STATE OF SOUTH CAROLINA COUNTY OF RICHLAND ACLU of South Carolina, Plaintiff, v. State Election Commission, South Carolina Department of Motor Vehicles, Defendants.	IN THE COURT OF COMMON PLEAS THE FIFTH JUDICIAL CIRCUIT C/A No.: 2024-CP-40-06286 **SPEAKER G. MURRELL SMITH, JR.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION**

Potential Intervenor-Defendant G. Murrell Smith, Jr., in his official capacity as Speaker of the South Carolina House of Representatives, by and through the undersigned counsel, submits this memorandum in support of his motion to dismiss the complaint and in opposition to the motion for a temporary restraining order (TRO) or a preliminary injunction filed by Plaintiff ACLU of South Carolina (the ACLU). For the reasons below, the Court should dismiss the complaint pursuant to Rules 12(b)(1) and/or 12(b)(6), SCRCP. At a minimum, the Court should deny the ACLU's motion for a TRO or a preliminary injunction.

INTRODUCTION

In 2022, the General Assembly unanimously passed a bipartisan election reform bill. *See* 2022 S.C. Act No. 150. South Carolinians now have more options than ever to exercise their constitutional right to vote, and hundreds of thousands of citizens have already done so through early voting. Less than two weeks before election day, however, the ACLU asks the Court to red pencil state election law to allow unnamed and unknown individuals to register to vote after the statutory deadline has already passed. While the ACLU may have noble purposes, respectfully, the State Election Commission (the Commission) and the Department of Motor Vehicles (the DMV) did nothing wrong here. And deadlines aren't unconstitutional. The Court should therefore

deny the request for a mandatory injunction, dismiss the complaint with prejudice, and allow Title 7 to operate as the General Assembly intended.

STANDARDS

I. Motion to Dismiss

"A motion to dismiss for lack of standing challenges the court's subject matter jurisdiction." *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022). Thus, the proper mechanism to challenge a party's standing is via a motion to dismiss under Rule 12(b)(1), SCRCP. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Rule 12(h)(3), SCRCP.

"Under Rule 12(b)(6), SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action." *Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). A circuit court's "ruling on a 12(b)(6) motion must be based solely upon the allegations set forth on the face of a complaint." *Stiles v. Oranato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." *Brown v. Theos*, 338 S.C. 305, 309–10, 526 S.E.2d 232, 235 (Ct. App. 1999) (quoting *Jarrell v. Petoseed Co., Inc.*, 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998)).

II. Motion for Preliminary Injunction

"The remedy of an injunction is a drastic one and ought to be applied with caution." *Strategic Res. Co. v. BCS Life Ins. Co.*, 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).

For the Court to grant a TRO or preliminary injunction, Plaintiff must establish "(1) [s]he will suffer immediate, irreparable harm without the injunction; (2) [s]he has a likelihood of success on the merits; and (3) [s]he has no adequate remedy at law." *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) (quoting *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004)). "A preliminary injunction should issue *only* if necessary to preserve the status quo ante." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010) (emphasis added).

"Mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances where the exigencies of the situation demand such relief." *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980). "Mandatory preliminary injunctive relief in any circumstance is disfavored[] and warranted only in the most extraordinary circumstances." *De La Fuente v. S.C. Democratic Party*, 164 F. Supp. 3d 794, 798 (D.S.C. 2016).

ARGUMENT

I. The Court should dismiss the ACLU's complaint for want of subject matter jurisdiction because it lacks standing.

"Standing to sue is a fundamental requirement to instituting an action." *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). "It is the responsibility of the complainant clearly to allege facts demonstrating that [it] is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 518 (1975). In South Carolina, three types of standing are recognized: standing conferred (1) by statute, (2) through constitutional standing, or (3) under the "public importance exception." *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339

(2008). Likewise, an organization *may* possess standing to sue on behalf of its members under certain circumstances. *Carnival Corp. v. Hist. Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75–76, 753 S.E.2d 846, 850 (2014).

The ACLU fails to allege it has standing. To start, the Court can dispense with statutory standing in short order. *See Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) ("Statutory standing exists, as its name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation."). No such statute exists. And the ACLU fares no better under the other tests.

