twenty years since it was scrutinized comprehensively in an academic publication, *see* Joshua D. Spencer, *Hearing Those Who Pay the Bills: A Comparison of the Federal and South Carolina Taxpayer Standing Models in Light of* Sloan v. Sanford, 56 S.C. L. REV. 675 (2005).

16. *See infra* Part III.

17. John DiManno, Note, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639, 644 (2008). This Note uses "public interest" and "public importance exception" synonymously. *See infra* note 91.

18. TransUnion LLC v. Ramirez, 594 U.S. 413, 417, 442 (2021).

19. *See supra* notes 5-7 and accompanying text.

acrimonious it may be, is insufficient by itself to meet Art[icle] III's requirements."[20]

For this reason, the Court has built a three-pronged test of standing: for a plaintiff's case to be heard in court, he must demonstrate (1) that he has either suffered or likely will suffer a particularized and concrete injury in fact, (2) that the defendant's challenged conduct caused the injury, and (3) that a favorable judicial decision will likely redress the injury.[21]

As is clear from the words of the test itself, the linchpin of this analysis is the injury requirement.[22] No injury in fact, no standing. The Court has defined an injury in fact as "'an invasion of a legally protected interest' that is," among other requirements, "concrete and particularized."[23]

For an injury to be *particularized* means that it "must affect the plaintiff in a personal and individual way."[24] For an injury to be *concrete*,[25] it must be "de facto" and "real."[26] In *TransUnion LLC v. Ramirez*, the Supreme Court clarified that legislatures can't concoct "concrete" injuries by inventing private causes of action; rather, concrete injuries must be either "tangible" (such as a financial or physical injury) or closely analogous to a common-law tort.[27]

Furthermore, the Supreme Court has consistently refused to grant standing to those who assert a generalized grievance rather than a particularized injury. The 1937 case of *Ex parte Levitt* provides an early example of this rule. In that case, the plaintiff, as a citizen and member of the bar, argued that Justice Hugo Black's appointment was precluded by the Constitution's Ineligibility Clause.[28] Part of the Court's opinion is reproduced below:

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20. Diamond v. Charles, 476 U.S. 54, 62 (1986).

21. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

22. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 218 (1974) (explaining that "whatever else the 'case or controversy' requirement embodie[s], its essence is a requirement of 'injury in fact'") (quoting Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970)).

23. Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560). The Court also requires that the injury be "actual or imminent." *Id.*

24. *Id.* This section does not seek to plumb the depths of federal standing but instead concentrates on the nature of the injury requirement, since that is the most pertinent to the subsequent comparative analysis of South Carolina standing law.

25. In *Spokeo*, the Court established that concreteness and particularization are not synonymous. *See id.* at 339–40.

26. *Id.* at 340.

27. 594 U.S. 413, 424–26 (2021).

28. *Ex parte* Levitt, 302 U.S. 633, 633 (1937). For more on *Levitt*, see generally William Baude, *The Unconstitutionality of Justice Black*, 98 TEX. L. REV. 327 (2019).

> The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public. The motion is denied.[29]

This rule—that a plaintiff must show a "direct injury" rather than a generalized grievance—has been reiterated time and time again.[30] The Court has used this rule both to turn away plaintiffs who asserted no true injury and to turn away those who asserted no injury distinct from that suffered by the public as a whole.[31]

Debate has long raged over whether the Court's stringent demand for a "concrete" injury, as explained by *Spokeo* and *TransUnion*, is constitutionally correct.[32] But for purposes of this Note, it suffices to focus on the broader constitutional rule, more broadly accepted,[33] that standing hinges on whether *the plaintiff is a proper party*: only a particularly-situated plaintiff can bring a case. A plaintiff is a proper party if he complains that he *individually* has suffered some sort of "injury," whether that be through a factual injury (as the Court has required) or through a statutory cause of action (as some critics would prefer).

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29. *Levitt*, 302 U.S. at 634. Note that *Levitt* was not an innovation. For example, it cited, *inter alia*, Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (explaining it is not enough for a plaintiff to show "merely that he suffers in some indefinite way in common with people generally").

30. *See* Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree.").

31. Harmanis, *supra* note 10, at 736.

32. For academic criticism of this rule, see generally Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269 (2021); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008); and Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992). For judicial criticism of this rule, see *TransUnion LLC*, 594 U.S. at 442–60 (Thomas, J., dissenting); Sierra v. City of Hallendale Beach, 996 F.3d 1110, 1115–40 (11th Cir. 2021) (Newsom, J., concurring); Barclift v. Keystone Credit Servs., LLC, 93 F.4th 136, 148–155 (3d Cir. 2024) (Matey, J., concurring in part and dissenting in part). For a defense of the injury requirement, see generally Woolhandler & Nelson, *supra* note 8.

33. *See, e.g.*, Chemerinsky, *supra* note 32, at 272–74 (recognizing that while Congress cannot constitutionally authorize injury-less lawsuits, he believes that when Congress creates "a statutory *right*, . . . the infringement of that right is deemed an injury sufficient for standing") (emphasis in original).

Although the Court has pinned this injury requirement to the text of Article III,[34] Justice Antonin Scalia (a major proponent of the injury requirement)[35] candidly acknowledged that this was a marriage of convenience, not the product of textual exegesis.[36] The fundamental basis for standing, according to the Court, is the Court's limited role within the constitutional separation of powers.[37] The Court has explained that it is neither a "continuing monitor" of other branches' actions[38] nor a "Council of Revision" with "power to invalidate laws at the behest of anyone who disagrees with them."[39] For example, in *Lujan*, Justice Scalia noted that untrammeled access to the courts would impinge the President's constitutional duty to "take Care that the Laws be faithfully executed."[40]

This approach reflects the Supreme Court's long-held view that constitutional separation of powers principles require that federal courts' function be limited, not plenary. In 1792, only four years after the Constitution's ratification, litigants asked a panel including Chief Justice Jay,

34. *See, e.g.*, *TransUnion LLC*, 594 U.S at 423 ("[W]e start with the text of the Constitution. Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.' For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case." (citations omitted)). While the Court once deemed the bar on generalized grievances to be a matter of discretion, it has since declared that the bar is required by Article III. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014).

35. *See generally* Scalia, *supra* note 5.

36. *Id.* at 882 ("The requirement of standing has been made part of American constitutional law through (for want of a better vehicle) the provision of Art. III, Sec. 2, which states that 'the judicial Power shall extend' to certain 'Cases' and 'Controversies.'").

37. *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (justifying the "direct injury" requirement because "neither department may invade the province of the other"); Flast v. Cohen, 392 U.S. 83, 94–95 (1968) (explaining that the words "case" and "controversy" "define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government"); Allen v. Wright, 468 U.S. 737, 752 (1984) ("[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (basing standing on "what activities are appropriate to" each branch); Murthy v. Missouri, 603 U.S. 43, 56 (2024) (stating that standing is "fundamental to the judiciary's proper role in our system of government" (quoting Raines v. Byrd, 521 U.S. 811, 818 (1997))).

38. *Lujan*, 504 U.S. at 577 (quoting *Allen*, 468 U.S. at 760).

39. Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 145–46 (2011). At the time of the founding, New York's Constitution, for example, vested the veto power in a Council of Revision, a body comprising the Governor and several judicial officers. James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 243–45 (1989). At the 1787 Constitutional Convention, the Framers rejected a federal Council of Revision after vigorous debate, *id.* at 235, in a move that "demonstrated their adherence to a rigid, rather than a flexible, separation of powers system with regard to the role of the judiciary," *id.* at 259.

40. 504 U.S. at 577.

riding circuit, to process veterans' pensions pursuant to an act of Congress.[41] The Court refused, explaining "[t]hat neither the legislative nor the executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner[, and t]hat the duties assigned to the circuit courts by this act are not of that description."[42] Famously, Justice Jay also refused to provide an advisory opinion to President George Washington.[43] And in the seminal case of *Marbury v. Madison*, the Supreme Court recognized that "[t]he province of the court is, solely, to decide on the *rights* of *individuals*."[44]

B. Standing in South Carolina Courts—No Harm, No Problem[45]

South Carolina acknowledges three official grounds by which a litigant can gain access to its courts: statutory standing, constitutional standing, and the public interest exception.[46] Unlike federal standing, standing in South Carolina is not explicitly tied to any component of its constitution.[47] When plaintiffs lack standing, South Carolina courts lack subject matter jurisdiction.[48]

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41. *See* Jonathan Lippman, *The Judge and Extrajudicial Conduct: Challenges, Lessons Learned, and a Proposed Framework for Assessing the Propriety of Pursuing Activities Beyond the Bench*, 33 CARDOZO L. REV. 1341, 1349–50 (2012); Hayburn's Case, 2 U.S. 408, 410 n.1 (1792).

42. *Hayburn*, 2 U.S. at 408, 410 n.1.

43. Cong. Rsch. Serv., *Article III, Section 2, Clause 1.4.2 Advisory Opinion Doctrine*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-4-2/ALDE_00013564/ [https://perma.cc/JLS3-FVLQ].

44. 5 U.S. (1 Cranch) 137, 170 (1803) (emphasis added).

45. I owe this wording to Rebekah G. Strotman's thoughtful note *No Harm, No Problem (In State Court): Why States Should Reject Injury in Fact*, 72 DUKE L.J. 1605 (2023).

46. *See, e.g.*, S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) ("We recognize three types of standing: (1) standing conferred by statute; (2) 'constitutional standing'; and (3) public importance standing." (citing ATC S., Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008))).

47. *See* Sassman, *supra* note 10, at 353 n.16. However, the Court once hinted toward a constitutional basis for standing, explaining that because Article V, Section 1 of the South Carolina Constitution restricts courts to the "judicial power," "courts are limited to resolving *cases*" rather than generalized grievances. *See* Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014) (emphasis added).

48. *See*, *e.g.*, S.C. Pub. Int. Found. v. Wilson, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022) ("A motion to dismiss for lack of standing challenges the court's subject matter jurisdiction.") (citing Cap. City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (S.C. Ct. App. 2009)); Richland Cnty. Recreation Dist. v. City of Columbia, 290 S.C. 93, 94–95, 348 S.E.2d 363, 364 (1986); Anders v. S.C. Parole & Cmty. Corr. Bd., 279 S.C. 206, 211, 305 S.E.2d 229, 231 (1983). Occasionally, however, courts have treated standing disputes as a

1. Statutory Standing

"Statutory standing exists, as the name implies, when a statute confers a right to sue on a party."[49]

Statutory standing, "perhaps the simplest, most straightforward type of standing," asks a single question: does a statute give the plaintiff the right to sue?[50] If so, there is no need to ask whether constitutional standing or the public importance exception applies.[51] For example, in *Bevivino v. Town of Mount Pleasant Board of Zoning Appeals*, a group of plaintiffs challenged the Board's decision to approve the construction of a telecommunications tower.[52] Once the court decided that a statute authorized the plaintiffs to sue, it deemed it unnecessary to consider the Board's alternate arguments that the plaintiffs lacked constitutional and "public importance" standing.[53]

A statutory standing analysis "is an exercise in statutory interpretation."[54] Courts "look to the language of the controlling statutes to determine if [the plaintiff] has standing."[55] And the General Assembly may confer standing even on plaintiffs who would otherwise have no legally protected interest in the outcome of the litigation.[56] Consider *Fowler v. Beasley*, where a group of

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South Carolina Rules of Civil Procedure ("SCRCP") Rule 12(b)(6) issue. *See, e.g.*, Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 73–75, 81, 753 S.E.2d 846, 849–50 (2014); Cordero v. Moore, No. 2021-000804, 2024 WL 2319457, at *1 (S.C. Ct. App. May 22, 2024) (affirming the trial court's 12(b)(6) dismissal after finding no statutory or taxpayer standing).

49. Youngblood v. S.C. Dep't of Soc. Servs., 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013).

50. Crowson & Shea, *supra* note 15, at 19.

51. *See Youngblood*, 402 S.C. at 317, 317 n.5, 741 S.E.2d at 518, 518 n.5 (analyzing statutory standing before constitutional standing and additionally explaining that the public importance exception may provide standing "where the elements of constitutional standing are not met"); Freemantle v. Preston, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012) ("The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute."); Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals, 402 S.C. 57, 64, 737 S.E.2d 863, 867 (S.C. Ct. App. 2013).

52. 402 S.C. at 60–61, 737 S.E.2d at 865–66.

53. *Id.* at 64, 737 S.E.2d at 867.

54. *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518; *see also* Crowson & Shea, *supra* note 15, at 19–20.

55. Taylor v. Aiken Cnty. Assessor, 402 S.C. 559, 562, 741 S.E.2d 31, 33 (S.C. Ct. App. 2013).

56. *See* Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006) (explaining that statutory standing requires no "personal stake in the outcome" (quoting Fowler v. Beasley, 322 S.C. 463, 466, 472 S.E.2d 630, 632 (1996))); Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control, 430 S.C. 200, 210–11, 845 S.E.2d 481, 486 (2020) ("The concept of Article III standing as applied in the federal courts does not limit a state's ability to statutorily formulate standing criteria."). Thus, this doctrine does not frame standing in terms of an injury at all, instead turning on whether a statute confers a right to sue. It could perhaps be

plaintiffs sued to enjoin a gubernatorial appointee, allegedly chosen through procedures that violated the Freedom of Information Act ("FOIA"), from being seated.[57] In that case, the defendant argued that the plaintiffs lacked standing since they had "no personal stake in the outcome."[58] The Supreme Court of South Carolina summarily rejected this argument, simply noting that because FOIA "permits any citizen to apply . . . for injunctive relief, . . . respondents have standing."[59]

2. Constitutional Standing

"When no statute confers standing, the elements of constitutional standing must be met."[60]

The South Carolina Court of Appeals first used the phrase "constitutional standing" in 2006.[61] The South Carolina Supreme Court followed suit two

conceptualized as a "cause of action"-based right to sue. *See* Sierra v. City of Hallendale Beach, 996 F.3d 1110, 1122 (11th Cir. 2021) (Newsom, J., concurring) (advocating for a rule whereby any plaintiff who "can show (1) that his legal rights have been violated and (2) that the law authorizes him to seek judicial relief" has standing to sue).

57. 322 S.C. 463, 465–66, 472 S.E.2d 630, 632 (1996).

58. *Id.* at 466, 472 S.E.2d at 632.

59. *Id.* Note that the Court decided this case in 1996—approximately two years before the United States Supreme Court created the informational injury doctrine that categorized such public-information lawsuits within *Lujan*'s standing requirements. Fed. Election Comm'n v. Akins, 524 U.S. 11, 20–21 (1998). In 2006, the Supreme Court of South Carolina found standing in another FOIA challenge and, rather than using the *Akins* rationale to find constitutional standing, explained that a plaintiff did not need a "real, material, or substantial interest in the outcome of litigation" where the General Assembly had "addressed the issue of standing . . . in a specific statutory provision." *Friends of Hunley, Inc.*, 369 S.C. at 28, 630 S.E.2d at 479.

