IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2021-000833

Richard J. Creswick,…… Petitioner,

v.

The University of South Carolina and
Alan Wilson in his official capacity as Attorney General…… Respondents.

RETURN OF ATTORNEY GENERAL ALAN WILSON

INTRODUCTION

We agree with this Court's acceptance of this case in its original jurisdiction and for expedited review. The will of the General Assembly in enacting Proviso 117.190 must be carried out. In our view, that will was to ban mask mandates at state-supported colleges and universities. The key phrase in the Proviso is "without being required to wear a facemask." The Legislature wanted to ensure that the student was not "required" to mask regardless of whether he or she was vaccinated. The principle of separation of powers should be the Court's guidepost in resolving this matter.

We readily acknowledge that there is a reasonable alternative interpretation of the Proviso, if read in isolation. However, it is very poorly written. As the Attorney General advised President Pastides, despite the confusing language, the intent of the General Assembly was to ban mask mandates at State-supported colleges and universities, consistent with the Legislature's prohibition of vaccination mandates at institutions of higher learning (Proviso

117.163) and its bar of mask mandates at public schools (Proviso 1.108). Thus, Proviso 117.190 should be interpreted in conjunction with these other Provisos rather than in isolation. Even if the Court thinks Proviso 117.190 is unambiguous, still, it must be read consistently with legislative intent. Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). As this Court has explained, the language of a statute must "be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

Alternatively, we think the Court could and should dismiss this case as constituting a political question more appropriate for the General Assembly to resolve. Moreover, in our view there is no justiciable controversy here. The Petitioner seeks an advisory opinion as to the correctness of the Attorney General's advisory opinion. Thus, even if the Court accepts this case, it does not have to address the merits of the Proviso's meaning.

Proviso 117.190 and Its Interpretation

Proviso 117.190 is part of the 2021-22 state budget and states as follows:

> [a] public institution of higher learning, including a technical college, may not use any funds appropriated or authorized pursuant to this act to require that its students have received the COVID-19 vaccination to be present at the institution's facilities without being required to wear a facemask. This prohibition extends to the announcement or enforcement of any such policy.

Attachment 1 (emphasis added). As the Attorney General pointed out in his letter to President Pastides, it is reasonable to read the Proviso as merely prohibiting discrimination against the unvaccinated student by requiring those students to wear masks. The Attorney General stated in that letter, if so read, "a uniform mask requirement does not violate the Proviso." However, the problem with such an interpretation is that it requires reading the Proviso in isolation and disregarding the phrase "without being required to wear a mask." On the other hand, if

construed together with the other Provisos, as a uniform whole, such an interpretation is inconsistent with the Legislature's clear policy to allow personal choice to prevail regarding masks and vaccinations.

Proviso 117.163, as a condition of admission or presence at State-supported colleges and universities, bans proof of a COVID-19 vaccination. See Attachment 2. A third Proviso – 1.108 – also prohibits "school district or any of its schools "from requiring students or employees to "wear a facemask at any of its education facilities." Attachment 3.

As this Court has recognized repeatedly,

> . . . our primary function in interpreting a statute is to ascertain the intent of the legislature. Multi-Cinema Ltd. v. S.C. Tax Commission, 292 S.C. 411, 357 S.E.2d 6 (1987). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). The real purpose and intent of the lawmakers will prevail over the literal import of the words. S.C. Dept. of Social Services v. Forrester, 282 S.C. 512, 320 S.E.2d 39 (Ct. App. 1984).

Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). (emphasis added). Thus, Proviso 117.190 must be construed in conjunction with Provisos 1.108 and 117.163 to ascertain "[t]he real purpose and intent of the lawmakers." In short, while it is generally correct that the words of a statute must be given their literal meaning, still, the statute must be read as a whole and "Sections of the same general statutory law must be construed together and each one given effect." CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal quotations omitted). In addition, the Court has explained that "[i]t is also an old and well-established rule that words ought to be subservient to the intent, and not the intent to the words." Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 281-82, 42 S.E.2d 390, 393-94 (1947).