A. The ACLU lacks constitutional standing as an organization.

"To possess constitutional standing, first, a party must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a *legally protected interest*." *Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518; *see also ATC S., Inc.*, 380 S.C. at 195, 669 S.E.2d at 339 (asserting that an injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical'" (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992))). "Second, a causal connection must exist between the injury and the challenged conduct." *Youngblood*, 402 S.C. at 317–18, 741 S.E.2d at 518. "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *ATC S., Inc.*, 380 S.C. at 195, 669 S.E.2d at 339 (quoting *Lujan*, 504 U.S. at 561).

When an organization attempts to rely on constitutional standing, however, the Court must evaluate a specific set of considerations. "[T]he organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act." *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600–01, 550 S.E.2d

287, 291 (2001). An organization can bring a suit on behalf of its members only if it establishes its "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Carnival Corp.*, 407 S.C. at 75–76, 753 S.E.2d at 850–51 (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). But the law of associational standing requires "plaintiff-organizations to make specific allegations establishing that at least one *identified* member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added). "[A]n organization cannot base standing on injury to its unnamed members or members of the public at large." *Coal. for Mercury-Free Drugs v. Sebelius*, 725 F. Supp. 2d 1, 13 (D.D.C. 2010).

Here, without alleging a single member has been affected, the ACLU attempts to skirt its lack of standing to adjudicate rights of 1,896 unknown eighteen-year-olds. But the ACLU has no "legally protected interest" because it does not have a constitutional right to vote. That is why its complaint is riddled with references to rights of unknown individuals and a threadbare statement that it "has members who vote in elections." Compl. at ¶ 7. Having "members," however, is only one piece of the puzzle. Who are those members, and are they part of the 1,896 people who are not registered to vote? The ACLU doesn't say. Nor does it allege any members have suffered an injury because of anything the Commission or the DMV has or has not done.

But the ACLU cannot adjudicate the rights of unknown individuals, especially when it hasn't properly alleged the elements for class certification under Rule 23, SCRCP.[1] As our court

[1] In its complaint, the ACLU references a purported "class" of individuals in an apparent, but utterly improper, attempt to circumvent standing. *See* Compl. at 8, ¶ 3 ("class of impacted voters"). The Court should reject any reference to a "class" in this lawsuit. To the extent the ACLU is asking the Court to create a class in this case, the Court should also deny that request. The ACLU has not alleged the requisite elements under Rule 23, SCRCP.

of appeals has stated, "[a]n organization has standing *only* if it alleges that it or its members will suffer an individualized injury; *a mere interest in a problem is not enough*." *Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul.*, 337 S.C. 476, 487, 523 S.E.2d 795, 800 (Ct. App. 1999) (emphasis added). What is more, constitutional rights are personal, and seeking redress for an alleged equal protection violation is limited to the individual who was actually deprived of a right. *See Rosenthal v. Unarco Indus., Inc.*, 278 S.C. 420, 425, 297 S.E.2d 638, 642 (1982) ("It is settled that one may not assert the violation of another's constitutional rights."). Thus, regardless of whether the ACLU has an interest in voter registration, it lacks standing to sue as an organization here to "preserve voters' fundamental rights." Compl. at ¶ 6.

Further, to the extent the ACLU is attempting to borrow from federal law and create a new form of standing in South Carolina in its allegation that it "has already devoted organizational resources to alerting" voters about the registration issue, the Court should reject the invitation. South Carolina courts have not adopted what the Supreme Court of the United States has recognized as "organizational standing."[2] And in any event, to establish organizational standing, the complained of action must "perceptibly impair" an organization's ability to carry out its mission *and* "consequent[ly] drain . . . the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). As the Fourth Circuit has clarified, that "standard is not met simply because an organization makes a 'unilateral and uncompelled' choice to shift its resources away from its primary objective to address a government action." *N.C. State Conf. of the NAACP*

[2] *See Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2157 (2023) ("[W]here the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways. Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert 'standing solely as the representative of its members.'" (quoting *Warth v. Seldin*, 422 U. S. 490, 511 (1975))).

v. Raymond, 981 F.3d 295, 301 (4th Cir. 2020) (quoting *CASA de Maryland, Inc. v. Trump*, 971 F.3d 220, 238 (4th Cir. 2020)).

The ACLU's complaint does not make this showing. It therefore lacks constitutional standing to sue as an organization.