Note also that South Carolina here diverges from the Supreme Court's approach: whereas the Supreme Court's concrete injury requirement prohibits Congress from "simply enact[ing] an injury into existence," TransUnion LLC v. Ramirez, 594 U.S. 413, 426 (2021) (quoting Hagy v. Demers & Adams, 882 F.3d 616, 622 (6th Cir. 2018)), the South Carolina General Assembly is free to empower citizens who have no legally protected interest at stake to sue. *Pres. Soc'y of Charleston*, 430 S.C. at 210–11, 845 S.E.2d at 486. This difference could be explained by pointing to the fact that while the Supreme Court has recognized concreteness as part of an "irreducible constitutional minimum," Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992), South Carolina recognizes no such universal constitutional floor (despite some confusing language to that effect, see *infra* Part II.B.2).

60. *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518. This remains cited as the rule. *See, e.g.*, *Pres. Soc'y of Charleston*, 430 S.C. at 211, 845 S.E.2d at 486–87.

61. Commander Health Facilities, Inc. v. S.C. Dep't of Health & Env't Control, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (2006) ("Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained.").

years later.[62] But the leading case on constitutional standing is generally thought to be *Sea Pines Association for the Protection of Wildlife v. S.C. Department of Natural Resources*, decided by the South Carolina Supreme Court in 2001.[63] In that case, several conservation advocacy organizations opposed a plan for the lethal reduction of white-tailed deer on Hilton Head Island.[64] In its analysis, the court summarily announced that the test of standing would be the three-prong test set forth in *Lujan*.[65] "*Lujan* set forth the 'irreducible constitutional minimum of standing,'"[66] the court explained. Turning to the facts, the court decided that while the plaintiffs' claimed aesthetic interest was indeed legally protected, their injury was neither *particularized*—they "presented no evidence [that] their opportunity to view . . . the deer would be diminished"—nor *actual or imminent*—the plaintiffs had not shown that reducing the deer population would cause them to view fewer deer each day.[67] In sum, the court denied the plaintiffs standing "because they failed to satisfy the three-pronged *Lujan* test."[68]

The *Sea Pines* court wasn't the first to apply *Lujan* to disputes in South Carolina: a month prior, the Court of Appeals had done so in a claim brought by conservation organizations opposing the filing of particular subdivision plats.[69] In setting forth the prongs of *Lujan* as the governing rules, the court in that case wrote that "[t]he United States Supreme Court has established the . . . requirements to show standing."[70] And it noted disapprovingly that where a plaintiff challenges government action merely because of its alleged illegality, it is "'substantially more difficult' to establish standing."[71] Turning to the facts, the court noted that the plaintiffs had not shown that the filing of plats would cause them any individualized injury—none of their members had

62. ATC S., Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) ("Standing may be acquired: (1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception."). In 2007, a concurring justice wrote that the Court had "used the[] boundaries of federal constitutional standing to outline the requirements of the minimum a plaintiff must show in order to bring an action in a South Carolina court." Connor Holdings, LLC v. Cousins, 373 S.C. 81, 87–88, 644 S.E.2d 58, 61 (2007) (Toal, C.J., concurring).

63. *See* Crowson & Shea, *supra* note 15, at 20 (explaining that *Sea Pines* "adopted" the *Lujan* test); Spencer, *supra* note 15, at 679 (explaining that "the South Carolina Supreme Court adopted the *Lujan* test" in *Sea Pines*).

64. Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Nat. Res., 345 S.C. 594, 597–98, 550 S.E.2d 287, 289 (2001).

65. *Id.* at 601, 550 S.E.2d at 291.

66. *Id.* (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

67. *Id.* at 601–03, 550 S.E.2d at 291–92.

68. *Id.* at 603, 550 S.E.2d at 292.

69. Beaufort Realty Co. v. Beaufort County, 346 S.C. 298, 300–01, 551 S.E.2d 588, 589 (S.C. Ct. App. 2001).

70. *Id.* at 301, 551 S.E.2d at 589.

71. *Id.* (quoting *Lujan*, 504 U.S. at 562).

testified about any injury, and they had alleged only conjectured future harm.[72] It concluded, like *Sea Pines*, by holding that "the League does not have standing under the three-pronged *Lujan* test."[73]

This abrupt adoption of the *Lujan* rule triggered confusion in the following years. In 2003, the South Carolina Court of Appeals wrote, in what appeared to be dictum, "A party seeking to establish standing must prove the 'irreducible constitutional minimum of standing.'"[74] In 2005, a commentator noted that it was unclear whether *Sea Pines* was intended to constitute "a fundamental change" to South Carolina's standing rules.[75] What's more, it was unclear "whether these constitutional requirements [were] a part of the *United States* Constitution or a part of the *South Carolina* Constitution."[76] (The supreme court cleared this up in 2008 by specifying that "constitutional standing" refers to "[t]he principle of standing under the United States Constitution, [] 'part of the case-or-controversy requirement of Article III.'"[77])

During the following years, courts continued to issue opinions with sweeping constitutional language, signaling a tightening of standing rules. In 2006, the South Carolina Court of Appeals noted that "Our supreme court has articulated a stringent standing test . . . . A party seeking to establish standing

72. *Id.* at 302–03, 551 S.E.2d at 590.

73. *Compare id.* at 303, 551 S.E.2d at 590 ("[W]e hold the League does not have standing under the three-pronged *Lujan* test."), *with Sea Pines*, 345 S.C. at 603, 550 S.E.2d at 292 ("Appellants . . . are denied standing because they failed to satisfy the three-pronged *Lujan* test.").

74. *See* Sloan v. Greenville County, 356 S.C. 531, 549, 590 S.E.2d 338, 348 (S.C. Ct. App. 2003) (quoting *Lujan*, 504 U.S. at 560). Oddly, the court immediately proceeded to ignore this rule statement by using a pre-*Sea Pines* case comparison to find public interest and taxpayer standing. *See id.* at 550–51, 590 S.E.2d at 348–49.

75. Spencer, *supra* note 15, at 680.

76. *Id.* (emphasis added). Spencer also questioned whether *Sea Pines*, by "constitutionalizing" standing requirements, had stripped the General Assembly of its freedom to derogate from those requirements. *Id.* Of course, the South Carolina Supreme Court has since clearly articulated that the legislature is under no such disability. *See, e.g.*, Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 28–29, 630 S.E.2d 474, 479 (2006) (granting statutory standing to a plaintiff with no "personal stake in the outcome" (quoting Fowler v. Beasley, 323 S.C. 463, 466, 472 S.E.2d 630, 632 (1996))); Youngblood v. S.C. Dep't of Soc. Servs., 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) (clarifying that constitutional standing is only to be considered if the General Assembly has not enacted a statute confers standing).

77. ATC S., Inc. v. Charleston County, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (quoting *Lujan*, 504 U.S. at 560); *accord* Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (2020) ("Constitutional standing is based on Article III of the United States Constitution." (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016))).

must prove the 'irreducible constitutional minimum of standing.'"[78] In that case, a nursing home facility company sued its competitor, along with the South Carolina Department of Health and Environmental Control ("SC DHEC"), alleging that SC DHEC had improperly granted permission to build beds, leaving (according to the plaintiff) fewer beds available for the plaintiff's facilities in the future.[79] The court concluded that because the nursing home failed to show that it had been denied any beds as a result of the defendants' acts, it "failed to carry its burden of proving it suffered an injury in fact" and thus could not "satisfy the *Lujan* standing requirements."[80]

In 2007, Chief Justice Jean Toal, in a lone concurrence, wrote, "We have used [*Lujan*'s] boundaries of federal constitutional standing to outline the requirements of the minimum a plaintiff must show in order to bring an action in a South Carolina court."[81]

It's unclear whether South Carolina's constitutional standing rulings have always been consistent with federal standing rules—and with each other. For example, in *Joseph v. South Carolina Department of Labor, Licensing, & Regulation*, the South Carolina Supreme Court declared that two physicians had constitutional standing to challenge a provision that referrals between physical therapists ("PT"s) were not prohibited.[82] The court gave three reasons for finding standing for the physicians: (1) the plaintiffs had "an interest in how the PT system works and in their ability to employ PTs;" (2) the physicians were using the suit as a vehicle to challenge a prior precedent,

78. Commander Health Facilities, Inc. v. S.C. Dep't of Health & Env't Control, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (2006) (citing *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan*, 504 U.S. at 560)).

79. *Id.* at 300–02, 634 S.E.2d at 666–67.

80. *Id.* at 302–03, 634 S.E.2d at 667. This case demonstrated that South Carolina's *Lujan* test was not confined to conservation disputes, a question which was initially murky. *See* Spencer, *supra* note 15, at 680 ("Another unresolved issue is whether *Sea Pines*' constitutional language applies only to environmental concerns.").

81. Connor Holdings, LLC v. Cousins, 373 S.C. 81, 87–88, 644 S.E.2d 58, 61 (2007) (Toal, C.J., concurring). In that case, the plaintiffs argued that they had standing under a statute authorizing adjacent property owners "who would be specially damaged by any violation" to commence an injunction action. *Id.* at 84–85, 644 S.E.2d at 60. The majority disagreed. *Id.* at 84, 644 S.E.2d at 60. Chief Justice Toal, concurring in the judgment, argued (1) that the question should have gone to the adequacy of the claim rather than to justiciability, and (2) that the statute authorizing suit to prevent "special damage" merely reiterated the constitutional injury-in-fact requirement; thus, the case should have been dismissed for failure of constitutional standing. *Id.* at 88, 644 S.E.2d at 62 (Toal, C.J., concurring).

For other early cases applying a rigid *Sea Pines*/*Lujan* standing test, see Meehan v. Meehan, No. 2006–UP–088, 2006 WL 7285712, at *2–3 (S.C. Ct. App. Feb. 10, 2006); Charleston Trident Home Builders, Inc., v. Town Council of Summerville, 369 S.C. 498, 502, 632 S.E.2d 864, 866 (2006); Glover v. Glover, No. 2007–UP–207, 2007 WL 8327448, at *2–3 (S.C. Ct. App. May 9, 2007); Powell *ex rel.* Kelley v. Bank of Am., 379 S.C. 437, 444–47, 665 S.E.2d 237, 241–243 (S.C. Ct. App. 2008).

82. 417 S.C. 436, 449–50, 790 S.E.2d 763, 769–70 (2016).

and "[t]he ability to challenge precedent is a paramount principle of our judicial system;" and (3) suits brought under the Declaratory Judgment Act should be "liberally construed."[83] But all three of these justifications fail under the constitutional standing rules that South Carolina had formerly articulated. The first rationale—the physicians' important interest—is necessary but not sufficient; the plaintiffs in *Sea Pines* and *Beaufort Realty Co.* had also asserted legally cognizable interests but lost because they didn't show *injury* to those interests.[84] The second and third rationales depart from the Article III standing doctrine that the court purported to follow.[85] In dissent, then-Justice Donald Beatty protested that this case constituted a "marked departure from" earlier decisions that had stringently required a showing of injury.[86]

One curious component of the *Beaufort Realty*/*Sea Pines* duo is the courts' failure to explain why Article III has any bearing on the South Carolina Constitution. This makes South Carolina an outlier: "State courts almost uniformly begin any standing analysis by highlighting the inapplicability of the case-or-controversy requirement outside federal courts."[87] South Carolina, in contrast, has purported to *apply* the case-or-controversy requirement to disputes before it, without explaining its reason for doing so. This was not for a dearth of plausible explanations. For example, courts could have pointed to South Carolina's long history of requiring factual injuries.[88] They could have argued that the structural justifications for federal standing apply with equal force on the state level.[89] They could have even chosen to *actually*

83. *See id.* at 449–50, 790 S.E.2d at 770.

84. See the analyses of the two cases earlier in this Section, *supra* notes 63-73. Recall also *Commander Health Facilities, Inc. v. South Carolina Department of Health & Environmental Control*, where the court noted that the plaintiff, whose alleged injury was the unavailability of nursing home beds, hadn't shown an injury because it hadn't applied for additional beds. 370 S.C. 296, 302–03, 634 S.E.2d 664, 667 (2006).

85. For the second rationale, compare *Joseph*, 417 S.C. at 450, 790 S.E.2d at 770 (writing that "[c]itizens *must* be afforded access to the judicial process to address alleged injustices" (emphasis added) (quoting Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004))), with Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974) (explaining that "[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing").

For the third rationale, compare *Joseph*, 417 S.C. at 450, 790 S.E.2d at 770, writing that the plaintiffs' invocation of the Declaratory Judgment Act weighs in favor of standing, with Ala. State Fed'n of Lab. v. McAdory, 325 U.S. 450, 461 (1945), explaining that "[t]he requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit."

86. *Joseph*, 417 S.C. at 468, 790 S.E.2d at 780 n.14 (Beatty, J., dissenting).

87. Harmanis, *supra* note 10, at 738.

88. *See infra* Part III.A.

89. *See infra* Part III.B.

constitutionalize an injury requirement, as the South Carolina Supreme Court has gestured to.[90]

3. The Public Importance Exception[91]

"[T]he public importance exception may provide standing where the elements of constitutional standing are not met."[92]

South Carolina's public importance exception has been described as "the subject of much confusion and misapplication,"[93] as "a favorite of plaintiffs,"[94] and as the proper subject of judicial "cautio[n]."[95] Courts have variously characterized it as an "exception" to standing (obviously),[96] a "conferr[al]" of standing,[97] a "relax[ation]" of the traditional standing requirements,[98] and a means by which an uninjured plaintiff can "step into the shoes of someone who has" suffered an injury.[99] Notwithstanding these various characterizations, what is clear is that the public interest exception

90. *See* Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014) (describing how the South Carolina Constitution limits courts to the exercise of "judicial power," which in turn limits courts "to resolving cases").

91. This judicial doctrine has been referred to by various names, including the "public importance exception," ATC S., Inc. v. Charleston County, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008); "public interest standing," Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004); and the "public interest doctrine," Nat'l Tr. for Historic Pres. in U.S. v. City of North Charleston, 439 S.C. 222, 229, 886 S.E.2d 487, 491 (S.C. Ct. App. 2023). This Note will use such terms interchangeably.

92. Youngblood v. S.C. Dep't of Soc. Servs., 402 S.C. 311, 317, 741 S.E.2d 515, 518 n.5 (2013).

93. Bodman v. State, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013) (quoting Crowson & Shea, *supra* note 15, at 19).

94. Crowson & Shea, *supra* note 15, at 20.

95. *See, e.g.*, Eidson v. S.C. Dep't of Educ., 444 S.C. 166, 177, 906 S.E.2d 345, 350 (2024); Jowers v. S.C. Dep't of Health & Env't Control, 423 S.C. 343, 366, 815 S.E.2d 446, 458 (2018) (quoting S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013)); Vicary v. Town of Awendaw, 425 S.C. 350, 359, 822 S.E.2d 600, 604 (2018).

96. *See, e.g.*, Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 79, 753 S.E.2d 846, 852–53 (2014) (explaining that the public importance exception is an "exception to the requirement that a plaintiff possess standing"); Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul., 337 S.C. 476, 488, 523 S.E.2d 795, 801 (S.C. Ct. App. 1999) (same).

97. *S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. at 645, 744 S.E.2d at 524.

98. *Eidson*, 444 S.C. at 177, 906 S.E.2d at 350.

