In the Supreme Court of South Carolina

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S.C. SUPREME COURT

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

Case No. 2026-000032

SOUTH CAROLINA PUBLIC INTEREST FOUNDATION and JAMES WENINGER..........Plaintiffs

v.

HENRY MCMASTER, in his official capacity as Governor of the State of South Carolina; MAJOR GENERAL ROBIN B. STILLWELL, in his official capacity as Adjutant General of the South Carolina National Guard ....Defendants

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INTRODUCTION

Defendants and their *amici curiae* propose a power grab of remarkable scope. First, they ask this Court to abandon a decades-old, common, and cautiously-employed method of adjudicating some of the state's most pressing legal questions. Second, they ask the Court to construe statutes to *implicitly* authorize the deployment of military forces across state lines. Finally, they argue that even if Governor McMaster's deployment exceeds his statutory authority (it does), he should nevertheless be allowed to continue it because the Constitution (in Defendants' view) allows him to deploy the military for any reason, including to police common street crime hundreds of miles away.

These views are anathema to basic separation-of-powers principles and statutory-interpretation rules. This Court should reject them.

ARGUMENT

I. Public importance standing is constitutional, beneficial, and commonplace.

Perhaps sensing the weakness of their position on the merits, Defendants start with a Hail Mary: Reverse 75 years of precedent and eliminate public importance standing altogether.[1] *See* Defs. Br. at 9–21. The impulse is understandable: the Governor and the *amici curiae* are weary of the checks and balances attendant to judicial review. *See, e.g., Adams v. McMaster*, 432 S.C. 225,

[1] Defendants trace the doctrine back to the 1970s, but this Court has pointed as far back as 1947. *See Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (citing *Berry v. Zahler,* 220 S.C. 86, 66 S.E.2d 459 (1951) and *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 96, 44 S.E.2d 88, 97 (1947) (explaining it was "generally established" that questions of public importance should be answered "however abstract or moot they may have become in the immediate contest.")).

851 S.E.2d 703 (2020) (striking down the Governor's voucher program); *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 177, 906 S.E.2d 345, 351 (2024) (striking down the legislature's voucher program). The legal justification is harder to understand.

Public importance standing is well-settled, well-reasoned, and an important check on governmental overreach. *See, e.g.*, *id.* ("[W]e do not hesitate to hold Petitioners have satisfied the requirement for public importance standing."); *see also id.,*. 444 S.C. at 202, 906 S.E.2d at 364 (Kittredge, C.J., dissenting) ("I take no issue with the standing of Petitioners."). It is commonplace amongst our sister states. *See* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine, Agric. & Nat. Res. L. 349, 353 (2016). By contrast, Defendants' rigid view of standing (which they seek to import from federal law) has been castigated as atextual and ahistorical. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 167 (1992) (criticizing *Lujan* as adopting "a revisionist view of Article III, with no textual or historical support"); Robert J. Pushaw, *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III "Originalism"*, 31 Geo. Mason L. Rev. 893, 894-95 (2024) ("[Modern] standing rules have no discernible basis in Article III's language or history or in the Constitution's structure."). And far from being inevitable or inerrant, Defendants' view "is a relatively recent creation," William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 224 (1988); *see also, e.g.*, Punshaw, *supra*, that even the Supreme Court itself admits lacks clarity, *see Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) ("We need not mince words when we say that the concept of 'Art. III standing' has not been defined with complete consistency.").

So why change the law? In short: Defendants do not advocate for the federal view of standing because it is right but because it is convenient.

A. Public Importance Standing in South Carolina

In South Carolina, "[s]tanding may be acquired: (1) through the rubric of 'constitutional standing'; (2) under the 'public importance' exception; or (3) by statute." *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). Each type of standing is sufficient alone to confer jurisdiction. *Id.*; *accord Matheson v. McCormac*, 186 S.C. 93, 195 S.E. 122, 125 (1938) ("[T]here is certainly no limitation on the power of the courts to settle and decree the rights of litigants.").

When a plaintiff asserts constitutional standing, South Carolina courts apply the U.S. Supreme Court's case-or-controversy requirements from the Article III of the federal Constitution. *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 when plaintiffs assert statutory standing or public importance standing, they need not establish the "irreducible minimums" of Article III. *Youngblood v. S.C. Dep't of Soc. Serv.*, 402 S.C. 311, 317 n.5, 741 S.E.2d, 515, 518 n.5 (2013) ("[T]he public importance exception may provide standing where the elements of constitutional standing are not met."); *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44. As the Court said in *Preservation Society*, "[t]he concept of Article III standing as applied in the federal courts does not limit a state's ability to statutorily formulate standing criteria." 430 S.C. at 210, 845 S.E.2d at 486 (citing *Duncan v. FedEx Office & Print Servs., Inc.*, 123 N.E.3d 1249, 1256 (Ill. App. Ct. 2019) (noting that a state court need not define "injury" as in the federal forum).

That does not mean, of course, that the public importance exception is limitless. *Contra* Defs. Br. at 11 ("[T]he public importance exception allows anyone to sue about anything.") A litigant must demonstrate that the issue presented "is of such public importance as to require its resolution for future guidance." *Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999); *see also ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008) ("The key to the

public importance analysis is whether a resolution is needed for future guidance.”). When the exception is invoked, “[c]ourts must cautiously balance competing interests—citizenry’s need to hold the public’s officials accountable for alleged injustices and ‘the concomitant integrity of government action’—to determine whether the issue presented is ‘inextricably connected to the public need for court resolution for future guidance.’” *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 341–42, 878 S.E.2d 891, 895 (2022) (quoting *S.C. Pub. Int. Found. v. S.C. Dep’t of Transp.*, 421 S.C. 110, 118–19, 804 S.E.2d 854, 858 (2017)).

