**STATE OF SOUTH CAROLINA**

**COUNTY OF RICHLAND**

**IN THE COURT OF COMMON PLEAS**
**FIFTH JUDICIAL CIRCUIT**
**Civil Action No. 2024-CP-40-00475**

AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA FOUNDATION,

*Plaintiff*,

v.

STATE ELECTION COMMISSION; SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES,

*Defendants*.

**GOVERNOR MCMASTER'S RESPONSE TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION**

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, submits this Response to the American Civil Liberties Union of South Carolina Foundation's Motion for Temporary Restraining Order or Preliminary Injunction.

## INTRODUCTION

"[T]he right to vote is a cornerstone of our constitutional republic." *Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 271, 844 S.E.2d 390, 391 (2020). No one disputes that principle.

But even if the ACLU's claims weren't flawed on their merits (as other Defendants explain that the claims are), the importance of a right is no reason to throw out all the rules of procedure. Yet that's what the ACLU asks this Court to do. It wants the Court to skip over standing. It needs the Court to ignore Rule 23 for class actions. It demands the Court turn a blind eye to the lawsuit's timing. And it insists the Court break new ground in crafting relief for nonparties.

However laudable promoting voter registration is, courts are governed by rules and law. Those governing standards ensure the fairness and legitimacy of the judicial process and protect the People from judiciary tyranny. Courts do not sit as Plato's philosopher-kings to dispense some notion of justice as they see fit. Rather, they are "bound down by strict rules and precedents, which

serve to define and point out their duty in every particular case that comes before them." *The Federalist No. 78*, p. 470 (Hamilton) (C. Rossiter & C. Kelser eds. 2003).

## LEGAL STANDARD

"The remedy of an injunction is a drastic one and ought to be applied with caution." *Strategic Res. Co. v. BCS Life Ins.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation." *Allegro, Inc. v. Scully*, 400 S.C. 33, 45, 733 S.E.2d 114, 121 (Ct. App. 2012). A preliminary injunction seeks "to preserve the status quo." Compton v. S.C. Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). A plaintiff "must establish three elements" to obtain a preliminary injunction: (1) irreparable harm, (2) likelihood of success on the merits, and (3) no adequate remedy at law. *Id.* The elements for a temporary restraining order are the same. *See Foothills Brewing Concern, Inc. v. City of Greenville*, No. 2006-CP-23-7803, 2006 WL 6825375 (S.C. Com. Pl. Dec. 29, 2006) (Few, J.).

## ARGUMENT

### I. The ACLU lacks standing.

Standing comes in different forms, but the ACLU cannot satisfy any type of standing here. Start with constitutional standing. The ACLU has not alleged that it has suffered any "injury-in-fact." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). And for good reason—as an organization, the ACLU cannot have the right to vote. *See* S.C. Const. art. II, § 4 ("Every *citizen* of the United States and of this State of the age of eighteen and upwards who is properly registered is entitled to vote as provided by law." (emphasis added)). In the same vein, the ACLU cannot have any harmed redressed because, as an organization, it cannot register

to vote.

The ACLU fares no better with associational standing. To meet that standard, a group must satisfy three elements: "[1] an association's members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014). Take just the first element. The ACLU never alleges it has (much less identifies) any member who fits the template of 17-year-old, would-be voter registrant. When an organization fails to identify a member who would have standing in her own right, the organization lacks standing. *See id.* (holding that the organization lack standing).

Presumably the ACLU will seek shelter under the public-importance exception. But this case doesn't meet the requirement for that exception. The critical question "is whether a resolution is needed for future guidance." *S.C. Pub. Int. Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017). Nothing in the Complaint suggests that any problem here (if one even exists) cannot and will not be remedied before the next general election.

Finally, there is statutory standing, "when a statute confers a right to sue on a party." *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). But the ACLU never mentions any statute that would permit this lawsuit. And this Court has "unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer." *Bodman v. State*, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013).

The ACLU therefore lacks standing, so it is not likely to prevail on the merits.

## II. The ACLU has not complied with Rule 23.

The ACLU seeks relief "applied to the *class* of impacted voters." Compl. Prayer for Relief

3 (emphasis added); *see also* TRO Mot. 13. But there's nothing else in the Complaint about a class. That omission precludes any class-based relief.

Rule 23 governs class actions. Class actions require numerosity, commonality, typicality, and adequacy of representation. *See* Rule 23(a), SCRCP. "[T]he court must apply a rigorous analysis to determine each prerequisite is satisfied." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003). The "failure to satisfy even one prerequisite is fatal to class certification." *Id.* The burden to satisfy each prerequisite is on the ACLU. *Id.* at 20, 577 S.E.2d at 200.

The ACLU's shortcomings on a class are glaring. Most obviously, there is no motion for class certification. But even if there were, there is no proposed class representative. In fact, the ACLU does not even identify a single individual anywhere in its filings who might be that representative. Without a proposed representative, there's no way to determine whether there are any "conflicts of interest between named parties and the class they seek to represent" or whether the proposed representative and the class "possess the same interest." *Hosp. Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 664, 591 S.E.2d 611, 622 (2004). Because the ACLU has not complied with Rule 23, it cannot obtain relief for any "class."