99. *Jowers*, 423 S.C. at 366–67, 815 S.E.2d at 458.

requires of the plaintiff no concrete or particularized injury;[100] indeed, it does not require *any* nexus between the plaintiff and the challenged conduct.[101] As opposed to the traditional conception of standing, which is concerned with the nature of the *parties*, the public importance exception is concerned with the nature of the *issue*—namely, issues of public importance which the court feels inclined to weigh in on. The purpose of this exception, according to the South Carolina Supreme Court, is to promote "accountability and the concomitant integrity of government action."[102]

Under the classic, two-prong formulation of the test, debuted in 1999, a plaintiff may be granted standing "when an issue is [(1)] of such public importance as to [(2)] require its resolution for future guidance."[103] In that case, a group of Charleston doctors sued to enjoin the issuance of certain tax-exempt bonds for the construction of a medical care facility.[104] The plaintiffs

100. *See* S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017) ("Unlike with constitutional standing, a party is not required to show he has suffered a concrete or particularized injury in order to obtain public importance standing."); Davis v. Richland Cnty. Council, 372 S.C. 497, 500, 642 S.E.2d 740, 742 (2007) (explaining a plaintiff need not "show he has an interest greater than other potential plaintiffs").

101. Sloan v. Dep't of Transp., 365 S.C. 299, 304, 618 S.E.2d 876, 878 (2005) ("This Court has never held that there must be no other potential plaintiffs with a greater interest in the case or some other nexus.").

102. *S.C. Pub. Int. Found. v. S.C. Dep't of Transp*., 421 S.C. at 118, 804 S.E.2d at 858 (quoting Sloan v. Greenville County, 336 S.C. 531, 551, 590 S.E.2d 338, 349 (S.C. Ct. App. 2003)). As will be discussed later, the United States Supreme Court has soundly rejected the idea that federal courts should act as a "vehicle for the vindication of the value interests of concerned bystanders." United States v. Students Challenging Regul. Agency Procs., 412 U.S. 669, 687 (1973); *see also* FDA v. All. for Hippocratic Med., 602 U.S. 367, 382 (2024) ("Article III does not contemplate a system where 330 million citizens can come to federal court whenever they believe that the government is acting contrary to the Constitution or other federal law. Vindicating 'the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.'" (first citing Allen v. Wright, 468 U.S. 737, 754 (1984); and then quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 576 (1992)).

The South Carolina Supreme Court, despite its embrace of the public importance exception, has occasionally used similar rhetoric. *See, e.g.*, Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014) ("Courts are not bodies for the resolution of public policy and generalized grievances. Harms suffered by the public at large, like those Plaintiffs allege here, are to be remedied by the legislative and executive branches. If existing laws and regulations or their enforcement fail to protect the public from harm, it is incumbent upon the public to seek reform through their elected officials or failing that, at the ballot box."); Bodman v. State, 403 S.C. 60, 68–69, 742 S.E.2d 363, 367 (2013) ("Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them." (quoting Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 145–46 (2011))).

103. Baird v. Charleston County, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999).

104. *Id.* at 524–25, 511 S.E.2d at 72.

argued statutory standing—that they were "interested parties" under a relevant statute. Instead of embarking upon statutory interpretation,[105] the South Carolina Supreme Court explained that "the issuance of the hospital bonds clearly impacts a profound public interest—the public health and welfare" and that "by virtue of the immense public interest at stake here, Doctors have standing to bring the present action, and any further determination of imminent prejudice is unnecessary."[106]

Though *Baird* inaugurated a new regime of public interest standing,[107] it did not create the doctrine *ex nihilo*. Instead, it cited a 1976 case that could fairly be deemed the true progenitor of South Carolina public interest standing: *Thompson v. South Carolina Commission on Alcohol and Drug Abuse*.[108] In that case, several law enforcement officers sued an executive

105. The author of this case, then-Justice Jean Toal, elsewhere evinced a preference for deciding cases on constitutional grounds rather than statutory grounds when the statute mirrored Article III requirements. *See* Connor Holdings, LLC v. Cousins, 373 S.C. 81, 88, 644 S.E.2d 58, 62 (2007) (Toal, C.J., concurring) (arguing that where a statutory cause of action mirrors constitutional standing, courts should decide the case on the latter).

106. The court apparently felt no need to articulate the precise impact that the medical facility's construction would have on the "public health and welfare." *See Baird*, 333 S.C. at 531, 511 S.E.2d at 75–76. A highly general public interest alone was enough, without any showing of an injury to that interest to the plaintiff or to the broader community. *See id.*

107. *See* Spencer, *supra* note 15, at 687 (explaining that *Baird*'s rule has been applied in multiple subsequent cases).

108. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 (citing Thompson v. S.C. Comm'n on Alcohol & Drug Abuse, 267 S.C. 463, 229 S.E.2d 718 (1976)).

Thompson is the oldest public interest standing case routinely cited in South Carolina. 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976). Although *Baird* cited two pre-*Thompson* cases to buttress its public-importance standing rule—*Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951), and *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 44 S.E.2d 88 (1947)—the court was conflating South Carolina's public importance exception to *mootness* and the public importance exception to *standing*. *See Baird*, 333 S.C. at 531, 511 S.E.2d 75–76. In *Ashmore*, the court granted standing not because of *public* interest, but because the challenged act, providing for the issuance of bonds for a projected auditorium district, would inflict injury on the *plaintiffs* by raising their property taxes. 211 S.C. at 91–92, 44 S.E.2d at 94. *After* finding standing (on that basis) and subsequently deciding for the plaintiffs on the merits based on a technical error in the act, *see id.* at 92–93, 95–96, 44 S.E.2d at 94, 96, the court explained that it would proceed to answer other questions raised by the suit because "questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest," *id.* at 96, 44 S.E.2d at 96–97. And *Berry*, decided around four years later, did not discuss standing at all—it turned entirely on mootness. *See* 220 S.C. at 87, 66 S.E.2d at 460. In that case, a tenant facing eviction had vacated the premises after the eviction case had started. *Id.* at 87, 66 S.E.2d at 459–60. The court, explaining that it would not consider "moot or speculative questions," easily decided to dismiss the case, but it noted in dicta that *Ashmore* had illustrated a public interest exception to the rule against hearing moot cases. *Id.* at 87–89, 66 S.E.2d at 460–61. Fifty years later, the South Carolina Supreme Court cited *Berry* to establish a public-importance exception to mootness. *See* Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001); *see also* Sloan v. Greenville County,

agency for declaratory and injunctive relief against a law directing municipalities to encourage voluntary alcohol-addiction treatment programs instead of pursuing disorderly-conduct prosecutions.[109] The agency argued that the officers lacked standing because they had no "substantial interest in the subject matter."[110] In a unanimous per curiam opinion, the South Carolina Supreme Court dispensed with this argument in a single sentence:

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361 S.C. 568, 570, 606 S.E.2d 464, 465–66 (2004) (describing the "'public importance' exception to mootness" (quoting *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596)). But mootness and standing are separate questions. *See, e.g.*, Sloan v. S.C. Dep't of Transp., 365 S.C. 299, 303–04, 618 S.E.2d 876, 878–79 (2005) (analyzing mootness and standing separately); *cf.* Jowers v. S.C. Dep't of Health & Env't Control, 423 S.C. 343, 366, 815 S.E.2d 446, 458 (2018) (explaining that the public importance exception "applies to standing, not ripeness"). *See generally* Wilson v. Dallas, 403 S.C. 411, 423, 743 S.E.2d 746, 753 (2013) (explaining that justiciability is a prerequisite to filing a legal action and that "[j]usticiability encompasses several doctrines, including ripeness, mootness, and standing[]").

(As a side note, *Baird* was not the only case to confuse the two doctrines—several opinions have continued to apply *Ashmore* and *Berry* to standing's public importance exception despite the incongruity. *See, e.g.*, Evins v. Richland Cnty. Hist. Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (applying *Baird* to confer standing on a citizen to challenge a property conveyance and citing *Berry* and *Ashmore* to show that *Baird*'s holding extends beyond ultra vires acts); Vicary v. Town of Awendaw, 425 S.C. 350, 359–60, 822 S.E.2d 600, 604–05 (2018) (citing *Ashmore* as authority for *Baird*'s public importance rule); Charleston Cnty. Parents for Pub. Schs., Inc. v. Moseley, 343, S.C. 509, 514, 541 S.E.2d 533, 535 (2001) (citing *Berry* as authority for *Baird*'s public importance rule); Sloan v. Greenville County, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (S.C. Ct. App. 2003) (same).)

The point is that *Thompson* seems to be the first South Carolina case to confer standing to plaintiffs who asserted no invasion of a legally protected right. The case itself cited no precedent, and *Ashmore* and *Berry* are a different species and were artificially grafted into the family tree by *Baird*. Two other possible pseudo-ancestors to *Thompson* could be *Lee v. Clark*, where the South Carolina Supreme Court deemed that "the public interest requires that the validity of [an] Act [related to school district boards and elections] be promptly determined," 224 S.C. 138, 143–44, 548, 77 S.E.2d 485, 487 (1953), and *Breeden v. South Carolina Democratic Executive Committee*, where the supreme court explained that a dispute over the proper Democratic nominee was "not only of public interest, but one which should be promptly decided," 226 S.C. 204, 208, 84 S.E.2d 723, 725 (1954). Indeed, the supreme court recently cited *Breeden* in a public importance exception analysis. Adams v. McMaster, 432 S.C. 225, 236, 851 S.E.2d 703, 709 (2020). But neither case fits the bill. The "public interest" language in *Lee* appears to be dicta, with the decision hinging instead on whether the plaintiff had suffered "the invasion of" specific rights for purpose of the Declaratory Judgments Act. *See* 224 S.C. at 143–44, 77 S.E.2d at 487. The court concluded the plaintiff had. *Id.* at 143, 77 S.E.2d at 487. And *Breeden* was discussing whether the plaintiff had satisfactorily invoked the supreme court's original jurisdiction pursuant to the rule allowing the supreme court to assume original jurisdiction in matters of public interest. 226 S.C. at 208, 84 S.E.2d at 725. But the supreme court has elsewhere taught that the "the 'public interest' standard [for original jurisdiction] is not synonymous with the public importance necessary for the public importance exception to standing to apply." *Carnival Corp.*, 407 S.C. at 80, 753 S.E.2d at 853. In fact, prior to *Thompson*, South Carolina courts were palpably averse to conferring standing on a plaintiff who lacked a relevant interest or injury. *See infra* Part III.A.

109. *See Thompson*, 267 S.C. at 467–69, 229 S.E.2d at 719–21.

110. *Id.* at 467, 229 S.E.2d at 719.

> While it is the general rule . . . that public officials may not contest the validity of a statute, the rule is not an inflexible one and we are of the opinion that the questions involved are of such wide concern, both to law enforcement personnel and to the public, that the court should determine the issues in this declaratory judgment action.[111]

The court cited no precedent for its bold decision to decide "questions . . . of . . . wide concern" in derogation of the "general rule."[112]

This "questions of wide concern" standing doctrine lay dormant for twelve years, uncited in any reported appellate opinions.[113] But leading up to *Baird*, courts began to look at *Thompson* with greater interest: beginning in 1986, *Thompson* was cited in at least five reported pre-*Baird* opinions for the proposition that matters of "public concern" could confer standing.[114]

But in those cases between *Thompson* and *Baird* (and indeed in *Baird* itself), the court was wary of trusting "public concern" with the entire weight of standing, as *Thompson* had done. Instead, it took a belt-and-suspenders approach by pairing the public-concern analysis with an analysis of whether

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111. *Id*.

112. *Id*.

113. *See* note 114 *infra* for a list, in reverse-chronological order, of the reported pre-*Baird* South Carolina cases referencing *Thompson*'s standing rule. The list includes only citations to *Thompson* that pertain to the standing issue relevant here, not those that cite *Thompson* for its merits.

114. *See* Richland Cnty. Recreation Dist. v. City of Columbia, 290 S.C. 93, 95, 348 S.E.2d 363, 364 (1986) (citing *Thompson*, 267 S.C. 463, 229 S.E.2d 718) (finding that a recreation district lacked standing to challenge the City of Columbia's administering of recreational services within annexed territory because the plaintiff was not the real party in interest, i.e., had no special interest in the challenged conduct, and "[t]here is no overriding public issue in the case to bring it within the exceptions recognized in *Thompson*"); County of Lexington v. City of Columbia, 303 S.C. 300, 301, 400 S.E.2d 146, 147 (1991) (citing *Thompson*, 267 S.C. 463, 229 S.E.2d 718) (finding that a county lacked standing to challenge a city's annexation of property located in its territory because it alleged no "infringement of its own proprietary interests or statutory rights" and the court found "no issue of overriding public concern"); Quinn v. City of Columbia, 303 S.C. 405, 406–07, 401 S.E.2d 165, 166–67 (1991) (reversing the trial court's determination that a town had "public interest" standing to challenge a city's annexation of bordering territory because "unless an annexation ordinance is . . . not authorized by law, private individuals may not challenge its validity"), *overruled by* St. Andrews Pub. Serv. Dist. v. City Council of City of Charleston, 349 S.C. 602, 564 S.E.2d 647 (2002); Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 213, 423 S.E.2d 101, 103 (1992) (citing *Thompson*, 267 S.C. 463, 229 S.E.2d 718) (granting standing to private individuals to challenge the legality of proposed budget cuts because they had alleged a sufficiently "individualized injury" and "the questions involved here are of such wide concern"); Weaver v. Richland Cnty. Recreation Dist., 328 S.C. 83, 85, 492 S.E.2d 79, 80 n.1 (1997) (citing *Thompson*, 267 S.C. 463, 229 S.E.2d 718) (granting standing to a city council to challenge a tax law's constitutionality because it had "sufficient interest in the matter, and the matter [was] of such public concern, as to confer standing").

the plaintiff had a sufficient interest in the litigation.[115] With *Baird* on the books, though, the public importance exception was soon up and running in full force. Nine months after *Baird*, the South Carolina Court of Appeals described the public importance doctrine as an "exception" to standing.[116] In that opinion, a temporary employee claimed that her employer had failed to provide written notice of her rights as required by law.[117] The court began by deciding that the plaintiff lacked standing as she had "failed to demonstrate any injury to her."[118] Despite this, the court decided to "address the merits of Stern's claim to edify the Department as well as temporary agencies statewide."[119] Why? Because "temporary agencies are proliferating throughout the state and will continue to do so."[120] Thus, it was "unnecessary" to "leave them in a constant state of flux or confusion about . . . notification requirements."[121]

Public importance standing has undergone several iterations since *Baird*. Though the South Carolina Supreme Court articulated a two-prong test in that case,[122] subsequent decisions began to focus only on the first issue (whether the issue was of public importance) while neglecting the second question (whether resolution was needed for future guidance).[123]

In *Sloan v. Sanford*, the supreme court allowed a citizen to challenge Governor Mark Sanford's constitutional eligibility for office.[124] The plaintiff in that case argued that because the governor held a commission as an officer in the Air Force Reserve, he was in violation of the South Carolina Constitution's dual office-holding restriction.[125] The court began by introducing a "balancing" rationale for the doctrine, which is worth

115. *See* cases cited *supra* note 114; Baird v. Charleston County, 333 S.C. 519, 531, 511 S.E.2d 69, 75–76 (1999) (adding an analysis of the plaintiffs' particularized interests by saying that "as citizens of Charleston County, [they] have a significant interest in ensuring that their county acts" lawfully).

116. Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul., 337 S.C. 476, 488, 523 S.E.2d 795, 801 (S.C. Ct. App. 1999).

117. *Id.* at 486, 523 S.E.2d at 800.

118. This was because the plaintiff's employer had paid her a higher rate than what would have been required by the posted written notice. *Id.* Later, the court concluded that the plaintiff had failed to show that the challenged conduct impacted her rights in any way for purposes of the Declaratory Judgments Act. *Id.* at 487–488, 523 S.E.2d at 801.

119. *Id.* at 489, 523 S.E.2d at 802.

120. *Id.* at 489, 523 S.E.2d at 801.

121. *Id.* at 489, 523 S.E.2d at 801–02.

122. The public importance exception is triggered when (1) the issue is of public importance and (2) resolution is needed for future guidance. Baird v. Charleston County, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999).

123. *See* discussion of *Sloan v. Sanford infra* notes 124-133 and accompanying text.

124. 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

125. *Id.* at 433, 593 S.E.2d at 471.

reproducing in full, since courts frequently quote it in full when analyzing the public importance exception:[126]

> An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.[127]

In other words, this "balancing test" taught that courts may (or must) grant public importance standing when the need to provide judicial remedy of injuries outweighs the risk of vexatious litigation.[128] The court then decided to confer public interest standing "because of the importance of the issue [the plaintiff] raise[d]."[129] Analogizing to *Baird*, the court said that the issue of

126. *See, e.g.*, Adams v. McMaster, 432 S.C. 225, 235, 851 S.E.2d 703, 708 (2020) (quoting the paragraph in full); Jowers v. S.C. Dep't of Health & Env't Control, 423 S.C. 343, 365, 815 S.E.2d 446, 458 (2018) (same); S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 421 S.C. 110, 118, 804 S.E.2d 854, 859 (2017) (same); ATC S., Inc. v. Charleston County, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008) ("[E]ach [public importance standing] case must turn on 'the competing policy concerns' as we expressed in *Sloan v. Sanford*.").

127. *Sanford*, 357 S.C. at 434, 593 S.E.2d at 472. The *Sanford* court was not the first to articulate this theory of standing: the rationale was first articulated by then-Justice Toal in *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 85, 480 S.E.2d 72, 75 (1997) (Toal, J., dissenting).

128. Although a plain reading of this "test" would indicate that it is describing standing in general, subsequent South Carolina decisions have clarified that it is particular to public importance standing. For example, see *ATC South*, 380 S.C. at 191, 669 S.E.2d at 341, stating that "[w]hether an issue of public importance exists necessitates a cautious balancing of the competing interests presented" in *Sanford*. *See also* cases cited *supra* note 126. This approach appears internally contradictory, though: if the public importance exception requires no showing of a concrete or particularized injury, then why does this test turn on "alleged injustices" and "grievance[s]"? *Sanford*, 357 S.C. at 434, 593 S.E.2d at 472.

129. *Sanford*, 357 S.C. at 434, 593 S.E.2d at 472. Despite South Carolina courts' fondness for citing this language in public importance exception analyses, *see supra* note 126 and accompanying text, they do not often explicitly apply it in their opinions, *see infra* note 132 (listing cases wherein the court fails to explicitly apply *Sanford* balancing despite quoting the language), and sometimes simply appeal to the case without articulating their reasoning, *see, e.g.*, Sloan v. Wilkins, 362 S.C. 430, 436–37, 608 S.E.2d 579, 582–83 (2005) (stating conclusorily that a citizen has standing to argue a multi-subject act was unconstitutionally enacted "[i]n light of the great public importance of this matter"); Davis v. Richland Cnty. Council, 372 S.C. 497, 500, 642 S.E.2d 740, 741–42 (2007) (same conclusory grant of standing where county recreation commissioners challenged the constitutionality of an act transferring

gubernatorial eligibility "is at least as important as the proper funding for a clinical hospital."[130] Notably, the court made no mention of whether any sort of future guidance was needed on this issue.[131] Later decisions continued to focus almost solely on whether the issue was "important" enough, in the court's opinion, to warrant judicial commentary.[132] In practice, this meant that courts tended to grant public importance standing somewhat freely.[133]

The South Carolina Supreme Court tried to restore balance in the 2008 case of *ATC South v. Charleston County*.[134] In that case, the plaintiff company challenged the rezoning of nonadjacent property that had been leased to a business competitor.[135] In a unanimous opinion rejecting standing, the court emphasized that the second *Baird* prong—the need for future guidance—was crucial: public importance standing requires that an issue, "in the context of the case, be inextricably connected to the public need for court resolution for future guidance."[136] According to the court, "It is this concept of 'future guidance' that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance."[137] Despite this, the rest of the court's opinion focused more heavily on the word *public* than the word *future*: it explained that while zoning, like "most legislative and executive actions," is "[o]f course" a matter of public importance, here there was

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the authority to appoint commissioners). The "judicial economy" prong of *Sanford* seems particularly neglected. I have come across only one South Carolina case applying this principle. *See* Ballard v. Newberry County, 432 S.C. 526, 534, 854 S.E.2d 848, 852 (S.C. Ct. App. 2021) (refusing public importance standing for a citizen seeking to enforce the Public Records Act where there was no "urgent need for future guidance" and "[f]inding standing here could well invite countless copycat suits"). Ironically, *Ballard* did not cite *Sanford*. *See id.*

130. *Sanford*, 357 S.C. at 434, 593 S.E.2d at 472.

131. *See id.*

132. *See, e.g.*, *Wilkins*, 362 S.C. at 436–37, 608 S.E.2d at 582–83 (granting standing where a citizen sued to allege that an Act violated the South Carolina Constitution's one-subject provision because "of the great public importance of this matter," though not explaining the precise basis for that importance); Sloan v. Hardee, 371 S.C. 495, 497, 640 S.E.2d 457, 458 n.1 (2007) ("find[ing a] matter of sufficient public interest as to confer standing" where a citizen alleged that two Department of Transportation commissioners were unlawfully appointed); *Davis*, 372 S.C. at 500, 642 S.E.2d at 741–42 (finding public importance standing with no discussion of whether there was a need for future guidance); Sloan v. S.C. Dep't of Transp., 379 S.C. 160, 170–71, 666 S.E.2d 236, 241 (2008) (conferring public importance standing on a citizen to challenge the misuse of an emergency procurement provision because he had alleged "an unlawful expenditure by public officials").

133. *See, e.g.*, Spencer, *supra* note 15, at 682 (observing in 2005 that "[t]he particularized facts of the cases using the language seem to show only that when the language is used, standing is likely to be granted"); Bodman v. State, 403 S.C. 60, 68, 742 S.E.2d 363, 366–67 (2013) ("In recent years, we have routinely found standing through this exception." (collecting cases)).

134. 380 S.C. 191, 669 S.E.2d 337 (2008).

135. *See id.* at 194, 669 S.E.2d at 338–39.

136. *See id.* at 199, 669 S.E.2d at 341.

137. *Id.*

"nothing *public*" about the plaintiff's complaint since it pertained only to a single piece of property that had been rezoned for a "narrow purpose," and the only complaint came from a "disgruntled competitor."[138] Thus, the plaintiff lacked public importance standing.[139] The court warned against a "formulaic approach" to the public importance exception, saying that instead "each case must turn on 'the competing policy concerns' . . . expressed in *Sloan v. Sanford.*"[140] The court would later note (in dicta) that *ATC South* had "tempered the application of the public importance exception somewhat."[141]

ATC South ushered in nearly a decade of relatively strict public interest standing decisions.[142] But in 2017, a sharply divided supreme court shifted standing jurisprudence back in plaintiffs' favor. In *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, a group of citizens filed a declaratory judgment action against the South Carolina Department of Transportation ("DOT"), alleging that the agency had unconstitutionally used public funds for a private purpose when it inspected certain private bridges.[143] In a 3-2 opinion, the court explained that, "[a]lthough a close call," the issue warranted public importance standing.[144] First, the issue was of public importance because it implicated (1) the legality

138. *Id.* at 199–200, 669 S.E.2d at 341–42.

139. *Id.* at 200, 669 S.E.2d at 342.

140. *Id.* at 199, 669 S.E.2d at 341.

141. Bodman v. State, 403 S.C. 60, 68, 742 S.E.2d 363, 367 (2013).

142. For post-*ATC South* cases denying public importance standing, *see* Freemantle v. Preston, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012) (denying public importance standing to a citizen challenging a severance agreement between a county and its former county administrator because the plaintiff's claim for monetary damages violated "the purpose and spirit of the public importance exception" and a county's personnel decisions "do not necessitate further guidance"); Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 80–81, 753 S.E.2d 846, 853 (2014) (denying standing to citizens seeking an injunction against a cruise ship operator for nuisance and zoning violations because the suit challenged no government action, and there were other potential plaintiffs who could have shown adequate injury); S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 412 S.C. 18, 24, 770 S.E.2d 399, 402 (S.C. Ct. App. 2015) (finding no standing where there was no need for future guidance because the defendant had determined its actions were unlawful via an internal audit), *rev'd*, 421 S.C. 110, 804 S.E.2d 854 (2017); Countrywood Nursing, LLC. v. S.C. Dep't of Health & Hum. Servs., No. 2015-001986, 2017 WL 4616600, at *1 (S.C. Ct. App. Aug. 9, 2017) (denying public interest standing to a corporation to because the breach of contract allegations only concerned two governmental entities); *see also* Crowson & Shea, *supra* note 15, at 23 (noting that *ATC South* "place[d] a clear limitation upon the previous *Sloan* cases"). *But see* S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013) (finding standing for a citizen to challenge the constitutionality of South Carolina's transportation infrastructure bank because the plaintiff's suit had "cast[] a cloud of illegitimacy which could marginalize the [organization's] important decisions").

143. 421 S.C. 110, 116, 804 S.E.2d 854, 857 (2017).

144. *Id.* at 119, 804 S.E.2d at 859.

of government conduct,[145] (2) the expenditure of public funds,[146] and (3) citizens' safety.[147] Second, the issue required future guidance because (1) there was no extant judicial guidance on the issue[148] and (2) the agency had stated that it intended to engage in similar conduct again in the future if time permitted.[149] In dissent, Justice Costa Pleicones, joined by then-Justice John Kittredge, argued that the public importance exception did not apply because the fact that the challenged conduct was subjected to an internal audit[150] indicated that (1) the Department's internal procedures rendered it accountable to the public and (2) the Department did not intend to subsequently conduct unlawful inspections of private property.[151] Dissenting separately, Justice Kittredge (the author of *ATC South*) protested that the majority had expanded public importance exception well beyond what his *ATC South* opinion allowed, causing "the exception to swallow the rule."[152] In his view, the majority's decision was "tantamount to conferring standing on every citizen in every case where improper governmental activity is alleged"[153]—in other words, a return to the pre-*ATC South* view of public standing that was concerned solely with an issue's public interest rather than the need for future guidance.[154]

This decision seems to have (re-)opened the floodgates of standing. As illustrations of this modern approach, consider three recent South Carolina Supreme Court decisions, each finding public importance standing.

Start with *Adams v. McMaster* in 2020, where the supreme court unanimously allowed uninjured plaintiffs to challenge the governor's

145. Namely, that of the DOT. *Id.*

146. *Id.* The inspection cost $1,400. *Id.* at 115, 804 S.E.2d at 857.

147. *Id.* at 119, 804 S.E.2d at 859. As evidence, the majority cited the dissent's statement that the decision would "have far-reaching negative consequences for the safety of our citizens" because it hampered the DOT's "duty to build and maintain a safe roadway system for the use of the public." *Id.* (quoting *id.* at 125, 804 S.E.2d at 862 (Kittredge, J., dissenting)).

148. *See id.* at 119, 804 S.E.2d at 859. Although an internal audit by the Department's Officer of the Chief Internal Auditor had questioned the propriety of the Department's action, *id.* at 115–16, 804 S.E.2d at 857, and the South Carolina Court of Appeals had decided the audit showed that "there is no 'future guidance' to be provided," S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 412 S.C. 18, 24, 770 S.E.2d 399, 402 (S.C. Ct. App. 2015), *rev'd*, 421 S.C. 110, 804 S.E.2d 854, the supreme court did not discuss this in its standing analysis, *see* 421 S.C. at 118–19, 804 S.E.2d at 858–59. However, the supreme court challenged the court of appeal's interpretation of the audit's conclusions in its mootness analysis. *See id.* at 120–21, 804 S.E.2d at 860.

149. *S.C. Pub. Int. Found. v. S.C. Dep't of Transp*., 421 S.C. at 119, 804 S.E.2d at 859.

150. *See id.* at 130, 804 S.E.2d at 865 (Pleicones, J., dissenting).

151. *See id*. at 129–30, 804 S.E.2d at 864–65 (Pleicones, J., dissenting).

152. *Id.* at 125, 804 S.E.2d at 862 (Kittredge, J., dissenting).

153. *Id.* (Kittredge, J., dissenting).

154. While Justice Kittredge did not expressly accuse the majority of reverting to the lenient era of pre-*ATC South*, his opinion strongly implies such a view. *See id.* (Kittredge, J., dissenting).

allocation of federal COVID-19 emergency education funding to tuition grants.[155] After reiterating that the public importance exception requires no concrete or particularized injury, and reciting *Sanford*'s "competing policy concerns" and *ATC South*'s emphasis on "future guidance,"[156] the court found public interest standing in two steps. It started by describing the widespread impact of the COVID-19 pandemic, including both its effects "in every area of life" and "on education in this State."[157] Moving to step two, the court explained that this issue implicated a need for future guidance because it involved (1) the legality of government conduct, (2) the expenditure of public funds, (3) a matter of urgency, and (4) the issue was likely to reoccur in the future "if and when" the federal government appropriated additional emergency education funding.[158]

Next, in 2022, the supreme court unanimously applied the public importance exception where a public interest organization sued to block an allegedly unlawful contingency-fee agreement between the South Carolina Attorney General and particular law firms.[159] The court laid out the law by reciting the two-prong *Baird* rule, repeating *ATC South*'s emphasis on "future guidance." It also articulated a new balancing test: whereas *Sanford* instructed courts to weigh the two competing interests of (a) citizens' need for "access to the judicial process to address alleged injustices" and (b) "judicial economy,"[160] *Wilson* instructed courts to balance the competing interests of (a) citizens' "need to hold public officials accountable" and (b) "the concomitant integrity of government action."[161] The trial court ruled against

155. 432 S.C. 225, 235–36, 851 S.E.2d 703, 708 (2020).

156. *Id.* at 235, 851 S.E.2d at 708.