The question here is not whether the Proviso, even though poorly worded, is "ambiguous." Even if not, it still requires the ascertainment of legislative intent. Whether "a

statute's language is unambiguous and conveys a clear and definite meaning is not always an easy one." Ray Bell Const. Co., Inc. v. School Dist. Of Grnvlle Co., 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998). In Ray Bell, this Court reversed the Court of Appeals for focusing on only one section of a statute, in concluding that that such section was unambiguous, and thus refusing "to resort to other rules of statutory construction." Id. Quoting Kirakides, supra, the Court concluded in part that "[h]owever plain the ordinary meaning of the words used in a statute may be, the court will reject that meaning when to accept it would lend to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." Id. (emphasis added). Ray Bell thus concluded that the Court of Appeals' interpretation "would conflict with the overall purpose" of the statute.

So too here. Based upon Ray Bell, Proviso 117.190 cannot simply be read by itself, but must be interpreted in conjunction with the parallel Provisos. Reading the three Provisos together, it appears that the overarching purpose of the Legislature was to ban vaccination mandates at universities and colleges and mask mandates at public schools. The third Proviso, 117.190, is poorly worded, to be sure, but in conjunction with the other Provisos, should be read also to prohibit mask mandates at colleges and universities. Rather than construing Proviso 117.190 in isolation, it makes sense as in Ray Bell, to interpret it by ascertaining the overall legislative purpose. It makes little sense to think the Legislature would have banned mask mandates in the public schools and vaccination mandates at colleges and universities, yet authorized mask mandates at institutions of higher learning. If not absurd, certainly, such a conclusion is inconsistent with the legislative purpose.

Furthermore, it seems redundant to prohibit vaccinations altogether at universities and colleges in one Proviso (117.163) and, at the same time, to bar a college or university from requiring an unvaccinated person to wear a facemask. In other words, Proviso 117.163 gives a

student an unfettered right to be admitted, or be on campus without being vaccinated. The more limited right to be on campus unvaccinated without being discriminated against for not wearing a mask, as petitioner contends, seems superfluous. This Court has advised that "'[a] statute should be so construed that no word, clause, sentence, provisions or part shall be rendered surplusage, or superfluous. . . .'" In The Matter of Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (quoting 82 C.J.S. Statutes § 346).

We recognize that this Court has repeatedly stated that the views of individual legislators or drafters cannot be considered in interpreting a statute. Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796, 799 (1928). However, such intent is relevant to demonstrate how the executive branch interpreted an amendment (or Proviso) after enactment. Kennedy v. S.C. Retirement System, 345 S.C. 339, 353, 549 S.E.2d 243, 251 (2001). Here, the Attorney General, the State's chief legal officer of the executive branch, State v. Sanders, 118 S.C. 498, 110 S.E. 808, 810 (1920), interpreted Proviso 117.190 after enactment, resting his advice upon his understanding of the intent of the General Assembly to impose a prohibition of a mask mandate. He based such determination of intent both upon the overarching legislative policy of the three Provisos, read as a whole, and in conjunction with one another, as well as upon Rep. Jones' opinion request, wherein he stated that as the Proviso's drafter, "the intent of Proviso 117.190 is to ensure that the choice of wearing a mask or getting a COVID vaccine is left to the student individually, and not required in order to be present." Attachment 4. While Rep. Jones' intent cannot be determinative, certainly, it is relevant with respect to the Attorney General's interpretation, and appears consistent with the legislative policy of the three Provisos, when read together. It is also consistent with the focus of the Proviso on "Masks at Higher Institution Facilities" (the title) and on the language "without being required to wear a facemask."

In short, an alternative reading of 117.190 requires focus upon the language "without being required to wear a facemask." (emphasis added). The Proviso could and should thus be read as prohibiting mask mandates, as the Attorney General advised. Vaccination mandates are forbidden by Proviso 117.163, and mask mandates are prohibited in the public schools by Proviso 1.108. Requiring the student to choose between a vaccination or a mask could have been thought by the Legislature to be compulsory either way. Thus, while confusingly worded, Proviso 117.190 could be seen as banning a student's being "required to wear a facemask" regardless of vaccination status. Pursuant to this interpretation, both masks and vaccinations would be the personal choice of the student, not the mandate of the University. Such an interpretation would be consistent with the General Assembly's overall policy of banning vaccination mandates (in Proviso 117.163) and mask mandates in the public schools (in Proviso 1.108). See letter of President Pro Tem Peeler and Speaker Lucas. Attachment 5 (expressing the General Assembly's policy in Proviso 1.108).

Finally, even if the intent of Proviso 117.190 was simply to bar discrimination against the unvaccinated students by requiring them to wear a mask, such does not mean that a mask mandate for all students was authorized by the Proviso. The Legislature simply did not speak to such authorization. One cannot assume that the Legislature intended to authorize a uniform mask mandate, particularly given the fact that another Proviso (1.108) bans such mandates in the public schools.

