THE STATE OF SOUTH CAROLINA
In The Supreme Court

IN THE ORIGINAL JURISDICTION OF THE SUPREME COURT

Governor Mark Sanford……Petitioner,

v.

South Carolina Workers' Compensation Commission; and David W. Huffstetler, J. Alan Bass, George N. Funderburk, Susan S. Barden, G. Bryan Lyndon, Andrea Pope Roche, and Derrick L. Williams in their official capacities as members of the South Carolina Workers' Compensation Commission……Respondents,

and Susan Monaco, James Collins, Deborah Rowell, Thomas Stanford, Keny Foster, Michael Hatch, and Elaine Hodge……..... Intervenors.

INJURED WORKERS' ADVOCATES BRIEF AS AMICUS CURIAE IN SUPPORT OF THE INTERVENORS

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INTEREST OF THE *AMICUS CURIAE*

The Injured Workers' Advocates (the "IWA") respectfully submits this brief as *amicus curiae* in support of Intervenors, Susan Monaco, James Collins, Deborah Rowell, Thomas Stanford, Keny Foster, Michael Hatch, and Elaine Hodge. It requests the Supreme Court to deny the Petitioners' proposed so-called settlement. It also requests the Supreme Court to invalidate the Executive Orders at issue, unless the Governor voluntarily rescinds them *in toto.* This brief is accompanied by a motion for leave to file pursuant to Rule 213 of the South Carolina Appellate Court Rules.

The Injured Workers' Advocates is a 501(c)(3) non-profit organization whose mission is to protect the rights of hardworking South Carolina women and men who have been injured on the job. It was founded in 1983 and has been active ever since. Through educational programs, outreach and other efforts, the IWA has served as a counterbalance to those who seek to advance their personal financial and political interests by trampling on the rights of injured South Carolina workers.

The IWA seeks status as *amicus* because the real rights at issue in this case are not those of the named parties, but instead those of South Carolina's injured workers, past, present and future. The Executive Orders issued by the Governor, and the so-called settlement agreement between the Governor and the Workers' Compensation Commission directly and adversely affect those rights. For this reason, there must be a voice for these tens of thousands of men and women. The IWA is that voice.

The purpose of this brief is to show, first, that the Executive Orders of the Governor at issue in this case are an unconstitutional usurpation of the powers of the legislative and judicial branches of government and, second, that the so-called settlement

agreement between the Governor and the Workers' Compensation Commission is a stick-and-carrot arrangement that suffers that same infirmity. If the executive orders are not voluntarily rescinded by the Governor and the "settlement agreement" is not abandoned, then, in order to protect the rights of the injured workers of South Carolina, the Supreme Court should declare the orders and agreement null and void.

ARGUMENT

SUMMARY OF ARGUMENT

The Governor and the Commissioners invoked this Court's original jurisdiction to hear this case on the ground that there is a "strong, compelling public interest" in this Court's grant of original jurisdiction and in the Court's ultimate and definitive determination of the various issues raised by the Executive Orders at issue. See Ret. to Petition, at 4; Petitioner's Petition for Original Jurisdiction, at 7-8; see also Rule 229, SCRAP; S.C. Const. art. V, § 5. Despite previously asserting the strong and compelling public interest in having this Court issue a definitive determination on the various constitutional issues raised by these Executive Orders, the Governor now seeks to have this case dismissed by means of a settlement without any determination of the issues by this Court. The proposed settlement provides for an executive branch determination of the issues before the Court – issues of Constitutional and statutory interpretation that are wholly within the province of the courts alone. In proposing this settlement between the executive and a quasi-judicial agency that operates as part of the executive branch of our government, the Governor is attempting, once again, to encroach on the powers of another branch of the government – the judiciary. This proposed settlement is not only a

blatant violation of the separation of powers, but also amounts to an unconstitutional agreement as to the interpretation of the law by the executive and an executive agency. Approval of the proposed settlement would only further exacerbate the increasing public perception that the Workers' Compensation Commission is no longer a quasi-judicial body subject to the Canons of Judicial Conduct, but rather a group of individuals subject to the influence and coercion of an imperial Governor. As such, this Court should not, indeed it cannot, approve the settlement proposed by the Governor.