B. The public importance exception to standing does not apply.

The public importance exception to standing doesn't carry the day either. Our supreme court has "recognized, under certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

> 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.

Id. Because "many issues may be of public interest, or importance, '[t]he key . . . 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) (quoting *ATC S., Inc.*, 380 S.C. at 199, 669 S.E.2d at 341).

Of course, the Speaker fully recognizes the right to vote is an issue of great public importance. As our supreme court has stated, however, "[t]he 'has not suffered a particularized injury' language does not remove the injury in fact requirement; instead, it simply allows someone who has not personally suffered an injury to step into the shoes of someone who has." *Jowers v. S.C. Dep't Health & Env't. Control*, 423 S.C. 343, 367, 815 S.E.2d 446, 458 (2018). "In other words, the exception allows a substitution in place." *Id.* at 367, 815 S.E.2d at 459. But the ACLU has not alleged an injury to any specific person and is merely hunting for one through this lawsuit.

This is not the type of case that warrants the Court's "relax[ation of the] general standing rules," especially given our supreme court's guidance that courts "must be cautious with this exception, lest it swallow the rule." *Id.* at 360, 815 S.E.2d at 455 (quoting *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013)).

To that end, in declining to invoke the public importance exception to standing, our supreme court has previously observed as follows:

> In our constitutional system of government with its separation of powers, courts exercise the limited constitutional function of the "judicial power." Accordingly, courts are limited to resolving cases and the powers inherent in that function. 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.

Carnival Corp., 407 S.C. at 81, 753 S.E.2d at 853 (quoting S.C. CONST. art. V, § 1).

* * *

For all these reasons, the ACLU lacks standing to bring this lawsuit, and the Court should dismiss the complaint under Rule 12(b)(1), SCRCP.

II. The Court should dismiss the complaint because the requested relief would violate the separation of powers.

It is axiomatic that our courts "will dismiss any case that does not present a justiciable controversy." *Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 273, 844 S.E.2d 390, 392 (2020). Indeed, "courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial." *S.C. Pub. Interest Found. v. Jud. Merit Selection Comm'n*, 369 S.C. 139, 143, 632 S.E.2d 277, 278 (2006). "The nonjusticiability of a political question is primarily a function of the separation of powers." *Id.* at 142, 632 S.E.2d at 278.

"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 department shall assume or discharge the duties of any other." S.C. CONST. art. I, § 8. The General Assembly has provided for the qualification and registration of voters and administration of the elections in which they participate in Title 7. It did so pursuant to its exclusive constitutional authority to provide for registration of voters. *See, e.g.*, S.C. CONST. art. II, § 8 ("The General Assembly shall provide for the registration of voters for periods not less than ten years in duration. Provision shall be made for registration during every year for persons entitled to be registered. The registration lists shall be public records.").

And the General Assembly "may enact any law not expressly, or by clear implication, prohibited by the State or Federal Constitutions" that advances a public purpose. *Moseley v. Welch*, 209 S.C. 19, 27, 39 S.E.2d 133, 137 (1946); *see also City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) ("The power of our state legislature is plenary, and therefore, the authority given to the General Assembly by our Constitution is a limitation of legislative power, not a grant."). Thus, when invited "to rewrite a permanent law, this Court must adhere to well-established separation of powers principles, leaving the power to legislate to the General Assembly." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control*, 407 S.C. 583, 591, 757 S.E.2d 408, 413 (2014). After all, "it is the General Assembly's prerogative to modify or repeal legislation and to make policy decisions." *Id.* at 597, 757 S.E.2d at 415.

Respectfully, the Court is not permitted to come behind the General Assembly—less than two weeks before an election—and rewrite Title 7 to provide the relief the ACLU seeks. *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (noting a court "cannot rewrite the statute and inject matters into it which are not in the legislature's language"). The Court should dismiss the complaint accordingly.

III. Laches bars the ACLU's belated grievances.

Because "[e]xtreme diligence and promptness are required in election-related matters . . . laches is available in election challenges." 29 C.J.S. *Elections* § 459. Thus, "if a party seeking extraordinary relief in an election-related matter fails to exercise the requisite diligence, laches will bar the action." *Id.* "Laches is an equitable doctrine which arises upon the failure to assert a known right." *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007).