Political Question

In Dantzler v. Callison, 230 S.C. 75, 94, 94 S.E.2d 177, 187 (1956), citing Williamson v. Lee Optical, 348 U.S. 483 (1955), this Court noted that ". . . in matters of public health, the power of the legislature is exceedingly broad and it . . . [is] not for the Court but for the legislature to determine the need for such regulation as a protection of the public." The

Legislature must balance the protection of the public health against the liberty and freedom of the individual. Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905) ["'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of country essential to the safety, health, peace, good order, and morals of the community.'"]. As this Court has held in another context, the liberty interest from bodily restraint must be balanced against public safety by the Legislature in the first instance. In re Treatment and Care of Luckabaugh, 351 S.C. 122, 141, 568 S.E.2d 338, 347 (2002). It appears that the General Assembly here has come down on the side of liberty.

Thus, this matter is primarily one for the General Assembly to determine in the political arena. As the Attorney General wrote to Senator Harpootlian, in responding to his vitriolic letter, critical of his advice to President Pastides and Representative Jones,

> [t]here is, however, an easy fix to your concerns and one which avoids vitriolic attacks. As you know, no statute is written perfectly, particularly in the haste of adopting a state budget. You are an influential Senator and a persuasive advocate. If your view of legislative intent of Proviso 117.190 is correct, and the understanding of Representatives Jones and Wooten is incorrect, it should be a simple matter for you to propose and push through to enactment a clarifying amendment to reflect what you perceive as the true intent of the General Assembly. As we stated in our August 2 letter [to President Pastides] it is the Legislature [which] . . . sets state health policy in the final instance, not the University of South Carolina or the State Attorney General. This Office did not create the problem. Again, if you believe the intent of the Legislature was in accordance with your view, I strongly urge you to seek a clarifying amendment to Proviso 117.190 when the Legislature returns in September.

Attachment 6. The Attorney General further noted in that letter that "[a]s our Supreme Court has recognized, legislative intent may override the literal language where the statute is subject to more than one reading." Id. See Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ["courts are not confined to the literal meaning of a statute where the literal import contradicts

the real purpose and intent of the lawmakers."]. After the Attorney General' letter was sent to Senator Harpootlian, this lawsuit immediately followed, asking this Court to weigh in.

In Bailey v. S.C. Elec. Comm., 430 S.C. 268, 844 S.E.2d 390 (2020), the Court refused to answer the question in its original jurisdiction as to whether existing South Carolina law allowed all registered voters to vote by absentee ballot in the November general election "in the face of the COVID-19 pandemic." The Court, in doing so, relied upon the Legislature's apparent intent that the pandemic provided no exception to allow absentee balloting generally. 430 S.C. at 274, 844 S.E.2d at 393. Acknowledging that "[s]tatutory interpretation is certainly a judicial question," nevertheless, the Court refused to decide the issue, deeming it a "political question" for the General Assembly to determine when it returned. While there are factual differences between this case and Bailey, certainly, the legal principle here is the same. In this instance, it appears the legislative intent of Proviso 117.190 was likely to forbid any mask mandate; moreover, the Legislature can address the question upon its immediate return, should it see fit to do so. Accordingly, this is a political question for the General Assembly rather than this Court to tackle. See Callison, supra.

The Legislature will soon return in September. It may well clarify whether it intended to impose a ban on mask mandates at state-funded colleges and universities. It certainly did prohibit such mandates for schools and school districts in Proviso 1.108 (Attachment 3). And it certainly did bar any requirement of a COVID-19 vaccination for admission to or to be present at colleges and universities in Proviso 117.163 (Attachment 2). The likelihood, therefore, that the Legislature intended colleges and universities to impose mask mandates is thus small.

No Case or Controversy

The University accepted the Attorney General's advisory opinion that the Proviso was intended to prohibit mask mandates, even if the words did not clearly say so. It then rescinded

its earlier policy. However, Petitioner now seeks to have the Court declare the Attorney General's advice was incorrect. In short, Petitioner desires an advisory opinion concerning the Attorney General's advisory opinion. Thus, this case does not belong in this Court, but on the floor of the General Assembly. See Hitter v. McLeod, 274 S.C. 616, 618, 266 S.E.2d 418, 419-20 (1980). ["(W)hile respondent['s] dilemma is appreciable . . . it does not ipso facto confer jurisdiction on this Court . . . to render an advisory opinion, which we have repeatedly refused to do even on constitutional issues. . . ."].