BACKGROUND

Governor Sanford filed this action requesting this Court to assume original jurisdiction to declare that the members of the Workers' Compensation Commission (the "Commission") must "furnish to the Governor, in such form as he may require, any information desired by him in relation to their respective affairs or activities" in the performance of their duties as Commissioners pursuant to S.C. Const. art. IV, § 17, S.C. Code Ann. § 1-3-10 (Supp. 2007), and Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997). The Commission and its members, as Respondents, filed their Answer and Counterclaim, seeking a declaration by this Court that Executive Orders 2007-16 and 2007-19 violate the separation of powers doctrine and the Commission's duty to adhere to the Code of Judicial Conduct. The Commission also asserted that Executive Order 2007-20 invades the Commission's judicial authority in directing them with regard to the content of their orders. The Commission claimed further that all of the subject Executive Orders violated the due process rights and equal protection of laws afforded to litigants appearing before the Commission.

The Governors' Executive Orders violate basic principles of the separation of powers because they encroach on the powers of both the legislative and the judicial branches. For example, the directives contained in Executive Order 2007-16, just one of those at issue in this case, require the use of legal standards that are contrary to the statutes adopted by the South Carolina General Assembly and interpreted by the South Carolina appellate courts. The directives contained in the Executive Order directly encroach upon the power specifically reserved to the legislature. A proposal similar to that contained in the Governor's Executive Order 2007-16 was considered by the General Assembly, but was tabled by a majority vote of the full House. The South Carolina Supreme Court has held that a proposal "explicitly rejected by the Legislature" provides evidence of legislative intent. Gilstrap v. Budget and Control Board, 310 S.C. 210, 423 S.E.2d 101, 104 (S.C. 1992). Thus, Executive Order 2007-16, which presumes to direct the legal standards to be applied under the Workers' Compensation Act in pending adjudicative matters before the Commission, creates a real and substantial controversy that has a potential material impact on the legal rights and claims of parties in these matters before the Commission.

The Governor also sought to encroach on those powers specifically reserved for the judiciary by dictating the regulation of attorneys and the setting of attorneys' fees. This is a function of the judicial branch, not the executive branch. The Commission determines the reasonableness of fees in accordance with the Rules of Professional Conduct and the Commission Regulations. Thus, not only did the Governor attempt to use his Executive Orders to create new law, something only the legislative branch can do,

but he also attempted to tell the Commission how to interpret that law and the existing laws of this State, something only the judicial branch can do.

It was these Executive Orders that the Commission and the Intervenors sought to have declared – by this Court – to be unenforceable and unconstitutional violations of the separation of powers. Now a settlement is proposed in order to avoid having this Court to decide just those questions: (1) whether the Governor could legally inject himself into the quasi-judicial process of the Commission's determinations by mandating, by means of Executive Order, action by the Commission that even the legislature did not pass;[1] and (2) whether the Governor could legally inject himself into this Court's judicial process by mandating an interpretation of the law as it relates to the award of attorneys' fees. Such a settlement simply cannot be a substitute for this Court's definitive ruling.[2]

I. The Proposed Settlement – Just Like The Previous Executive Orders – Violates the Doctrine of Separation of Powers

[1] The South Carolina Constitution places specific requirements on "judicial or quasi-judicial decision[s] of an administrative agency," including the provision that the liberty or property rights of a citizen cannot be adjudicated "unless by a mode of procedure prescribed by the General Assembly." S.C. Constitution art. I, § 22.

[2] Not only would the proposed settlement avoid a ruling by this Court on the Governor's encroachment into the legislature's powers, the settlement would also avoid any ruling on the Commission's other claims for declaratory relief. For example, the Commission sought a declaration from this Court that they act within adjudicatory capacity and are judicial officers when acting on cases before them, that the *En Banc* order of October 25, 2007, is correct as adopted, and other relief based upon a finding that all of the subject Executive Orders violate the Separation of Powers doctrine as well as the constitutional rights of litigants before the Commission. The proposed settlement sidesteps such a declaration from this Court and provides instead a declaration from the Governor. Instead of having this Court issue a declaration, the settlement declares that the "**Governor is satisfied** that the Commission's interpretation of the Workers' Compensation Act as set forth in its October 25, 2007 *En Banc* Order is consistent with state statutes and South Carolina Supreme Court precedent." See Joint Motion to Adopt and Approve Agreement and Stipulations Between the Governor and the Workers' Compensation Commission, at 4, ¶ 3 ("Proposed Settlement") (emphasis added).