**III. This lawsuit comes too late.**

Under *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), federal courts "ordinarily [do] not alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020). This rule has two bases. One is federalism. That, of course, isn't a concern here.

But the other is election administration and confidence in election integrity. *See Purcell*, 549 U.S. at 4 ("Confidence in the integrity of our electoral processes is essential to the functioning

of our participatory democracy."). This rationale applies in full force. Election day is less than two weeks away, and the ACLU filed this case only 14 days from election day. In fact, by the time the lawsuit was filed, early voting had already started. *See* S.C. Code Ann. § 7-13-25(E).

The Complaint includes nothing about when any 17 year old first learned that his attempt to register to vote was incomplete. And the Complaint similarly includes nothing about when the ACLU first learned about this issue. At the very least, the ACLU must have known for more than a week, given that DMV has spent "the last week" reviewing its records. Compl. ¶ 27; *see also Hemingway v. Mention*, 228 S.C. 211, 217, 89 S.E.2d 369, 372 (1955) ("Equity aids the vigilant, not those who slumber on their rights").

Put simply, a last-minute lawsuit that pulls election officials away from their primary responsibility of administering a general election cannot be condoned. Litigants must have every incentive to bring these cases immediately. Permitting them to sue so close to election day not only encourages gamesmanship through manufactured urgency but also threatens the sound administration of elections.

## IV. The Court lacks the power to grant the relief sought.

The only plaintiff here is the ACLU. No one else. That's significant because South Carolina courts can grant relief to parties only.

Injunctions are equitable relief. *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). Courts in this State have the power "to exercise the equity jurisdiction known to the courts of England at the time of the adoption of our Constitution." *Montgomery Crawford, Inc. v. Arcadia Mills*, 174 S.C. 252, 177 S.E. 151, 152 (1934). "Equity originated in England as a means for the Crown to dispense justice by exercising its sovereign authority." *Trump v. Hawaii*, 585 U.S. 667, 716 (2018) (Thomas, J., concurring). This field "allowed the sovereign to afford

discretionary relief to parties where relief would not have been available under the rigors of the common law." *Id.* at 716–17 (cleaned up). But this relief was limited to the parties, which is also the traditional rule in American courts. *Id.* at 717 ("American courts of equity did not provide relief beyond the parties to the case."); *see also Brenan v. Burke*, 27 S.C. Eq. 200, 201 (S.C. App. Eq. 1854) ("Equity acts only *in personam*").

The ACLU wants relief for "all 17-year-old customers who, at the time of their SCDMV transaction between September 6, 2023, and October 14, 2024, were eligible to register to vote under S.C. Code Ann. § 7-5-180 and who checked '**Yes**, I wish to register to vote' on Step 5 of the 477-NC form." TRO Mot. 13–14. But none of those customers are plaintiffs here. The Court therefore lacks the power to grant relief to these individuals.

* * *

Any of those 17 year olds could have brought this lawsuit. That would have avoided many of the procedural obstacles here, and it would have made it more likely that the Court would have had an adequate record for addressing the legal questions. But there's no such record here: no affidavit, no documentation, no anything specific to any person who falls into the supposed "class." *See Denman*, 387 S.C. at 141, 691 S.E.2d at 470 (a plaintiff lost an election-related case because "he ha[d] presented no evidence, save for his own statement"). That lack of evidence makes deciding a case hard. *Cf. N. Sec. Co. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law."). It's why courts require plaintiffs who have "a direct stake in the outcome of a litigation" rather than only "a mere interest in the problem." *Smiley v. S.C. Dep't of Health & Env't Control*, 374 S.C. 326, 332, 649 S.E.2d 31, 34 (2007). As it is, this case is no more than a generalized disagreement with how Title 7 addresses voter-registration issues. The Court should not allow "a judicial resolution of this policy dispute."

*Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 291, 882 S.E.2d 770, 826 (2023) (Kittredge, J., dissenting). And it should not disregard the long list of rules that the ACLU overlooks in rushing to demand overbroad relief for unnamed individuals.

## CONCLUSION

The Court should deny the Motion for Temporary Restraining Order or Preliminary Injunction.

Respectfully submitted,

s/Wm. Grayson Lambert
Thomas A. Limehouse, Jr.
*Chief Legal Counsel*
S.C. Bar No. 101289
Wm. Grayson Lambert
*Senior Litigation Counsel*
S.C. Bar No. 101282
Erica W. Shedd
*Deputy Legal Counsel*
S.C. Bar No. 104287
Tyra S. McBride
*Deputy Legal Counsel*
S.C. Bar No. 103750
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
tlimehouse@governor.sc.gov
glambert@governor.sc.gov
eshedd@governor.sc.gov
tmcbride@governor.sc.gov

*Counsel for Governor McMaster*

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Columbia, South Carolina