Even if the ACLU had standing (it doesn't) and the Court could grant the relief the ACLU seeks (it can't), the ACLU waited too long to assert these purported constitutional violations on behalf of unknown individuals. As the complaint makes clear, "individuals who turn 18 between January 4, 2024 (close of books for the first primary), and November 5, 2024 (Election Day), were eligible to register to vote under" section 7-5-180 of the South Carolina Code "starting 120 days before January 4, 2024, which [was] September 6, 2023." *Id.* at ¶ 16. Multiple elections have occurred between then and now. *See* 2024 General Election Calendar, S.C. ELECTION COMM'N (last accessed Oct. 24, 2024), chrome-extension://efaidnbmnn nibpcajpcglclefindmkaj/https://scvotes.gov/wp- content/uploads/2024/07/2024-Election-Calenda r-scVOTES-2024-07-23.pdf.[3] And as the Court is aware, the voter registration deadline has already been extended once in response to Hurricane Helene. *See S.C. Democratic Party v. Knapp*, No. 2024-CP-40-05967 (S.C. Ct. Comm. Pleas for Richland Cnty. filed Oct. 4, 2024).

[3] The Court may take judicial notice of the Commission's published election deadlines. *See* Rule 201(b)(2), SCRE ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."). Relying upon facts capable of judicial notice does not convert a motion to dismiss into a motion for summary judgment. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (2014). This is especially so considering the ACLU has relied on that publication in its complaint. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.3d 824, 826 (2009) ("[A]llowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.").

Yet the ACLU waited until two weeks before the 2024 General Election to file this lawsuit, which at its core asks the Court to extend the deadline yet again. The Court should not entertain this untimely request.

That is especially so considering the ACLU seeks an "eleventh hour," *S.C. Progressive Network Educ. Fund v. Andino*, 493 F. Supp. 3d 460, 468 (D.S.C. 2020), extraordinary mandatory injunctive relief "in the period close to an election," *Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006) (per curiam)). The Supreme Court of the United States "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). Known as the "*Purcell* principle," its "wisdom" is "to avoid . . . judicially created confusion" in elections. *Id.* After all, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

While the *Purcell* doctrine generally applies when a federal court is asked to intervene in a state election, the considerations remain in full force in state-law cases like this one and are instructive here. The Court can simply replace federalism concerns with the equally weighty separation of powers concerns. "When an election is close at hand, the rules of the road should be clear and settled. That is because running a statewide election is a complicated endeavor." *Democratic Nat'l Comm. v. Wisc. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). As Justice Kavanaugh recognized during the last presidential election cycle,

> Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences. If a court alters election laws near an election, election administrators must first understand

> the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes. It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a . . . court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent.

Id.

In reality, the *Purcell* doctrine is just a species of laches that is specific to elections. And it should bar the ACLU's claims. As explained, there have already been multiple elections this year before or after which the ACLU could have asserted the issues it raises now. Instead, it chose to wait until the last minute in hopes that the Court would ignore normal pleading requirements under the guise of an emergency. But the General Assembly has carefully crafted a sophisticated timeline for the administration of elections, including voter registration. It has done so pursuant to its exclusive constitutional authority to provide for registration of voters and to maintain the integrity of elections. *See* S.C. CONST. art. II, §§ 8 & 10. When a court begins to tinker with those carefully crafted deadlines, chaos ensues. For instance, if the Court rewrites Title 7 now and orders the DMV and the Commission to take actions to allow for 1,896 unknown individuals to vote, what will stop other people who missed the voter registration deadline from doing the same?

And the ACLU is not merely asking the Court to allow these unknown individuals to vote. It is also asking the Court to ignore the other statutory requirements to be a qualified elector. For instance, the ACLU wants the Court to ignore that none of these people signed the oath as required in section 7-5-170(2). It also wants the Court to ignore the fact that there is no way for the Court to verify that each unknown person meets the qualifications to vote under section 7-5-120. But we are unable to conduct any individual inquiry into the circumstances of each individual because

none are before the Court. Do they still live in the county in which they did when they wished to register to vote at the DMV? Are they felons? In fact, we don't even know whether each unknown individual wants to vote in the 2024 General Election. The ACLU has not filed an affidavit establishing these or any other facts. It didn't even file a verified complaint. To ask for such relief on no factual record at this late hour is improper.