As this Court has advised, "[t]he Declaratory Judgment Act is not properly invoked for an advisory opinion to be put on ice by the plaintiff for use if the defendants or the applicant reach the occasion which might demand it. . . ." Orr v. Clyburn, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982). An adjudication which "would settle no rights of the parties," is "only advisory and therefore beyond the intended scope of a declaratory judgment." Power v. McNair, 255 S.C. 150, 154-55, 177 S.E.2d 551, 553 (1970). The ruling Petitioner seeks would resolve nothing except the satisfaction of knowing he has read the law correctly. Yet, the Attorney General readily acknowledged the alternative reading was reasonable. Still, the University is not required to take action even if the Court rules in Petitioner's favor.

As the Court has stressed, "[q]uestions of statutory interpretation, by themselves, do not rise to the level of actual controversy." Tourism Expenditure Review Comm. v. City of Myrtle Beach, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013) (quoting Entergy Nuclear Generation Co. v. Dept. of Envt'l. Protection, 944 N.E.2d 1027, 1034 (Mass. 2011) (internal quotations omitted). "It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223 (1975).

It is also well-settled that "Attorney General opinions are persuasive but not binding authority." S.C. Pub. Int. Found. v. Greenville Cnty., 401 S.C. 377, 383, n. 3, 737 S.E.2d 502,

560-61, 713 S.E.2d 604, 609 (2011). Here, the Attorney General simply responded to an opinion request from Rep. Stewart Jones. He issued the contested guidance to President Pastides (with a copy of that letter to the Representative). Representative Jones' request letter (by email) had stated the following:

> I've heard that USC is saying they've got a work around in the language of 117.190 to still require masks on campus. As the author of the Proviso, I'd like to state that the intent of Proviso 117.190 is to ensure that the choice of wearing a mask or getting a covid vaccine is left to the students individually, and not required in order to be present. Please address this in your opinion.

Attachment 4 (Request of Rep. Jones).

Thus, contrary to Petitioner's inflammatory rhetoric, the Attorney General did not "intervene" against the University, but responded to an opinion request, as state law requires him to do. See § 1-7-90 [Attorney General to "give his opinion upon questions of law submitted to him by either branch" of the General Assembly or the Governor]. As stated above, the Attorney General advised Rep. Jones and President Pastides that, while Proviso 117.190 could reasonably be read as Petitioner interprets it, -- simply to preclude discrimination against the unvaccinated – the intent of the Legislature appears to have been contrary to that interpretation, and was to ban mask mandates at state colleges and universities. Regardless, such advice from the Attorney General was not "binding authority" and the discretion to impose a mask mandate remained with the University even if the law were deemed to permit such policy.

Thus, at bottom, the question of whether the University of South Carolina, may compel masks is one of its own discretion even it has a legal right to do so. Clemson, for example, has not imposed a mask mandate, nor has the College of Charleston. As the Court has explained, "[a]s a general rule, the courts will not attempt to interfere with the exercise of discretionary powers by a public board or subordinate government agency." Griggs v. Hodge, 229 S.C. 245, 251, 92 S.E.2d 654, 657 (1956). Therefore, we cannot see how this case is anything more than a

request for an advisory opinion. Petitioner merely seeks a ruling that his view of the law is correct. But what good that does him in light of the fact that any decision remains discretionary with the University is beyond us. In short, the fact that the University may have the authority to impose a mask mandate, certainly does not mean it will do so. A ruling from this Court does not compel action by the University for exercising a discretionary act. There is no case or controversy here.

CONCLUSION

The principle of separation of powers should guide the Court. We believe that in enacting Proviso 117.190, the Legislature intended to ban mask mandates at state-supported colleges and universities, consistent with its policy of prohibiting a mandate of vaccinations at colleges and universities (117.163) and barring a mandate of wearing of masks at public schools (1.108). Alternatively, we believe this is a political question more properly addressed by the General Assembly. Finally, this case lacks a justiciable controversy.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

s/ J. EMORY SMITH, JR.
S.C. Bar No. 5262
Deputy Solicitor General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3680; (803)734-3677 (Fax)
esmith@scag.gov

ATTORNEYS FOR THE
ATTORNEY GENERAL

August 11, 2021