157. *Id*. at 236, 851 S.E.2d at 708. This logic appeared to mirror the South Carolina Court of Appeals' approach two decades earlier in *Carolina Alliance for Fair Employment v. South Carolina Department of Labor, Licensing, & Regulation*, 337 S.C. 476, 488–89, 523 S.E.2d 795, 801–02 (S.C. Ct. App. 1999). *Compare Adams*, 432 S.C. at 236, 851 S.E.2d at 708 ("The COVID-19 pandemic that has plagued our State in recent months has posed unprecedented challenges in every area of life."), *with Carolina All. for Fair Emp.*, 337 S.C. at 488, 523 S.E.2d at 801 ("In the economy today, a greater number of businesses are relying on temporary employees.").

158. *See Adams*, 432 S.C. at 236, 851 S.E.2d at 708–09.

159. *See* S.C. Pub. Int. Found. v. Wilson, 437 S.C. 334, 342–43, 878 S.E.2d 891, 896 (2022).

160. Sloan v. Sanford, 357 S.C. 431, 434, 593. S.E.2d 470, 472 (2004).

161. *Wilson*, 437 S.C. at 341–42, 878 S.E.2d at 895 (quoting S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 421 S.C. 110, 118–19, 804 S.E.2d 854, 858 (2017)). The first prong of this test, changing the focus to public officials, could indicate the court is unwilling to confer public interest standing in lawsuits against private individuals. And the second prong strangely seems to imply that too much "accountabl[ility]" will hamper the integrity of government action. In contrast, prior precedent taught that the public importance exception was a mode of *furthering* such integrity. *See, e.g.*, *S.C. Pub. Int. Found. v. S.C. Dep't of Transp.*, 421 S.C. at 118, 804

the plaintiff on standing, concluding that the case presented no "need for future guidance" since the ruling would be limited entirely to a particular contract between two parties.[162] The supreme court reversed the trial court, again tracking *Baird*'s two steps. It found first that the issue—the expenditure of public funds—was "indisputably" of public importance.[163] Turning then to the second prong, the court noted that the attorney general had five other litigation retention agreements with contingency fee provisions.[164] Thus this issue would "inevitably rise again" absent judicial instruction.[165]

Finally, in 2024 the supreme court conferred standing on citizens to challenge a school-choice law as unlawfully authorizing the use of public funds for private benefit.[166] The court recited the two-prong public importance exception rule and then noted that it had often found that the "future guidance" prong was satisfied in cases dealing with the expenditure of public funds. Here, "because this case concern[ed] legislation involving the annual transfer of $90 million dollars from the public treasury," the court "did not hesitate" to find public importance standing.[167]

As it stands today, the precise contours of the public importance exception are ambiguous.[168] Only two factors seem clear-cut: the public importance

S.E.2d at 858 ("The purpose of public importance standing is to allow interested citizens a right of action in our judicial system when issues are of significant public importance to ensure accountability and the concomitant integrity of government action." (cleaned up)). But this question is more academic than functional: a rewording of the "balancing" test is not likely to impact the outcomes of standing cases because South Carolina courts do not often apply the test, despite frequently invoking it. *See supra* note 129.

162. *Wilson*, 437 S.C. at 339, 878 S.E.2d at 894.

163. *Id.* at 342, 878 S.E.2d at 895.

164. *Id.*

165. *Id.*

166. *See* Eidson v. S.C. Dep't of Educ., 444 S.C. 166, 177, 906 S.E.2d 345, 351 (2024).

167. *Id.* at 177, 906 S.E.2d at 350–51.

168. *See infra* Part III.C.

exception applies only to challenges to government conduct,[169] and only to suits requesting prospective relief.[170]

III. STANDING AGAINST THE PUBLIC IMPORTANCE EXCEPTION

There are seven popular modes of constitutional argument: "(1) appeals to text . . ., (2) constitutional structure, (3) prudence (or consequences), (4) purpose or intention, (5) judicial precedent, (6) past practice [e.g., history] . . . and (7) national ethos and political tradition."[171] These modalities apply with equal force to the public importance exception, and this Note will discuss three in particular—history, structure, and prudence—that counsel against the public importance exception as it is used today.

A. History

South Carolina's public importance exception, which has been in common use for less than thirty years,[172] stands in stark contrast to South Carolina's traditional practice of requiring a plaintiff to show an injury to a legally protected interest.

1. The Legal Interest Requirement

South Carolina's traditional approach to standing strictly required a showing that the plaintiff assert a concrete injury or that a significant legal interest of the plaintiff be at stake. A brief survey of some of the relevant cases

169. An unpublished South Carolina Court of Appeals case recently stated this rule categorically: "Public importance standing centers around scrutinizing *government* action." Davis v. Connelly, No. 2020-001348, 2024 WL 35435, at *2 (S.C. Ct. App. Jan. 3, 2024). As another example, see Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 80–81, 753 S.E.2d 846, 853 (2014) (finding no public interest standing because, *inter alia*, "[t]he case presents no issue of the constitutionality or legality of government action"). But this has not always been the rule: in 1999, the South Carolina Court of Appeals bestowed public importance standing on a lawsuit against private temporary employment agencies because it wished to "edify . . . [these types of] agencies statewide." Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul., 337 S.C. 476, 489, 523 S.E.2d 795, 802 (S.C. Ct. App. 1999). In the same case, the Court simultaneously found public importance standing for a lawsuit against a state agency. *Id.*

170. *See, e.g.*, Freemantle v. Preston, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012) (denying public importance standing to a citizen challenging a severance agreement between a county and its former county administrator because, *inter alia*, the plaintiff's claim for monetary damages violated "the purpose and spirit of the public importance exception").

171. SANFORD LEVINSON ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 43 (Aspen Publ'g 8th ed. 2022).

172. *See supra* Part II.B.3.

demonstrates that courts routinely rejected appeals to "public interest"-style jurisdiction.

For an early example of this traditional approach to standing, consider *Ex parte Florence School*.[173] In that case, a school's board of commissioners sued the county school commissioner, accusing him of withholding funds that were lawfully apportioned to the school.[174] The South Carolina Supreme Court chose not to consider the question of whether the underlying statute was constitutional because, as it explained, it is improper for a court to "listen to an objection made to the constitutionality of an act by a party whose rights it does not affect."[175] The right to challenge a law's constitutionality did not belong to "strangers."[176] The court explained that:

> if it is claimed that such provision is unconstitutional, and *invades or infringes upon the constitutional rights of any citizen*, it is for *such citizen* to raise the question . . ., and not for this respondent, whose constitutional rights, . . . have neither been invaded nor infringed upon by said act.[177]

Jellico v. Conner, decided in 1909, is another example.[178] In that case, the plaintiffs sued for an injunction against holding an election to determine whether Charleston alcohol dispensaries should be reopened, on the grounds that the act regulating such elections was unconstitutional.[179] Citing *Florence School*, the court refused to address a particular challenged provision of the act at issue because "the respondents are not proceeding to hold an election under that section; therefore the rights of the petitioner thereunder are not involved."[180]

In 1939, the South Carolina Supreme Court published a trio of cases that further buttressed this rule. Start with *Townsend v. Richland County*, where the supreme court rejected the plaintiff's argument that because a law was unconstitutional as applied to a third party, it should be struck down in its entirety.[181] The court explained that it would "refuse to determine whether or not a legislative Act is constitutional as to persons who are not shown by the agreed case to be affected," because "[a] party cannot be permitted to harass others and take the time of the Courts in litigating matters in which they have

173. 43 S.C. 11, 20 S.E. 794 (1895).
174. *See id.* at 12, 20 S.E. at 794.
175. *See id.* at 16, 20 S.E. at 796.
176. *Id.*
177. *Id.* (emphasis added).
178. 83 S.C. 481, 65 S.E. 725 (1909).
179. *Id.* at 482, 485, 65 S.E. at 726–27.
180. *Id.* at 489–90, 65 S.E. at 728.
181. 190 S.C. 270, 280, 2 S.E.2d 777, 781 (1939).

no interest."[182] The next case was *Kirk v. Douglass*, where an owner of county bonds challenged the constitutionality of a tax-collection law and asked the court to order the county sheriff to enforce existing tax liens.[183] The court stated the governing rule as follows:

> Before a law can be assailed by any person on the ground that it is unconstitutional, he must show that he has an interest in the question, in that the enforcement of the law would be an infringement on his rights. The corollary of the general rule is that one who is not prejudiced by the enforcement of an Act of the Legislature, cannot question its constitutionality.[184]

The court determined that the plaintiff had shown a sufficient interest to state a cause of action and remanded for an initial merits determination.[185] Finally, in a third case that rejected the plaintiffs' challenges due to mootness, the court explained that "there [was] no party before the Court who c[ould] properly be heard to question the constitutionality of the [challenged statutory] provisions . . . , even if they are not constitutional, since it does not appear that they invade any right which any party . . . is entitled to assert . . . ."[186]

In 1940, the court decided the case of *Culbertson v. Blatt*, with nearly identical facts to *Sloan v. Sanford* (decided sixty-four years later), but an opposite outcome.[187] In *Culbertson*, the court declined to consider a citizen's claim that certain members of a university's Board of Trustees were appointed in violation of the constitutional prohibition on dual office-holding.[188] The court firmly rejected the plaintiff's "capacity to bring the suit" because he had shown "no legal interest in the maintenance of the action."[189]

Justifying its holding, the *Culbertson* court expressed concern for "the traditional and constitutional division of powers among the legislative, executive and judicial branches of the government."[190] And while acknowledging that "a legislative act which . . . *infringes the rights* of citizens and taxpayers . . . is subject to judicial restraint and nullification," the court

182. *Id.*

183. 190 S.C. 495, 497–98, 3 S.E.2d 536, 536 (1939).

184. *Id.* at 503, 3 S.E.2d at 538–39.

185. *Id.* at 503–04, 3 S.E.2d at 539.

186. Chesterfield County v. State Highway Dep't, 191 S.C. 19, 54, 3 S.E.2d 686, 702 (1939).

187. The *Sanford* court acknowledged this discrepancy, explaining simply that *Culbertson* had been decided prior to the inception of the public importance exception. 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

188. 194 S.C. 105, 107–09, 9 S.E.2d 218, 218–19 (1940).

189. *See id.* at 108, 110, 9 S.E.2d at 219.

190. *Id.* at 109, 9 S.E.2d at 219.

rebuked the notion that "on the mere ground that a legislative act is in violation of some constitutional provision, the act may be nullified . . . at the suit of any of the tens of thousands of citizens who may have the qualifications of taxpayers."[191] Such a lenient approach would render "[t]he holding of public office . . . a hazardous and burdensome undertaking" by exposing public figures to an avalanche of litigation levied by "dissatisfied citizens."[192]

Finally, consider *Crews v. Beattie*, where the court rejected a citizen's standing to seek an injunction against a public utility company's paying of certain obligations because the plaintiff's only interest was "the exceedingly small interest of a general taxpayer."[193] According to the court, "The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke *per se* a judicial determination of the issue."[194]

Eventually, South Carolina courts also developed a "real party in interest" requirement.[195] A real party in interest, according to the South Carolina Supreme Court, is "one who 'has a real, actual, material or substantial interest in *the subject matter of the action*, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.'"[196] Without delving into this line of cases, it suffices to point out that the doctrine, like the others under discussion here, requires a particularly-positioned *plaintiff*, unlike the public importance exception, which requires a particularly-important *issue* (in the court's judgment).

In summary, South Carolina's long history of insisting a plaintiff have a concrete interest at stake shows that public importance standing, rather than being deeply rooted in the state's jurisprudential tradition, is a modern and ahistorical doctrine.

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191. *Id.* at 111–12, 9 S.E.2d at 220 (emphasis added).

192. *Id.* at 112, 9 S.E.2d at 220.

193. 197 S.C. 32, 49, 14 S.E.2d 351, 357–58 (1941).

194. *Id.* at 49, 14 S.E.2d at 358.

195. *See, e.g.*, Townsend v. Townsend, 323 S.C. 309, 314, 474 S.E.2d 424, 427 (1996) ("To have standing, one must have a personal stake in the subject matter of the lawsuit; *i.e.*, one must be the 'real party in interest.'"); Glaze v. Grooms, 324 S.C. 249, 255, 478 S.E.2d 841, 845 (1996) (same). The court has not always clearly articulated this "real party in interest" doctrine. For example, two years before *Townsend*, the court described "real party in interest" as an *additional* requirement to having a personal stake. Bailey v. Bailey, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994) ("To have standing, a party must have a personal stake in the subject matter of a lawsuit. In South Carolina, a party must *also* be the 'real party in interest.'" (emphasis added)); *see also* Bardoon Props. v. Eidolon Corp., 326 S.C. 166, 169, 485 S.E.2d 371, 373 n.3 (1997) (acknowledging that its prior case law had "essentially equate[d] the concepts of standing and real party in interest").

196. *Townsend*, 323 S.C. at 314, 474 S.E.2d at 427 (quoting *Bailey*, 312 S.C. at 458, 441 S.E.2d at 327).

2. Public Nuisance and the "Special Damage" Requirement

South Carolina's traditional approach to public nuisance shows that it has traditionally required litigants to show injury in order to be heard in court, further confirming the ahistoricity of the public importance exception.[197]

To understand this argument, it is important to understand the tort of public nuisance. Under the common law, public nuisance was "a catch-all term for various invasions of public rights, ranging from corruption of public morals to obstruction of public highways."[198] Courts traditionally limited the ability of private individuals to challenge public nuisances, while allowing public authorities to penalize such nuisances through either criminal prohibition or injunctions.[199] The rationale was simple: there should be "public control over public rights and private control over private rights."[200] However, an exception to this prohibition existed where a plaintiff alleged "special damage," damage that was different in kind than that suffered by the public generally.[201] A classic example comes from a 1535 King's Bench case, where a justice gave the illustration of a defendant who digs a ditch across a public road, thereby obstructing it.[202] Although no citizen could bring a claim for the mere inconvenience of the blocked road, since this was a "nuisance common to all," if a rider injured himself by falling into the ditch, he would become eligible for a private claim against the defendant since the rider "was more damaged thereby than anyone else."[203]

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197. Some commentators and judges have looked to the common law principles of public nuisance to inform the content of the federal standing requirement. *See* Woolhandler & Nelson, *supra* note 32, passim; Spokeo, Inc. v. Robins, 578 U.S. 330, 345–46 (2016) (Thomas, J., concurring). But others have questioned (in the context of Article III standing) whether public nuisance law should inform standing at all. *See* Owen B. Smitherman, *History, Public Rights, and Article III Standing*, 47 HARV. J.L. & POL'Y 167, 212–26 (2024); Sierra v. City of Hallendale Beach, 996 F.3d 1110, 1126 (11th Cir. 2021) (Newsom, J., concurring). This Note looks to public nuisance law simply to emphasize that South Carolina has a robust tradition of requiring litigants to show a stake in the litigation.

198. Woolhandler & Nelson, *supra* note 32, at 701.

199. *Id.*

200. *Id.* at 695. Public rights are interests commonly shared among the citizenry at large, such as free use of public highways and waterways, while private rights are held by individual persons, such as the right to property. *Id.* at 693. The restrictions on private enforcement of the public interest in nuisance abatement reflected broader restrictions on private enforcement of public rights. In traditional United States common law, "civil remedies for violations of public rights were not generally available at the behest of private plaintiffs [e.g., citizens], at least in the absence of some connection to a private injury." *Id.* The justifications for this restriction were "the twin ideas of public control over public rights and private control over private rights." *Id.* at 694. In other words, only public authorities, acting on the public's behalf, could vindicate public rights in court. *Id.* at 701–02.