Voter confusion and election administrator confusion is exactly what will happen if the Court entertains the ACLU's untimely demands. The "important principle of judicial restraint" under *Purcell* prevents those problems and "thereby protects the State's interest in running an orderly, efficient election" to give the public "confidence in the fairness of the election." *Democratic Nat'l Comm.*, 141 S. Ct. at 31 (Kavanaugh, J., concurring). The Court should dismiss the complaint filed on the eve of the 2024 General Election under the equitable doctrine of laches and the more tailored *Purcell* doctrine.

IV. The Court should dismiss the ACLU's claims for a violation of the equal protection and due process clauses of the South Carolina Constitution.

The ACLU's first claim for relief alleges the DMV violated the equal protection clause and the DMV and the Commission violated the due process clause in article I, section 3 of the South Carolina Constitution. The Court should dismiss the ACLU's claims for purported constitutional violations because constitutional rights are personal, and seeking redress for an alleged equal protection violation is limited to the individual who was actually deprived of a right. *See Rosenthal*, 278 S.C. at 425, 297 S.E.2d at 642 ("It is settled that one may not assert the violation of another's constitutional rights."). The ACLU admits up and down its complaint that it is not the one who suffered any purported deprivation of constitutional rights. *See, e.g.*, Compl. at ¶¶ 6, 11–14, 32. Yet its equal protection claim hinges on a purported unequal treatment of "eligible voters" and deprivation of their "fundamental right to vote." *Id.* at 37. And its due process claim

states that "otherwise eligible individuals" have been deprived. *Id.* at 39. Because these constitutional claims are not based on any of the ACLU's own rights, the Court should dismiss them with prejudice.

V. The Court should dismiss the ACLU's claim for a declaratory judgment.

The ACLU's second claim for relief seeks a declaration that the DMV violated section 7-5-320 "by refusing to offer integrated voter registration to any SCDMV customers under the age of 18." Compl. at ¶ 41. The Speaker contends that the ACLU has failed to state a claim for any violation of section 7-5-320. The DMV followed the statutory process as required. For the sake of judicial economy, however, the Speaker incorporates by reference arguments that have been or may be made by the DMV and the Commission on this issue or by any other potential intervening defendant. Further, to the extent the DMV has already satisfied any of the ACLU's demands—which appears to be the case considering the representations in the ACLU's supplement to its motion for a TRO or preliminary injunction—such relief is moot. *See Mathis v. S.C. State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy.").

OPPOSITION TO INJUNCTIVE RELIEF

Even though it presents a faulty complaint that asks the Court to violate the fundamental separation of power principles and rewrite the law, all without standing to do so, the ACLU has asked the Court to go further and issue a mandatory preliminary injunction ordering the Commission and the DMV take action to allow 1,896 unknown individuals to register to vote in the 2024 General Election. The Court should deny the ACLU's motion.

Here, the ACLU seeks to upend, not preserve, the status quo. *Cf. Poynter Invs., Inc.*, 387 S.C. at 586, 694 S.E.2d at 17 ("A preliminary injunction should issue *only* if necessary to preserve

the status quo ante."). The General Assembly carefully crafted Title 7 to set forth the deadlines for voter registration and the administration of elections. The deadline for voter registration—even under the extended one—has come and gone. And the 1,896 individuals at issue did not register to vote in the 2024 General Election. The ACLU asks the Court—as an arm of the State of South Carolina—to usurp the General Assembly's authority and alter the comprehensive statutory process for qualifying and registering individuals to vote by requiring the Commission and the DMV to allow 1,896 unknown individuals who haven't signed the oath to register to vote in the 2024 General Election. That said, the ACLU does not satisfy the elements necessary for injunctive relief to issue.

I. The ACLU cannot succeed on the merits for all the same reasons the Court should dismiss its complaint.

As explained above, the Court should dismiss the ACLU's complaint because it fails in many respects. For starters, the ACLU lacks standing to bring this election law challenge, which is based on unnamed individuals' right to vote, as an organization that has identified no members with any relation to the allegations in the complaint. In a similar vein, the ACLU fails to state a claim upon which relief can be granted under article I section 3 of the South Carolina Constitution—on either equal protection or due process grounds—because the ACLU does not have a right to vote. Neither the Commission nor the DMV can violate a right that does not exist. Further, to the extent the DMV has already satisfied any of the ACLU's demands, such relief is moot. And even if it wasn't, the ACLU is too late considering early voting is already underway and the 2024 General Election is only twelve days away. Laches and the *Purcell* doctrine bars the ACLU's claims. Finally, the ACLU has failed as a matter of law to allege entitlement to the drastic mandatory injunctive relief it seeks in several respects, including because the relief it seeks would

violate the fundamental principle of the separate of powers. Because the ACLU cannot succeed on the merits of its claims, the Court should deny its motion for a TRO or preliminary injunction.