The Constitution requires that the legislative, executive, and judicial departments of the government shall be forever separate and distinct from each other. S.C. Const. art. I, § 8. The South Carolina Constitution provides:

> In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Id. The separation of powers mandate is followed by Articles III, IV, and V of the Constitution, which delineate the authority and functions of the three departments of government. Article III says: "[t]he legislative power of this State shall be vested in . . . the 'General Assembly of the State of South Carolina.'" S.C. Const. art III, § 1. Article IV states: "[t]he supreme executive authority of this State shall be vested in a Chief Magistrate, who shall be styled 'The Governor of the State of South Carolina.'" S.C. Const. art IV, § 1. Article V specifies: "[t]he judicial power shall be vested in a unified judicial system, which shall include a Supreme Court, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law." S.C. Const. art V, § 1. One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares what the law is.

The question of the constitutionality of an executive order of the Governor or an act of the legislature has always been recognized as a judicial question to be determined by the courts. "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch

exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." Baker v. Carr, 369 U.S. 186, 211, 82 S.Ct. 691, 691, 7 L.Ed.2d 663 (1962); see also, South Carolina Public Interest Foundation v. Judicial Merit Selection Com'n, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006). Both the executive and the legislative branches of the government are denied the power to exercise this judicial function, or to confer on any other person or entity – other than the judiciary – the right to exercise it. The final responsibility of interpreting the Constitution, and of deciding whether an act of one of the other two branches violates the Constitution, rests with this Court. See, e.g., Evatte v. Cass. 217 S.C. 62, 59 S.E.2d 638, 639 (1950).

The challenge to the constitutionality of the Executive Orders and the validity of the *En Banc* Order of the Commission is a serious one. And, it is a challenge that only this Court can or should resolve. In fact, even the Commission, an executive agency, realized the gravity of such a challenge, when it noted in a footnote to its *En Banc* Order that, "[t]he Commission renders no opinion concerning whether Executive Order 2007-16 is in any way unconstitutional since that matter would more appropriately be addressed by the Courts." See *En Banc* Order of Workers' Compensation Commission, W.C.C. File No. 0514538, at Petitioner's Complaint, Exhibit L, 10, n. 1.

The proposed settlement agreement flatly ignores the doctrine of separation of powers. In fact, the Governor's proposed settlement seeks to stand these constitutionally delineated powers on their head. The proposed settlement and the accompanying "superseding" Executive Order attempt to sidestep around this Court's constitutionally provided judicial function. The proposed settlement would forego a declaration by this

Court as to whether the Executive Orders violate the separation of powers provision of the Constitution. Worse yet, the proposed settlement attempts to usurp the role of this Court by simply declaring that Governor "is satisfied" that the *En Banc* Order is "consistent with state statutes and South Carolina Supreme Court precedent". See Proposed Settlement, 4, ¶ 3. The Governor may not, however, discharge the duties of this Court with such a simple declaration from on high. See S.C. Const. art. 1, § 8. As has been pointed out before by this Court when addressing previous encroachments into the power of the judiciary, if such a statement by the executive or legislature foreclosed the question of constitutionality, there could be no effective constitutional control. See, e.g., Doran v. Robertson, 203 S.C. 434, 27 S.E.2d 714, 718 (1943). The executive cannot finally determine the limits of its power under the Constitution; that is a fundamental function of the courts. See, e.g., Gentry v. Taylor, 192 S.C. 145, 5 S.E.2d 857 (S.C. 1939). Such an obvious encroachment by the executive into the powers of the judiciary should not be tolerated by this Court.

II. The Executive and an Executive Agency Do Not Have the Authority To Decide What the Law Is by Agreeing Between Themselves.