201. *Id.* at 702.

202. Smitherman, *supra* note 197, at 188–90.

203. *Id.* at 189–90.

As states' jurisprudence developed, states varied in their adoption of this rule, with some more willing to allow private suits against public nuisance, and others adhering to the traditional ban.[204] South Carolina fell firmly in the latter camp: in 1915 a commentator noted that South Carolina and Massachusetts were "[t]wo of the States which go farthest in opposing . . . private action" for tortious obstruction to public right of passage.[205]

For example, in the 1833 case of *Carey v. Brooks*, a defendant had drained a creek, blocking the plaintiff from using it to deliver timber, and the plaintiff sued.[206] The South Carolina Supreme Court rejected the plaintiff's claim, explaining that because the creek was a "public high way," only a person who had suffered "special damage," such as injury to himself or his horse, could sue.[207] Even though the plaintiff was contractually obligated to deliver the timber, and subject to penalty if he failed,[208] this injury did not suffice—a would-be plaintiff who suffered only delay was out of luck, even if the delay would "damnif[y]" him or force him to miss an "important affair."[209] In such cases, the only legal remedy was for a prosecutor to indict the miscreant.[210] The reason for this rule: to avoid "the inconvenience of allowing a separate action to every individual who suffers an inconvenience common to many."[211]

In *South Carolina Steam-Boat Co. v. South Carolina Railway Co.*, a lawsuit "to recover damages for the obstruction of a navigable stream," the court explained that a "special" injury "must differ in kind, and not merely in degree or extent, from that which the general public sustains."[212] Because in that case, the plaintiffs merely alleged that they had been prevented from using

204. *See* Jeremiah Smith, *Private Action for Obstruction to Public Right of Passage* (pt. 2), 15 COLUM. L. REV. 142, 144 (1915) ("[In America] there is more conflict than in England. While a private action is sometimes denied, yet it is sustained in many cases.").

205. *See id.* at 145 (first citing Carey v. Brooks, 19 S.C.L (1 Hill) 365 (1833) (finding no right to sue where the defendant had drained a stream and thus prevented plaintiff from transporting timber); then citing S.C. Steamboat Co. v. S.C. Ry. Co., 30 S.C. 539, 9 S.E. 650 (1889) (dismissing a suit to recover damages for the defendant's obstruction of a navigable stream); then citing S.C. Steamboat Co. v. Wilmington, C. & A. Ry. Co., 46 S.C. 327, 24 S.E. 337 (1896) (same); and then citing Cherry v. Fewell, 48 S.C. 553, 26 S.E. 798 (1897) (dismissing a plaintiff's suit challenging a street closure near his house because the closure was at some distance rather than immediately adjacent)).

206. 19 S.C.L. (1 Hill) at 365.

207. *Id.* at 366–68.

208. *Id.* at 365–66; *see also Wilmington*, 46 S.C. at 335, 24 S.E. at 340 ("[T]he plaintiff, in Carey v. Brooks, was subject to a penalty for not delivering his timber according to his contract.").

209. *Carey*, 19 S.C.L. (1 Hill) at 367–68.

210. *See id.* at 367.

211. *Id.* at 368.

212. 30 S.C. 539, 544–45, 9 S.E. 650, 650–51 (1889).

the stream to operate their business, they alleged no such special injury and failed to state a cause of action.[213]

In 1906, the supreme court made it clear that this "special injury" rule was not confined to public-nuisance torts. That case, *Duncan v. Heyward*, involved a suit for injunction leveled by citizens against the South Carolina Board of Education, on the ground that a certain surcharge provision of the Board's contracts with textbook publishers was unlawful.[214] The court found for the Board, because, *inter alia*, "[t]he injury which the petitioners allege they would suffer does not differ in kind from that which would be suffered by the people at large patronizing the public schools."[215]

In *Culbertson v. Blatt*, discussed earlier, the court further articulated a bar against generalized grievance claims by plaintiffs, explaining that "the constitutionality of . . . legislation may not be questioned by one who fails to show . . . that he has some personal interest in the situation other than that shared in common by other members of the public."[216] The court cited *Ex parte Levitt*[217] and the 1922 South Carolina case of *State v. Mittle*. (In the latter case, a man convicted of manslaughter was denied standing to argue that the jury selection process had unconstitutionally excluded women, because the man was "not a member of the alleged excluded class.")[218]

Despite this rule's tension with the public importance exception, South Carolina has carried it into modern jurisprudence, even tightening it. In the 1992 case of *Citizens for Lee County, Inc. v. Lee County*, the South Carolina Supreme Court decided that two citizens and a public interest group lacked standing to challenge a county's contract for the construction of a landfill because any alleged interest of or injury suffered by them was "indistinguishable from that of other members of the general public."[219]

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213. *Id.* at 544, 547–48, 9 S.E. at 650, 652. For other examples of this doctrine's application, see *S.C. Steamboat Co. v. Wilmington*, *Columbia & Augusta Railway Co.*, 46 S.C. 327, 24 S.E. 337 (1896) for similar facts and decision as *South Carolina Steam-Boat Co.*; *Cherry v. Fewell*, 48 S.C. 553, 560, 26 S.E. 798, 800 (1897), which rejected a complaint seeking an injunction against the city for illegally closing a street near the plaintiff's lot because, even though this forced him to access his lot by a more circuitous route, it was not a "special or peculiar injury;" and *Manson v. S. Bound Railroad Company*, 64 S.C. 120, 127, 130, 41 S.E. 832, 834–35 (1902), which cited *Cherry* to reject a complaint seeking an injunction against the condemnation of property for railroad construction near the plaintiffs' lots.

214. 74 S.C. 560, 561, 54 S.E. 760, 761 (1906).

215. *Id.* at 566, 54 S.E. at 763.

216. 194 S.C. 105, 113, 9 S.E.2d 218, 221 (1940).

217. *Id.* at 112, 9 S.E.2d at 220–21 (first citing *Ex parte* Levitt, 302 U.S. 633 (1937); and then State v. Mittle, 120 S.C. 526, 113 S.E. 335 (1922)). *See also generally supra* Part II.A (which includes a discussion on the relevance of *Ex parte Levitt*).

218. *Mittle*, 120 S.C. at 529, 533–34, 113 S.E. at 336, 338.

219. 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992).

In the 2002 case of *St. Andrews Public Service District v. City Council of City of Charleston*, the supreme court overturned a doctrine that had allowed citizens to challenge illegal annexation proceedings.[220] The court held that "the better policy is to limit 'outsider' annexation challenges to those brought by the State 'acting in the public interest.'"[221] In other words, challenges to public rights were to be brought by public authorities.

In 2005, the supreme court tightened *Carey v. Brooks*, holding that the "special injury" required for a public nuisance suit must be an injury to one's *property*, not an injury to one's *person*.[222] And in 2014, the court rejected a nuisance claim against a cruise ship operator, explaining that

> [c]ourts are not bodies for the resolution of public policy and generalized grievances. Harms suffered by the public at large . . . are to be remedied by the legislative and executive branches . . . . [I]t is incumbent upon the public to seek reform through their elected officials or failing that, at the ballot box.[223]

In summary, South Carolina has not only traditionally clung to an injury requirement for standing, it has at times *stood out* among the states for doing so.[224] The public importance exception, a comparatively recent innovation, blinks this tradition.

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220. 349 S.C. 602, 605, 564 S.E.2d 647, 648 (2002).

221. *Id.*

222. *See* Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 574–75, 614 S.E.2d 619, 622–23 (2005).

223. Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014).

224. *See* Smith, *supra* note 204, at 145 (explaining that South Carolina was one of "[t]wo . . . States which go farthest in opposing . . . private action" for tortious obstruction to public right of passage); Flast v. Cohen, 392 U.S. 83, 108, 108 n.4 (1968) (Douglas, J., concurring) (contrasting South Carolina's more stringent taxpayer standing rules with other states' rules that allowed a citizen to serve as "a private attorney general seeking to vindicate the public interest"). One might argue that South Carolina's taxpayer standing doctrine refutes this argument because it historically allowed taxpayers to sue without alleging special damages; indeed, a long line of cases seemed to teach this doctrine. *See* Shillito v. City of Spartanburg, 214 S.C. 11, 22, 51 S.E.2d 95, 99 (1948) ("[P]rivate citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. An apparent exception to this rule exists when the Act sought to be enjoined in an unlawful diversion of public funds."); Kirk v. Clark, 191 S.C. 205, 210, 4 S.E.2d 13, 15 (1939) ("The principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and all other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law."); *see also* Mauldin v. City Council of Greenville, 33 S.C. 1, 18, 11 S.E. 434, 435 (1890) (finding taxpayer standing to sue to enjoin a city council from issuing bonds because taxpayer plaintiffs were "comparatively a small part of" the public); McCullough v. Brown, 41 S.C. 220, 253–54,19 S.E 458, 475 (1894) (finding

taxpayer standing to challenge a statutory ban on private alcohol sales because the suit pertained to "the use of public funds derived from taxation under an act of the legislature claimed to be unconstitutional"), *overruled by* State *ex rel.* George v. City Council of Aiken, 42 S.C. 222, 20 S.E. 221 (1894); Butler v. Ellerbe, 44 S.C. 256, 259, 22 S.E. 425, 428 (1895) (citing *Mauldin* to "waiv[e]" the question of whether the plaintiff could sue to enjoin the state comptroller from withdrawing money from the state treasury for a particular purpose); Sligh v. Bowers, 62 S.C. 409, 413, 40 S.E. 885, 887 (1902) (citing, *inter alia*, *Ellerbe* to confer taxpayer standing where patrons of a school district sued to enjoin the construction of a schoolhouse building with public funds); Lamar v. Croft, 73 S.C. 407, 410–11, 53 S.E. 540, 541 (1906) (citing *Mauldin* and *Ellerbe* to confer standing where plaintiffs sought injunction against commissioners tasked with hiring surveyors to survey a proposed new county that would allegedly violate a constitutional prohibition against forming new counties more than once within a prescribed time period); Rawl v. McCown, 97 S.C. 1, 5, 81 S.E. 958, 960 (1914) (citing, *inter alia*, *Mauldin* to reject the defendant's argument that because the plaintiffs had suffered no special damage, they could not maintain their claim relating to the dispensation of alcohol); Gaston v. State Highway Dep't of S.C., 134 S.C. 402, 408–09, 132 S.E. 680, 682 (1926) (conferring taxpayer standing and rejecting any analogy to the special damage required for nuisance where the plaintiff sought to enjoin the construction of a road).

But on closer analysis, these cases do not undercut South Carolina's tradition of requiring injury. First, the court corrected itself decades ago in *Crews v. Beattie*, laying down the rule that "a taxpayer may not maintain a suit to enjoin the action of State officers when he has no special interest and his only standing is the exceedingly small interest of a general taxpayer." 197 S.C. 32, 49, 14 S.E.2d 351, 358 (1941). In that case, the court denied taxpayer standing where a plaintiff alleged that a public utility's proposed act was unlawful and would cost the state $90,000. *Id.* at 42, 14 S.E.2d at 355. The court distinguished many of the taxpayer standing cases cited above, saying that in those cases the plaintiffs had "had an immediate, direct and special interest in the matters involved." *Id.* at 52, 14 S.E.2d at 359. Supreme Court Justice William Douglas cited *Crews* in *Flast v. Cohen* to illustrate that unlike states allowing a taxpayer to serve as "a private attorney general seeking to vindicate the public interest," South Carolina (among other states) required "that the taxpayer have more than an infinitesimal financial stake in the problem." 392 U.S. at 108, 108 n.4.

Second, many of the aforementioned cases actually relied on a form of the basic special injury standard, albeit at a higher level of generality. The theory was that "taxpayers of a municipal corporation . . . whose burdens of taxation are increased by the misappropriation of public funds . . . sustain such special damage as to entitle them to relief." Manson v. S. Bound R.R. Co., 64 S.C. 120, 128, 41 S.E. 832, 834 (1902) (quoting JAMES HIGH, A TREATISE ON THE LAW OF INJUNCTIONS, VOL II § 1298 (3d ed. 1890)). And the court clarified that the taxpayer standing doctrine did not give taxpayer plaintiffs carte blanche to "maintain an action in all cases of this nature, regardless of their personal interest, or of the degree of injury which they may sustain." *Id.* at 128, 41 S.E. at 835 (quoting JAMES HIGH, *supra* at § 1301). The court produced several opinions relying on this "special injury" rationale. *See, e.g.*, *Mauldin*, 33 S.C. at 19, 11 S.E. at 436 (explaining that taxpayers "constitute a class especially damaged by . . . the alleged increase of the burden of taxation"); *Ellerbe*, 44 S.C. at 283, 22 S.E. at 437 (McIver, C.J., dissenting) (citing, *inter alia*, JOHN DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 736 (1872), as an authority for the taxpayer standing doctrine); *Kirk*, 191 S.C. at 210, 4 S.E.2d at 15 (same). For the relevance of the citations to John Dillon, see Hilary P. Bradford, *Municipal Taxpayers and Standing to Sue*, 2 BUFF. L. REV. 140, 145 (1952), explaining that the taxpayer standing rationale relied upon by Dillon was based on an analogy to a stockholder's interest in his corporate property. This is all a far cry from today's freewheeling public interest standing, which requires no injury at all to be asserted by a plaintiff.

B. Structure

Not only is the public importance exception unmoored from tradition, it compromises the interbranch separation of powers. It does so by requiring courts to evaluate the challenged policy rather than the nature of the litigant—something courts are fundamentally ill-equipped to do. In his famous work *Democracy in America*, Alexis de Tocqueville observed three key aspects of the American judicial system. First, he noted, American courts' job was to "serve as an arbiter;" to resolve a "dispute."[225] Second, courts were "to pronounce on particular cases and not on general principles."[226] Finally, courts were "able to act only when . . . appealed to."[227] A judge "is led despite himself onto the terrain of politics;" he "judges the law only because he has to judge a case."[228] This had a salutary effect, de Tocqueville explained. Although Americans "entrusted an immense political power to their courts" in the form of judicial review, these three characteristics "much diminished the dangers of this power."[229]

This doctrine, by "intimately binding the case made against the law with the case made against one man" and requiring a "particular interest," ensures "that legislation will not be attacked lightly."[230] Although this means that some laws would never be subjected to judicial review, because they could "never give rise to the sort of clearly formulated dispute that one calls a case,"

Today, taxpayer standing occupies an odd place in South Carolina standing jurisprudence—despite not being listed among the three grounds of standing, see, e.g., S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017), it is still invoked and analyzed as a separate ground of standing in South Carolina courts, see, e.g., Davis v. Connelly, No. 2020-001348, 2024 WL 35435, at *2 (S.C. Ct. App. Jan. 3, 2024) (analyzing taxpayer standing after finding no public importance standing). Despite being invoked as a separate category of standing, taxpayer standing in practice seems to be equated with the "constitutional standing" requirement by requiring that the taxpayer plaintiff allege a particularized injury. *See, e.g.*, *S.C. Pub. Int. Found. v. S.C. Dep't of Transp.*, 421 S.C. at 125, 804 S.E.2d at 862 (Kittredge, J., dissenting) (citing *Crews* for the rule on taxpayer standing). In two cases, the South Carolina Supreme Court has located taxpayer standing under its "constitutional standing" rubric. *See* ATC S., Inc. v. Charleston County, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008) ("We reject ATC's claim of taxpayer standing under constitutional standing principles."); Bodman v. State, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013) ("In *ATC*, we unanimously closed the door to a litigant asserting [constitutional] standing simply by virtue of his status as a taxpayer" because such harm "is shared by all taxpayers in the State."). Despite these holdings, courts (and litigants) have occasionally conflated taxpayer standing with the public importance exception. *See infra* Part III.C.

225. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 83 (Harvey C. Mansfield & Delba Winthrop trans., U. Chi. Press 2000) (1835).

226. *Id.* at 83–84.

227. *Id.* at 84.

228. *Id.* at 86.

229. *Id.*

230. *Id.*

de Tocqueville concluded that this system of a restrained judiciary was "most favorable to liberty."[231]

In other words, courts are fundamentally concerned with *disputes* between *parties*.[232] These disputes are decided against the backdrop of law; the application of law to government policy is a necessary incident but not the main thing. When a judge makes decisions divorced from these constraints, "he goes outside his sphere completely and enters that of the legislative power."[233]

Following similar logic, the United States Supreme Court has routinely grounded standing in separation of powers principles, as noted earlier.[234] If federal separation-of-powers principles require plaintiffs to show injury in order to appear before federal courts, this should be no less true at the state level. Unlike the U.S. Constitution,[235] the South Carolina Constitution includes an express provision that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other."[236] If anything, this express textual provision should *heighten* the importance of separation of powers in South Carolina.

The public importance exception's derogation from the traditional understanding of judicial function—by instructing courts to evaluate the importance of an issue, separate from whether the plaintiff has an interest in the outcome—jeopardizes the separation of powers in at least three additional ways beyond invasion of the legislative power. First, the public importance exception allows "the judiciary to intentionally and unilaterally expand its role on its own,"[237] setting its own bounds of power. This makes the court more closely resemble a "continuing monitor"[238] of the other branches than a co-equal partner. Recently, the Ohio Supreme Court, in overruling its public interest standing doctrine, said that the doctrine "essentially allows this court to engage in policy-making by ruling on the legislation of the General

231. *Id.* at 86–87.

232. *Cf.* Scalia, *supra* note 5, at 894 (explaining that "the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*") (emphasis in original).

233. DE TOCQUEVILLE, *supra* note 225, at 83.

234. *See supra* note 37.

235. Trump v. United States, 603 U.S. 593, 637 (2024) (noting the Constitution contains no "separation of powers clause" (quoting Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 227 (2020)).

236. S.C. CONST. art. I, § 8.

237. Harmanis, *supra* note 10, at 743.

238. *See* Lujan v. Defs. of Wildife, 504 U.S. 555, 577 (1992) (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

Assembly in cases that lack an injured party."[239] And the public importance exception could signal that the South Carolina Supreme Court is willing to violate its own rules by waiving subject-matter jurisdiction when it wishes to hear a case.[240] As one commentator noted, "to apply public interest standing, courts must go completely beyond both an injury-in-fact and the entire political process."[241]

The second separation-of-powers violation flows from the first: public importance standing brings the court dangerously near to issuing advisory opinions. The South Carolina Supreme Court has firmly stated that it will not issue such opinions.[242] The court has elsewhere declared that it has a "limited (non-policy) role."[243] But standing acts as a bulwark against advisory opinions;[244] when it is weakened, such opinions are more likely to slip through. If, as the public importance exception teaches, courts may deem certain issues to be of such public importance that a plaintiff with no "nexus between himself and the action[]" can trigger review,[245] then it follows that the plaintiff's existence is simply window dressing—a meaningless formality. As an example, consider *Carolina Alliance for Fair Employment v. South Carolina Department of Labor, Licensing, & Regulation*, considering a challenge brought by an individual and a labor advocacy group.[246] Although the former "failed to demonstrate any injury to her based on the" defendant's challenged action, and the latter "[n]owhere . . . allege[d] any individualized harm or injury to itself or any of its members," the South Carolina Court of Appeals decided to consider the merits anyway in order to "edify" both the defendant and others who were not parties to the case.[247] There is not a yawing

239. State *ex rel.* Martens v. Findlay Mun. Ct., No. 2024-0122, 2024 WL 4982624, at *4 (Ohio Dec. 5, 2024).

240. *Compare* Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 79–80, 753 S.E.2d 846, 852–53 (2014) (explaining that the public importance exception is an "exception to the requirement that a plaintiff possess standing"), *and* S.C. Pub. Int. Found. v. Wilson, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022) ("A motion to dismiss for lack of standing challenges the court's subject matter jurisdiction."), *with* State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) ("The lack of subject matter jurisdiction may not be waived . . . ."). The court thus appears willing to craft an exception to subject matter jurisdiction when it deems a legal question to be of sufficient public importance.

241. Harmanis, *supra* note 10, at 750 n.134.

242. *See, e.g.*, Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 234 (1975) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.").

243. Planned Parenthood S. Atl. v. State, 440 S.C. 465, 472, 892 S.E.2d 121, 126 (2023).

244. *See* Harmanis, *supra* note 10, at 737 ("[S]tanding is intended to ensure that federal courts settle only those disputes that are truly adversarial in nature. The Supreme Court strictly adheres to this principle, which is reflected in the Court's refusal to issue advisory opinions.").

245. *See* Sloan v. Dep't of Transp., 365 S.C. 299, 304, 618 S.E.2d 876, 878 (2005).

246. Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul., 337 S.C. 476, 480, 523 S.E.2d 795, 797 (S.C. Ct. App. 1999).

247. *Id.* at 486–89, 523 S.E.2d at 800–02.

gulf between "edification" and "advice." As another example, consider the recently-overruled[248] case of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, where the Ohio Supreme Court created a version of public importance standing.[249] In dissent, one justice protested that this decision had "created a whole new arena of jurisdiction—'advisory opinions on the constitutionality of a statute challenged by a special interest group.'"[250]

Thirdly, public importance standing infringes on the executive branch by allowing private citizens to subsume the Executive's constitutional law enforcement duties. In *Lujan v. Defenders of Wildlife*, Justice Scalia pointed out that if private citizens are allowed to assume a law-enforcement function by bringing lawsuits, this could infringe the President's prerogative to take care that the laws be faithfully executed.[251] The same rationale applies on the state level: as stated above, the South Carolina Constitution tasks the Executive, not private actors, with enforcing laws.[252]

C. Prudence

A key prudential goal for courts is to promulgate standards that are clear, objective, and workable.[253] But the public importance exception seems to provide little room for such a bright-line test. The Ohio Supreme Court recently discussed this problem, asking, "How is a court to determine when something is of such 'great importance and interest to the public,' that it should allow parties to bypass the standing requirement and other normal judicial procedures?"[254] The answer: "standardless policymaking."[255]

In practice, South Carolina's public importance exception has created an ocean of ambiguity. Occasionally the South Carolina Supreme Court has signified that public importance standing should not be applied where another

248. *See infra* Part IV.A.

249. *See* 715 N.E.2d 1062, 1084–85 (Ohio 1999), *overruled by* State *ex rel.* Martens v. Findlay Mun. Ct., No. 2024-0122, 2024 WL 4982624 (Ohio Dec. 5, 2024).

250. *Id.* at 1122 (Lundberg Stratton, J., dissenting).

251. 504 U.S. 555, 577 (1992). For a discussion of this view as applied to federal standing doctrine, see *Sierra v. City of Hallendale Beach*, 996 F.3d 1110, 1131 (11th Cir. 2021) (Newsom, J., concurring).

252. *See* S.C. CONST. art. IV, § 15.

253. *Cf.* Rucho v. Common Cause, 588 U.S. 684, 703 (2019) (explaining that when assessing constitutional challenges to partisan gerrymandering, courts should employ "limited and precise[, and] . . . clear, manageable, and politically neutral" standards) (quoting Vieth v. Jubelirer, 541 U.S. 267, 306–08 (2004) (Kennedy, J., concurring in the judgment)).

254. State *ex rel.* Martens v. Findlay Mun. Ct., No. 2024-0122, 2024 WL 4982624, at *4 (Ohio Dec. 5, 2024) (quoting State *ex rel*. Ohio Acad. Trial Laws. v. Sheward, 715 N.E.2d 1062, 1082 (Ohio 1999)).

255. *Id.*

potential plaintiff could assert "constitutional standing,"[256] but elsewhere it has rejected the idea of looking to other potential plaintiffs.[257] The court claims to employ a policy-driven balancing test, but the test paradoxically purports to consider "injustice" or "grievances," and it is rarely applied in practice.[258] Although the court has emphasized that an issue must require "future guidance," it has given inconsistent signals as to just how imminent this need for guidance must be,[259] and it has allowed policy judgments to bleed into this prong.[260] The court has frequently implied that the exception is particularly applicable when public funds are being expended,[261] but it has been willing to find standing where no public funding is directly implicated.[262]

256. *See* Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014) ("Additionally, the claims asserted by Plaintiffs could be brought by other parties who can show the required injury. Therefore, we find the public importance exception inapplicable here.").

257. *See, e.g.*, Sloan v. Dep't of Transp., 365 S.C. 299, 304, 618 S.E.2d 876, 878 (2005) ("This Court has never held that [, for public importance standing,] there must be no other potential plaintiffs with a greater interest in the case . . . .").

258. *See supra* notes 127-128 and accompanying text.

259. *Compare* S.C. Pub. Int. Found. v. Wilson, 437 S.C. 334, 342, 878 S.E.2d 891, 895 (2022) (explaining that there was a need for future guidance because the issue would "inevitably arise again"), *with* Adams v. McMaster, 432 S.C. 225, 236, 851 S.E.2d 703, 708–09 (2020) (finding a need for future guidance regarding the proper state use of federal education funding because, *inter alia*, the legal question would recur "if and when" the federal government appropriated additional funding).

260. *See Adams*, 432 S.C. at 236, 851 S.E.2d at 708–09 (finding a need for "future guidance" because, *inter alia*, the issue implicated the expenditure of public COVID-19 relief funds).

261. *See id.*; Eidson v. S.C. Dep't of Educ., 444 S.C. 166, 177, 906 S.E.2d 345, 350 (2024) (using a challenge to public spending to satisfy prong two—need for future guidance—"[i]n many cases, we have found future guidance is needed when the legality of the expenditure of public funds is at issue"); S.C. Pub. Int. Found. v. Wilson, 437 S.C. 334, 342, 878 S.E.2d 891, 895 (2022) (using a challenge to public spending to satisfy prong one—issue of public importance—"[b]y claiming [South Carolina Attorney General Alan] Wilson improperly disbursed state settlement funds, Appellants indisputably allege an issue of public importance[]"); S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017) ("The issue of whether SCDOT may inspect bridges within private, gated communities is one of public importance as it involves . . . the expenditure of public funds."); Sloan v. Sch. Dist. of Greenville Cnty., 342 S.C. 515, 524, 537 S.E.2d 299, 303 (S.C. Ct. App. 2000) ("The expenditure of public funds pursuant to a competitive bidding statute is of immense public importance.").

262. *See* Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004) (finding public importance standing where a citizen challenged the governor's constitutional eligibility for office); Sloan v. Hardee, 371 S.C. 495, 497, 640 S.E.2d 457, 458 n.1 (2007) (finding public importance standing where a citizen argued that two South Carolina Department of Transportation commissioners were unlawfully appointed); S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013) (finding public importance standing where a citizen argued that the South Carolina Transportation Infrastructure Bank's board of directors was unconstitutionally composed).

Public importance cases have produced a grab bag of other factors also: whether the matter is urgent,[263] whether the defendant is alleged to have acted in bad faith,[264] and whether the plaintiff is merely a "disgruntled competitor."[265] Often, the decision simply seems to come down to a mere judgment call: does a majority of the court feel that an issue implicates important public policy concerns?[266] In other words, it comes down to "standardless policymaking."[267] When deciding whether an issue is of sufficient public importance, South Carolina's approach seems to be the following: "I know it when I see it."[268]

This ambiguity has practical consequences: it harms judicial efficiency by confusing litigants.[269] As a commentator noted, "[b]ecause public interest standing is only applied when no actual injury is present, an ambiguous public

263. *See, e.g.*, *Adams*, 432 S.C. at 236, 851 S.E.2d at 708 (finding a need for "future guidance" in a citizen's challenge to South Carolina's allocation of federal emergency education funding to private schools because, *inter alia*, "a prompt decision is necessary").

264. *Compare* Vicary v. Town of Awendaw, 425 S.C. 350, 360, 822 S.E.2d 600, 605 (2018) (finding public importance standing in an annexation dispute because the defendant town allegedly "engage[d] in underhanded conduct" by falsely representing to the public that it had followed lawful procedure), *with* Nat'l Tr. for Historic Pres. in U.S. v. City of North Charleston, 439 S.C. 222, 230, 886 S.E.2d 487, 491 (S.C. Ct. App. 2023) (determining that in an annexation dispute, the plaintiffs had "failed to show any deceitful conduct by [the defendant city] that would necessitate finding standing under the public interest doctrine").

265. *See, e.g.*, ATC S., Inc. v. Charleston County, 380 S.C. 191, 199–200, 669 S.E.2d 337, 341–42 (2008) (finding no public importance standing for a utility to challenge a zoning decision that would benefit its competitor because "[t]here [was] nothing *public* about [the plaintiff's] concern with a competing cell-phone tower" and the plaintiff "present[ed] to the Court as a disgruntled competitor, nothing more").

266. *See, e.g.*, Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul., 337 S.C. 476, 488–89, 523 S.E.2d 795, 801–02 (S.C. Ct. App. 1999) (finding a dispute over temporary employment agencies of sufficient public importance because "[i]n the economy today, a greater number of businesses are relying on temporary employees"); *Adams*, 432 S.C. at 236, 851 S.E.2d at 708 (finding a dispute over South Carolina's use of federal COVID-19 emergency education funding of sufficient public importance because, *inter alia*, "[t]he COVID-19 pandemic that has plagued our State in recent months has posed unprecedented challenges in every area of life"); *Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 (finding public importance standing because the issue of gubernatorial eligibility was "at least as important as the proper funding for a clinical hospital," which had been deemed of sufficient public importance in *Baird v. Charleston County*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)); *see also* Jowers v. S.C. Dep't of Health & Env't Control, 423 S.C. 343, 370, 815 S.E.2d 446, 460 (2018) (Hearn, J., concurring in part and dissenting in part) (arguing that the court erred in declining to confer public importance standing on plaintiffs who brought a public trust claim because "public waterways extend to every corner and every county in South Carolina").