II. The ACLU has not and will not suffer any irreparable harm absent injunctive relief.

Like its complaint, a fatal flaw in the ACLU's motion for injunctive relief is that its purported harm is borrowed from someone else. The Court need look no further than its heading on irreparable harm, which states "[e]ligible voters will suffer irreparable harm in the absence of an injunction." Mot. for TRO at 11.

To show entitlement to a preliminary injunction, a plaintiff must establish *it* will suffer irreparable harm absent the injunctive relief. *See Denman v. City of Columbia*, 387 S.C. 131, 140–41, 691 S.E.2d 465, 470 (2010) ("An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm *suffered by the plaintiff*." (emphasis added) (quoting *Scratch Golf Co.*, 361 S.C. at 121, 603 S.E.2d at 907)). Yet the ACLU makes no connection between it and the purported irreparable harm that may ensue. Nor could it. One cannot manufacture irreparable harm by waiting until the eve of an election to bring a lawsuit on behalf of unknown individuals with no relationship to the organization.

III. The ACLU (and the 1,896 unknown individuals) lacks an adequate legal remedy only because it presents a question that is not fit for judicial review at this late hour.

According to the ACLU, there is no adequate remedy at law because "early voting [is] underway and only two weeks before Election Day [remains]." Mot. for TRO at 11. But that is precisely the same reason the ACLU's claims fail. Had the ACLU—or the 1,896 unknown individuals who want to vote—acted sooner, they had an adequate remedy at law.

Section 7-5-180 sets forth the "[p]rocedure for registration when qualification is completed after closing books," and provides:

> Any person not laboring under the disabilities named in the Constitution and in Section 7-5-120 and whose qualification as an elector is completed after the closing of the registration books, but before the next ensuing election, has the right to apply for and secure registration at any time within one hundred twenty days immediately preceding the closing of the books for the election or for the primary election preceding the election. Written notification of approval or rejection must be issued personally or mailed by the board to each applicant on a form to be prescribed and provided by the State Election Commission. The decision of the county board of voter registration and elections may be appealed as provided by Section 7-5-230.

S.C. Code Ann. § 7-5-180. So the 1,896 unknown individuals could have registered to vote after the books closed. Indeed, as the ACLU admits, "6,000 of those voters were able to successfully register to vote by some other means." Compl. at ¶ 29. Yet the ACLU fails to address why this remedy would have been inadequate in the first instance.

What is more, although the ACLU artfully pleads around the National Voter Registration Act, 28 U.S.C. § 20504 (the "Motor Voter law")—presumably to avoid removal to federal court—the relief it seeks is predicated on the notion that the DMV has somehow violated the Motor Voter law. The ACLU cannot have it both ways. Still, under the Motor Voter law, the 1,896 unknown individuals also had an adequate remedy at law for these purported violations yet failed to take advantage of it. *See* 28 U.S.C. § 20510.

Simply put, if there is no longer an adequate remedy at law, that is simply a function of the late hour at which the ACLU brought this lawsuit with early voting underway and less than two weeks before the 2024 General Election.

CONCLUSION

In sum, the Court should deny the ACLU's motion for preliminary injunction and dismiss the complaint with prejudice. To the extent not inconsistent with his arguments, the Speaker respectfully adopts and incorporates the arguments of the other defendants and intervenors.

Respectfully submitted,

/s/Vordman Carlisle Traywick, III

Vordman Carlisle Traywick, III (102123)
Sarah C. Frierson (104643)
ROBINSON GRAY STEPP & LAFFITTE, LLC
2151 Pickens Street, Suite 500
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
ltraywick@robinsongray.com
sfrierson@robinsongray.com

Counsel for Intervening Defendant G. Murrell Smith, Jr., in his official capacity as Speaker of the South Carolina House of Representatives

Columbia, South Carolina
October 24, 2024