The fact that the Governor and the Commission appear to agree on a settlement does not change the unlawful nature of their actions. In State v. Archie, 322 S.C. 135, 470 S.E.2d 380 (1996), the South Carolina Court of Appeals considered a similar agreement between the executive branch and the opposing party. In Archie, the Court of Appeals found that the Probation Department, a component of the executive branch, did not have the authority to increase a probationer's sentence. The Court noted that "the imposition of sentences is a judicial function." Id., at 138 (citing State v. De La Cruz, 302 S.C. 13, 393 S.E.2d 184 (1990), and 16 C.J.S., *Constitutional Law*, § 173 (1984)).

"Exercise of this function by [the Department], a member of the executive branch of the government, violated the doctrine of separation of powers." Id. (citing Williams v. Bordon's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980) (the granting of continuances is a judicial function which cannot be exercised by the legislative branch of the government)). The Court specifically noted that while the Department and the probationer could agree on sanctions under a new Department of Probation program, it did not change the judicial nature of the proceedings. The Court ultimately held, "[c]learly judicial action is required for final disposition, and the Department's attempt to do anything other than withdraw the citation or submit it to the circuit court is an unconstitutional exercise of power." Id. at 138.

Here, as in Archie, the determination of the constitutionality of an executive order is an inherently judicial function. Exercise of this function by the executive by means of an agreement between the Governor and an executive agency – an agency susceptible to the coercion and control of the Governor[3] – violates the doctrine of separation of powers. Further, any settlement between the Governor and the executive branch commissioners appointed by the Governor does not change the fact that judicial action is required for final disposition of this matter. The Governor and those performing a function of the executive branch cannot just agree on an interpretation of the law. The Executive and those appointed by him may not simply declare that an action taken by the Executive is

[3] The proposed settlement between the Governor and the Commission states that the "The Commission and individual Commissioners have not been intimidated or coerced by any of the Executive Orders of the Governor". See Proposed Settlement, 5, ¶ 7. This statement appears to deliberately exclude any discussion of other forms of intimidation and coercion of the Commission and individual Commissioners by the Governor. Section III, infra, outlines some examples of what might be perceived as coercion and intimidation of the Commission and the individual Commissioners by the Executive.

not unconstitutional. This is clearly, and solely, the prerogative of the courts. And, the Governor and the Commission may not just agree amongst themselves that the Commission's interpretation of the law is consistent with both statutory law and this Court's precedent. As the Court of Appeals stated in Archie, the Governor's "attempt to do anything other than withdraw the [executive orders] or submit [them] to the [] court is an unconstitutional exercise of power."[4] Id.

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[4] It should be noted that, if this Court were inclined to dismiss this action, no proposed settlement of this action by the Governor and the Commission should be accepted by this Court, unless the complained of conduct is abandoned without qualification. It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a court of its power to determine the legality of the practice." City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, 102 S.Ct. 1070 (1982); Dunn v. Sullivan, 776 F. Supp. 882, 885 (D. Del. 1991); Los Angeles County v. Davis, 440 U.S. 625 (1979). "If it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" City of Mesquite, at 289, n. 10, 102 S.Ct. 1070 (citing United States v. W.T. Grant Co. 345 U.S. 629, 632, 73 S.Ct. 894 (1953)).

The courts have been clear that when a superseding order, statute or ordinance does not entirely remove the challenged features of the challenged law, order, or ordinance, the case is not moot. See, e.g., Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301 (11th Cir. 2000) ("when an ordinance is repealed by the enactment of a superseding statue, then the 'superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law. To the extent that those features remain in place, and changes in the law have not so fundamentally altered the statutory framework as to render the original controversy a mere abstraction, the case is not moot.'" (quoting Naturist Soc'y, Inc. v. Fillyaw, 958 F.2d 1515, 1520 (11th Cir. 1992) ("Where a superseding statute leaves objectionable features of the prior law substantially undisturbed, the case is not moot.")); Citizens for Responsible Government State Political Action Committee v. Davidson, 236 F.3d 1174 (10th Cir. 2000) ("Where a new statute 'is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues,' the controversy is not mooted by the change ….") (quoting Northeastern Fla. Chpt. of Assc. General Contractors of America v. City of Jacksonville, 508 U.S. 656, 662 (1993); Griffith v. Bowen, 678 F. Supp. 942, 946 (D. Mass. 1988) (quoting Wilson v. Sec. of Health & Human Servs., 671 F.2d 673, 679 (1st Cir. 1981)).