267. State *ex rel.* Martens v. Findlay Mun. Ct., No. 2024-0122, 2024 WL 4982624, at *4 (Ohio Dec. 5, 2024).

268. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

269. The supreme court has acknowledged that the public importance exception has become "the subject of much confusion and misapplication." Bodman v. State, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013) (quoting Crowson & Shea, *supra* note 15, at 19).

interest standing doctrine provides little indication to potential litigants whether they will have standing."[270] Not only does this likely lead to more time spent on pre-merits litigation,[271] but it causes confusion among advocates. For example, the public importance exception has become confused with taxpayer standing:[272] in a recent case before the South Carolina Court of Appeals, a plaintiff argued that he had "taxpayer standing to bring his lawsuit because his complaint raised issues of public importance [that] require resolution for future guidance."[273] It's hard to fault this plaintiff—the judiciary has conflated the two at times. For example, in 2008, the South Carolina Court of Appeals agreed with the plaintiff's argument that he had both taxpayer and public importance standing to challenge a construction project.[274] Throughout its analysis, the court did not distinguish the two, treating them instead as interchangeable.[275]

In summary, nothing good can come from murky doctrine, yet that is exactly what the public importance exception generates.[276]

IV. ALTERNATIVES

This Part considers two doctrinal reforms—one more blunt; the other more incremental. While any such overhaul might be perceived as using a hammer where a chisel would do, it's not clear that a more modest tweak, such as a clarification of the criteria, would rectify any of the problems just discussed. For one, this wouldn't solve the theoretical error underpinning the historical and structural problems discussed above: the decision to divorce a plaintiff's interest from the alleged violation of law. For another, the court has

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270. Harmanis, *supra* note 10, at 752.

271. *See id.* (warning that "until courts give a consistent answer to public interest standing, they will spend more time making decisions on whether to hear cases at all instead of adjudicating them on the merits").

272. For a discussion of South Carolina's taxpayer standing doctrine, see *supra* Part III.A.

273. Cordero v. Moore, No. 2021-000804, 2024 WL 2319457, at *1 (S.C. Ct. App. May 22, 2024).

274. Sloan v. Dep't of Transp., 379 S.C. 160, 169, 666 S.E.2d 236, 240–41 (2008).

275. *See id*. at 169–71, 666 S.E.2d at 241.

276. Public importance standing also likely increases the overall caseload of the South Carolina judiciary. *See* Crowson & Shea, *supra* note 15, at 20 (describing the public importance exception as "a favorite of plaintiffs"); Harmanis, *supra* note 10, at 754 (warning that an unclear public interest standing doctrine will create "an influx of lawsuits with tenuous grounds for standing"). For a system facing an "overwhelming workload," Jessica Holdman, *SC Chief Justice Talks Caseloads, Magistrate System Changes In First 'State of the Judiciary,'* S.C. DAILY GAZETTE (Mar. 5, 2025, 4:50 PM), https://scdailygazette.com/2025/03/05/sc-chief-justice-talks-caseloads-magistrate-system-changes-in-first-state-of-the-judiciary/ [https://perma.cc/H8SR-6UDW], a tighter standing rule would allocate scarce judicial resources more efficiently to those cases in which the plaintiff actually has a stake in the subject matter being litigated.

already urged a more cabined approach to public importance standing to little avail. The supreme court has "repeatedly cautioned against [the doctrine's] routine use" but acknowledged "the doctrine's expansive reach" in practice.[277]

A. Following Ohio, Eliminating the Exception

In light of the public importance exception's flaws, the South Carolina Supreme Court should consider eliminating it entirely. It would not be the first to do so: the Ohio Supreme Court took a similar path in December 2024. In *State ex rel. Martens v. Finlay Municipal Court*, the Ohio Supreme Court overruled a former case that had established public interest standing, saying that the case "was wrong when it was decided and remains wrong today."[278] First, the court appealed to the Ohio Constitution, construing its conferral of "judicial power" to limit courts to hearing "actual controversies legitimately affected by specific facts."[279] It also explained that the injury requirement was "deeply rooted" in its caselaw.[280] Next, the court explained that its public interest doctrine was a "violation of separation-of-powers principles," calling it an "example[ ] of abusive judicial power."[281] Finally, the court raised a prudential concern, explaining that "the content of the doctrine is so vague and amorphous as to make principled judicial application of the doctrine nearly impossible."[282]

The South Carolina Supreme Court should use *Martens* as a roadmap. As explained earlier,[283] the rationales animating Ohio's repudiation of public interest standing apply with equal force to South Carolina. South Carolina would thereby align itself with at least some of its fellow states: even before *Martens*, a commentator noted that "public rights exceptions are not a trend

277. Vicary v. Town of Awendaw, 425 S.C. 350, 359, 822 S.E.2d 600, 604 (2018). *See also* Eidson v. S.C. Dep't of Educ., 444 S.C. 166, 177, 906 S.E.2d 345, 350 (2024) (noting the court's application of the public importance exception has been "consistent[]" despite being "cautious[]"); *cf.* Bodman v. State, 403 S.C. 60, 68, 742 S.E.2d 363, 367 (2013) (cautioning in dicta against "an overzealous use of this exception" and suggesting that "more limited rules of standing are actually beneficial for the judicial process").

278. No. 2024-0122, 2024 WL 4982624, at *1 (Ohio Dec. 5, 2024).

279. *Id.* at *2 (first quoting OHIO CONST. art. IV, § 1; and then quoting Fortner v. Thomas, 257 N.E.2d 371 (1970)).

280. *Id.* (first citing Foster v. Comm'rs of Wood Cnty., 9 Ohio St. 540, 543 (1859); and then citing State *ex rel.* Williams v. Indus. Comm'n of Ohio, 156 N.E. 101 (1927)).

281. *Id.* at *3 (alteration in original) (first quoting Basil Loeb, *Abuse of Power: Certain State Courts Are Disregarding Standing and Original Jurisdiction Principles So They Can Declare Tort Reform Unconstitutional*, 84 MARQ. L. REV. 491, 514 (2000); and then quoting Kristen Elia, *Ohio's Standing Requirements and the Unworkable Public-Rights Exception*, 86 U. CIN. L. REV. 1019, 1043 (2018)).

282. *Id.* at *4.

283. *See supra* Part III.

in other jurisdictions."[284] And the South Carolina Supreme Court has explained that "stare decisis is not an inexorable command [, because] '[t]here is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right.'"[285]

Some have argued that public interest standing is necessary because without it, litigants will have no means of vindicating their rights or holding government accountable.[286] South Carolina courts routinely use this argument to justify the public importance doctrine. They have explained that "[t]axpayers must have some mechanism of enforcing the law"[287] and that "the purpose of public importance standing is to . . . 'ensure[ ] . . . accountability and the concomitant integrity of government action.'"[288] Indeed, the supreme court once suggested that without the public importance exception, certain laws would be rendered "superfluous."[289] But the assumption that the judiciary is the only forum for holding the government accountable is wrong—the most potent source of accountability is not judges; it's the electorate.[290] Ironically, it was the South Carolina Supreme Court that said it best in 2014:

> Courts are not bodies for the resolution of public policy . . . . Harms suffered by the public at large . . . are to be remedied by the legislative and executive branches. If existing laws and regulations or their enforcement fail to protect the public from harm, it is incumbent upon the public to seek reform through their elected officials or failing that, at the ballot box.[291]

Not only is the electorate free to vote out misbehaving officials, it can also press the South Carolina legislature to confer additional grounds of

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284. Kristen Elia, *Ohio's Standing Requirements and the Unworkable Public-Rights Exception*, 86 U. CIN. L. REV. 1019, 1040 n.144 (2018).

285. McLeod v. Starnes, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012) (quoting Smith v. Daniel Const. Co., 253 S.C. 248, 255–56, 169 S.E.2d 767, 771 (1969) (Bussey, J., dissenting)).

286. *See, e.g.*, Strotman, *supra* note 45, at 1632 (noting that "rights hold less water if they are more difficult to vindicate because of strict standing requirements").

287. Sloan v. Sch. Dist. of Greenville Cnty., 342 S.C. 515, 523, 537 S.E.2d 299, 303 (S.C. Ct. App. 2000) (quoting E. Mo. Laborers Dist. Council v. St. Louis County, 781 S.W.2d 43, 47 (Mo. 1989)).

288. S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 421 S.C. 110, 118, 804 S.E.2d 854, 858 (2017) (alteration in original) (quoting Sloan v. Greenville County, 356 S.C. 531, 551, 590 S.E.2d 338, 349 (S.C. Ct. App. 2003)).

289. *See id.* at 119, 804 S.E.2d at 859.

290. *Cf.* Scalia, *supra* note 5, at 896 (explaining that because courts are "removed from all accountability to the electorate," they are "terrible . . . for a *group* that is supposed to decide what is good for the *people*" (emphasis added)).

291. Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014).

standing via the statutory standing rule.[292] Citizens are not less powerful at the ballot box than before the bench, and this approach contains the additional salutary effect of respecting the separation of powers and keeping the judiciary from serving as a "continuing monitor[]" of the other branches.[293]

B. A Middle Ground

As a middle ground, the South Carolina Supreme Court should consider adopting the rule advocated by Justice Costa Pleicones. During his time on the South Carolina Supreme Court, Justice Pleicones argued that "standing should not be conferred on a party who cannot allege a particular harm when another potential plaintiff has interests greater than the plaintiff's."[294] In other words, if there is a plaintiff who could assert constitutional or statutory standing, that plaintiff must bring the case.

Justice Pleicones first articulated this argument in *Sloan v. Department of Transportation*.[295] In that case, a South Carolina resident and frequent litigant[296] argued that the South Carolina Department of Transportation's procurement procedures for several infrastructure products ran afoul of statutory bidding requirements.[297] The trial court conferred public importance standing, but the court of appeals reversed because the plaintiff "failed to show a nexus between himself and the actions."[298] In a 4-1 decision, the supreme court then reversed the court of appeals, pointing to previous public importance cases, none of which had "required the plaintiff show the absence of any other potential plaintiffs with a greater interest or any other nexus."[299]

Justice Pleicones dissented. He hearkened back to the language of *Crews v. Beattie* that "[t]he mere fact that the issue is one of public importance does

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292. *See* Doggett, *supra* note 3, at 839 (explaining that "legislative conferrals of standing . . . allow citizens to check and supplement executive power").

293. *See* Lujan v. Defs. of Wildife, 504 U.S. 555, 577 (1992) (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

294. S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 654, 744 S.E.2d 521, 528 (2013) (Pleicones, J., concurring in the judgment) (citing, *inter alia*, Sloan v. Dep't of Transp., 379 S.C. 160, 175, 666 S.E.2d 236, 244 (2008) (Pleicones, J., dissenting)); *see also id.* (Pleicones, J., concurring in the judgment) ("I would conclude that, despite the manifest public importance of the issues raised by Petitioner, the executive branch has a greater interest than Petitioner in seeing that the General Assembly does not intrude on executive powers. Thus, I would hold that Petitioner lacks standing to bring this challenge.").

295. 365 S.C. 299, 618 S.E.2d 876 (2005).

296. *See generally* John Monk, *Edward Sloan, SC Citizen Watchdog Who Fought Government Goliaths and Won, Dies at 91*, STATE (Nov. 1, 2020, 5:00 PM), https://www.theestate.com/news/local/crime/article246790242.html [https://perma.cc/RS7J-3RZT].

297. *Dep't of Transp.*, 365 S.C. at 302, 618 S.E.2d at 877–78.

298. *Id.* at 304, 618 S.E.2d at 878.

299. *Id.* at 304–05, 618 S.E.2d at 879.

not confer upon any citizen or taxpayer the right to invoke per se a judicial determination of the issue."[300] Here there were companies who, under the plaintiff's theory, wrongly lost out on bids and thus "ha[d] a strong incentive to take action if the process appear[ed] in violation of the law."[301] But those companies were absent from the litigation. Because "[t]hird-party standing is supposed to be the exception, not the rule," "a court should be very reluctant to confer standing upon a member of the general public who can allege no particular harm" "[w]hen there exist numerous potential plaintiffs that have been directly and significantly affected."[302]

This incrementalist approach would have the benefit of providing limiting criteria to the court's conferral of public importance standing, thus mitigating some of the ambiguity in the doctrine. It would also push the court toward evaluating the position of the *party* before it—a quintessentially judicial function—rather than the broad implication of the *policy*—a quintessentially legislative function. Nor would this rule render the State an extreme outlier: Alaska has adopted a similar (though not identical) rule.[303]

Despite these advantages, it is not clear that Justice Pleicones's approach would remedy the problems with public importance standing articulated in Part III. While it would require courts to *start* by assessing the plaintiff's right to be in court, it allows them to *end* by granting standing to a litigant who has suffered no invasion of rights if no affected litigant exists. So, in that scenario, the court would be right back where it started—allowing an unaffected third party to serve as a conduit by which a court can approve or disapprove the actions of the other two branches, guided solely by its evaluation of the issue's importance. Thus, this approach, while an improvement to the current framework, still falls short in some respects.[304]

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300. *Id.* at 308, 618 S.E.2d at 881 (Pleicones, J., dissenting) (quoting Crews v. Beattie, 197 S.C. 32, 49, 14 S.E.2d 351, 358 (1941)).

301. *Id.* (Pleicones, J., dissenting).

302. *Id.* (Pleicones, J., dissenting). Justice Pleicones expressed a softer version of his view in this early case, conceding that "the existence of potential plaintiffs with greater interests [was] not determinative in all cases." *Id.* (Pleicones, J., dissenting). But his view seemed to solidify in later cases, wherein he articulated his approach as a categorical rule, not just a rule of thumb. *See* Sloan v. S.C. Dep't of Transp., 379 S.C. 160, 175, 666 S.E.2d 236, 244 (2008) (Pleicones, J., dissenting) (containing no such caveat); Sloan v. Greenville Hosp. Sys., 388 S.C. 152, 170, 694 S.E.2d 532, 541 (2010) (Pleicones, J., concurring in the judgment) (same); Bodman v. State, 403 S.C. 60, 76, 742 S.E.2d 363, 371 (2013) (Pleicones, J., concurring in the judgment) (same); S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 654, 744 S.E.2d 521, 528 (2013) (Pleicones, J., concurring in the judgment) (same).

303. *See* Keller v. French, 205 P.3d 299, 302 (Alaska 2009) (denying "citizen-taxpayer standing" where there was another "plaintiff more directly affected by the challenged conduct who had sued or was likely to sue").

304. For a more comprehensive criticism of this "most appropriate litigant" rule, see Harmanis, *supra* note 10, at 745–47.

V. CONCLUSION

The doctrine of standing is not a mere technicality—it goes to the core of the judicial branch's function, nature, and purpose. For this reason, courts articulating the doctrine must be clear, consistent, and correct. While South Carolina's standing doctrine leaves room for improvement in all three areas, its public importance exception fundamentally misunderstands South Carolina's robust tradition of requiring that those who approach the court do so to receive redress for an injury, not to vindicate political grievances that ought to be settled legislatively or through the ballot box. For this reason, South Carolina should tighten or eliminate its public importance exception. No matter how frequently the South Carolina Supreme Court protests that it is acting with utmost "cautio[n],"[305] this will ring hollow if it continues to confer public importance standing without "hesitat[ion.]"[306]

305. *See supra* note 95 (collecting cases).
306. *See* Eidson v. S.C. Dep't of Educ., 444 S.C. 166, 177, 906 S.E.2d 345, 351 (2024).