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| STATE OF SOUTH CAROLINA                 | ) | IN THE COURT OF COMMON PLEAS                |
|   | ) |   |
| COUNTY OF RICHLAND                      | ) | FIFTH JUDICIAL CIRCUIT                      |
|   | ) |   |
| DEBORAH MIHAL, and the                  | ) | Civil Action No. 2021-CP-40-01599           |
| AMERICAN CIVIL LIBERTIES UNION          | ) |   |
| FOUNDATION OF SOUTH                     | ) |   |
| CAROLINA,                               | ) |   |
|   | ) |   |
|   | ) | <b><u>GOVERNOR MCMASTER’S</u></b>           |
|   | ) | <b><u>MOTION TO DISMISS AND STRIKE</u></b>  |
| Plaintiffs,                             | ) | <b><u>AND OPPOSITION TO PLAINTIFF’S</u></b> |
|   | ) | <b><u>MOTION FOR TRO AND</u></b>            |
| vs.                                     | ) | <b><u>PRELIMINARY INJUNCTION</u></b>        |
|   | ) |   |
|   | ) |   |
| GOVERNOR HENRY D. MCMASTER,             | ) |   |
| in his official capacity; and MARCIA S. | ) |   |
| ADAMS, Executive Director of the South  | ) |   |
| Carolina Department of Administration,  | ) |   |
| in her official capacity,               | ) |   |
|   | ) |   |
|   | ) |   |
| Defendants.                             | ) |   |
|   | ) |   |

YOU WILL PLEASE TAKE NOTICE THAT Defendant Governor Henry D. McMaster, in his official capacity (Governor McMaster), by and through the undersigned attorneys, will move before the Presiding Judge of the Court of Common Pleas for Richland County, in the Fifth Judicial Circuit of South Carolina, ten days after service hereof, or as soon as counsel may be heard, for an Order dismissing the Complaint for declaratory and injunctive relief filed on April 6, 2021, by Plaintiffs Deborah Mihal and the American Civil Liberties Union Foundation of South Carolina (the ACLU) pursuant to Rules 12(b)(1), (b)(6), and (b)(7), SCRCP. Governor McMaster will further move for an Order striking Paragraphs 39, 40, 41, and 42 of Plaintiffs’ Complaint, as well as the unsworn declaration of Plaintiffs’ counsel, Susan Dunn (Dunn Declaration), pursuant to Rule 12(f), SCRCP.

The basis for this Motion is that, despite their considerable but curious efforts at creative pleading, Plaintiffs—both known and unknown, named and anonymous—failed to exhaust the

exclusive administrative remedies of which they are aware prior to filing this action in circuit court. See S.C. Code Ann. §§ 8-17-310 through -380; S.C. Code Ann. §§ 1-13-10 through -110. Nor can they demonstrate any recognized exceptions to the exhaustion requirement. What is more, under any theory of the case, Plaintiffs failed to state facts sufficient to constitute a cause of action upon which relief may be granted—whether declaratory or injunctive in nature—as to their claims. See Rule 12(b)(6), SCRCF. Governor McMaster’s Executive Orders were issued in accordance with his emergency powers and well within the scope of his constitutional and statutory authority. And the statutory provisions Plaintiffs challenge are constitutional. In any event, their Complaint fails to present a justiciable controversy under the doctrines of standing, mootness, and ripeness. Further still, dismissal is warranted because Plaintiffs inexplicably failed to join one or more necessary parties to this action—their employers. See Rule 12(b)(7), SCRCF.

In the alternative, and in the event Plaintiffs’ implausible claims are not summarily dismissed, the Court should strike certain allegations from the Complaint, along with the unsworn and unsupported Dunn Declaration, purporting to raise grievances on behalf of unidentified members or anonymous supporters of the ACLU.<sup>1</sup> See Rule 12(f), SCRCF. Respectfully, Plaintiffs cannot rely upon phantom individuals without giving Defendants any notice of the names of the purported state employees or their employers or the factual allegations necessary to maintain a cognizable claim. Without this most basic information, Defendants have no opportunity to

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<sup>1</sup> The Governor also expressly objects to Plaintiffs’ reliance upon various sources outside the Complaint in footnotes and exhibits—including newspaper articles, reports from various interest groups, and Plaintiffs’ purported expert report of Amanda McDougald Scott—because they constitute inadmissible hearsay, and Plaintiffs have not demonstrated their purported expert is qualified, reliable, relevant, and necessary in this case. See Rules 403, 701, 702, 703, 801 & 802, SCRE. The Court should therefore strike these allegations and exhibits under Rule 12(f), as well, to the extent they are referenced by and incorporated into Plaintiffs’ Complaint. See Rule 10(c), SCRCF (“Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading.”).

ascertain the truth of these allegations—upon which the ACLU seemingly, but insufficiently, relies to establish organizational or associational standing—much less to subject them to the requisite adversarial testing. Moreover, and to the extent Plaintiffs are allowed to rely on the Dunn Declaration, Ms. Dunn is now a necessary witness and, thus, disqualified as counsel. See Rule 3.7(a), SCRPC, Rule 407, SCACR. As for her purported declaration, it fails to comply with the affidavit or verification requirement in Rule 65(b), SCRCP; is not certified pursuant to In re Operation of the Trial Courts During the Coronavirus Emergency, App. No. 2020-000447, Am. Order No. 2021-03-04-01, ¶ (c)(16) (S.C. Sup. Ct. filed Mar. 4, 2021); and would not even comply with the declaration requirements in federal court under 28 U.S.C. § 1746. The ACLU, of course, cannot rely upon apparitions and the unsworn testimony of its counsel to establish standing, much less to advance arguments or claims of anonymous individuals.

Last, Plaintiffs’ request for a temporary restraining order (TRO) and injunctive relief fails as a matter of law. Mihal’s manufactured grievance fails to give rise to imminent irreparable harm, and the ACLU cannot assert irreparable harm on behalf of other unidentified alleged state employees. See Denman v. City of Columbia, 387 S.C. 131, 140–41, 691 S.E.2d 465, 470 (2010). As discussed above, Plaintiffs likewise cannot succeed on the merits in this action. And as Plaintiffs well know, they have an adequate remedy at law under the State’s grievance procedures and the South Carolina human affairs law. They cannot simply jettison the well-established and exclusive administrative process. Nor can Plaintiffs show that the “benefit” of injunctive relief would outweigh the significant resulting impacts on the State’s response to COVID-19 and on Governor McMaster’s ability to exercise his emergency authority.

For the foregoing reasons, the Court should enter an Order dismissing Plaintiffs’ Complaint, striking the improper allegations and exhibits therefrom, denying Plaintiffs’ Motion

for TRO and a Preliminary Injunction, and granting such other and further relief as the Court deems just and proper. In support of this Motion, Governor McMaster will rely upon a memorandum of law as well as any other documents that may be submitted prior to or at the time of the hearing in this matter.<sup>2</sup> The undersigned counsel certify that consultation with opposing counsel prior to filing this motion was not required or would serve no useful purpose. See Rule 11, SCRPC.

Respectfully submitted,

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*Counsel for Defendant Governor Henry McMaster*

April 7, 2021  
 Columbia, South Carolina

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<sup>2</sup> Because counsel have appeared on behalf of both Governor McMaster and Adams, an ex parte TRO would be inappropriate. Cf. Rule 65(b), SCRPC (“No temporary restraining order shall be granted without notice of motion for the order to the adverse party unless it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon.”). To that end, counsel for the Governor respectfully request notice of and the opportunity to be heard at any hearing scheduled on Plaintiffs’ request for injunctive relief in this matter.