In the case at bar, this action in the Court's original jurisdiction may only become moot as a result of the proposed settlement if the proposed settlement "completely and irrevocably eradicated the effects of the alleged violation". Los Angeles County v. Davis, 440 U.S. 625 (1979); DeFunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974); Indiana Employment Security Div. v. Burney, 409 U.S. 540, 93

III. Judicial Action Is Required for Final Disposition, Not Only Because To Do Otherwise Would Violate the Doctrine of Separation of Powers, but also so that the Citizens of South Carolina and the Injured Workers Whose Claims Are Adjudicated by the Commission Can Be Sure that the Commission Has Not Been Coerced into Accepting the Governor's Proposed Settlement

The citizens of South Carolina – and especially those whose claims are to be adjudicated by the Commission – deserve assurance that the constitutionality of the Governor's Executive Orders is resolved through the normal judicial process and not as a result of coercion or intimidation. Unfortunately, without judicial determination as to the constitutionality of the Governor's orders, the issue cannot be finally resolved and injured workers throughout this State cannot be sure that the Commission has not been coerced into accepting the Governor's proposed settlement.

During the pendency of this litigation, there have been a number of incidents, beyond the issuance of Executive Orders and letters and directives from the Governor to the individual commissioners, that create the appearance of impropriety, intimidation, or coercion of the Commission and the individual commissioners by the executive branch. For example, a workers' compensation seminar was held in Columbia, at which the opening speakers were Otis Rawl, president of the South Carolina Chamber of Commerce, and Scott Richardson, the Governor's Director of Insurance. Mr. Rawl stated the Executive Orders were his "brainchild", and Mr. Richardson stated the Governor intended to start "whacking" commissioners who did not comply with them. See

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S.Ct. 883, 35 L.Ed.2d 62 (1973). The settlement and the new executive order contemplated by it do not expressly revoke the previous orders. Thus, because the proposed settlement and executive order do not completely close the door on the effects of the previous executive orders, the proposed settlement does not moot the action currently pending before this Court.

Richardson Goes On the Offensive Against WCC Commissioners, at Workcompcentral, 2/29/08, attached as Exhibit 11 to Intervenor's Return. Two commissioners were replaced on June 30, 2008, and the proposed settlement agreement was reached between the Governor and the Commission the very next day. And, after the settlement agreement was reached, the Governor sent letters to the individual commissioners stating the he was pleased that they had "resolved the litigation between us on terms that are satisfactory to all of us" and that he "had no present intention or plan to seek the removal of any Commissioner". (emphasis added).

As has already been noted, both the Governor and the commissioners invoked this Court's original jurisdiction to hear this case on the ground that there is a "strong, compelling public interest" in this Court's grant of original jurisdiction and ultimate and definitive determination of the various issues raised by the Executive Orders. Ret. to Petition, at 4; Petitioner's Petition for Original Jurisdiction, at 7-8; see also Rule 229, SCRAP; S.C. Const. Art. V, § 5. Public trust and confidence in the independence and impartiality in the work of the Commission are essential to the effective operation of the Workers' Compensation System. Without an open judicial resolution of the serious constitutional issues raised by these Executive Orders and raised in this Court's original jurisdiction, the intimidation of executive, whether real or perceived, will continue to cast a shadow on the integrity of the judicial process.

CONCLUSION

It was not by accident that the framers of democracy in America selected a form of government with three separate branches. This case involves a direct attack by the

Governor upon that cherished structure. His first course was a frontal assault through his own executive orders. Then, aided by intimidation of the Workers' Compensation Commission, he sought a flank maneuver under the style of a so-called "settlement agreement." In both instances, the end is the same, namely an unconstitutional usurpation of the powers of the legislative and judicial branches of government.

As in many instances of improper extensions of power, the Governor chose a victim that he viewed as weak, namely injured workers. In that, he was wrong, just as he was wrong in the assault itself. The injured workers of South Carolina do have an advocate. It is the IWA. They have a protector, also. It is the Supreme Court.

For the foregoing reasons, the IWA respectfully requests that this Court the decline to accept the proposed settlement and deny the pending motion to dismiss.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

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