Here, Defendants agree that this case satisfies the public importance exception. Defs. Br. at 9–10. As such, Plaintiffs will test the coherence of Defendants’ arguments through the lens of this case.

B. Defendants’ attacks on public importance standing lack merit.

At bottom, Defendants do little more than urge the adoption of federal standing limits. The problem is that there is no structural, textual, or rational basis for doing so. “[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability.” *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *see also Lansing Schs. Educ. Ass’n v. Lansing Bd. of Educ.*, 487 Mich. 349, 381 (2010) (Weaver, J., concurring) (“To make standing a constitutional concern when our Michigan Constitution is completely silent regarding which of the government’s branches has power to grant standing represents judicial activism of the most objectionable sort.”).

1. <u>This lawsuit is a “case” within the meaning of Article V.</u>

Defendants’ primary argument for eliminating public importance standing is that the word ‘cases’ in Article V *excludes* public importance cases. But the word ‘case’ cannot bear the weight Defendants place on it. *See* Case, Black’s Law Dictionary (12th ed. 2024) (expansively defining the term to include any “civil or

criminal proceeding, action, suit, or controversy at law or in equity"). And even under the definitions they crib from federal cases, the argument fails.

Defendants aver that "cases" are "the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." Defs. Br. at 10 (citing *Muskrat v. United States*, 219 U.S. 346, 357 (1911) and *Calderon v. Ashmus*, 523 U.S. 740, 746 (1998)). They further add that a case "implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication." *Id.* (quoting *Muskrat*, 219 U.S. at 357).

This action easily meets those definitions. The case was brought (and accepted) in the Court's original jurisdiction, which is established by law in South Carolina. *See* S.C. Const. Art. V; Rule 245, SCACR. In defining the "Jurisdiction of the Supreme Court," Article V expressly states that "[t]he Supreme Court *shall have the power* to issue writs of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." S.C. Const. Art. V, § 5 (emphasis added). The constitution even grants Justices "the same power at chambers to issue writs . . . as when in open court." S.C. Const. Art. V, § 20 ("Powers of Justices and judges at chambers"). Critically, history shows that such writs were routinely granted on behalf of "stranger[s] to the official action." Louis L. Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1035 (1968). Quo warranto—which, like prohibition and *mandamus*, is a prerogative writ—never required an injured party. *State v. Tollison*, 95 S.C. 58, 78 S.E. 521, 522 (1913) ("quo warranto . . . may be brought by the Attorney General . . . or upon the complaint of *any* private party" (emphasis added). Likewise, "citizen's mandamus" actions were "widely used . . . as a means of testing the validity—constitutional and statutory—of official action." Jaffee, *supra* at 1035;

see also Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1396 (1988) ("Under the English practice, 'standingless' suits against illegal governmental action could be brought via the prerogative writs of mandamus, prohibition, and certiorari issued by the King's Bench."). Even early U.S. Supreme Court cases show that such actions fit comfortably within the historical conception of the judicial power. *Union Pac. R. Co. v. Hall*, 91 U.S. 343, 355 (1875) ("[W]e think, a decided preponderance of American authority in favor of the doctrine, that private persons may move for a mandamus to enforce a public duty. . . without the intervention of the government law-officer."). State court decisions from the era are in accord. *See*, *e.g.*, *Pike Cnty. Comm'rs v. People ex rel. Metz*, 11 Ill. 202, 208 (1849) ("[W]here the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result."); *see also Bd. of Comm'rs of Decatur Cty. v. State*, 86 Ind. 8, 12 (1882) (a writ of *mandamus* will lie against public official for exceeding legal authority "where the question is one of public concern").

2. <u>This case does not "usurp the powers of the political branches."</u>

There is also no "separation of powers" problem with public importance standing. Just as establishing "constitutional standing" is no guarantee that a plaintiff's claim is justiciable, *see Bailey v. S.C. St. Elec. Comm'n*, 430 S.C. 268, 844 S.E.2d 390 (2020), reliance on statutory or public importance standing does not, *ipso facto*, violate the separation of powers. The "separation of powers" question does not ask about the parties, but about whether *the issue* "would place a court in conflict with a coequal branch of government." *S.C. Pub. Int. Found. v. Jud. Merit Selection Comm'n*, 369 S.C. 139, 142-43, 632 S.E.2d 277, 278 (2006); *Alexander v. Houston*, 403 S.C. 615, 619, 744 S.E.2d 517, 519 (2013) ("[C]ourts cannot reject as 'no law suit' a

bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.").

The recent school voucher cases are instructive. In both *Adams* and *Eidson*, the Court unanimously agreed that the plaintiffs satisfied the public importance exception to standing. Given that they asked justiciable questions, the Court was then "duty bound to review" the voucher programs' constitutionality. *See Segars-Andrews v. Jud. Merit Selection Comm'n*, 387 S.C. 109, 123, 691 S.E.2d 453, 460–61 (2010). This case is no different. Neither the executive nor the legislature is responsible for assessing the legality of the Governor's deployment. *See Doran v. Robertson*, 203 S.C. 434, 445, 27 S.E.2d 714, 718 (1943) ("The Legislature cannot finally determine the limits of its power under the Constitution; that is a fundamental function of the courts."); *accord Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 68 (2015) (Thomas, J., concurring in judgment) ("When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it."). The question is purely legal and "clearly within the prerogative of this Court." *Sloan v. Hardee*, 371 S.C. 495, 500, 640 S.E.2d 457, 459-60 (2007). Thus, the separation of powers clause does not forbid review; it commands it. S.C. Const. Art. I, § 8; *accord. Nevada Pol'y Rsch. Inst., Inc. v. Cannizzaro*, 138 Nev. 259, 262–63 (2022) ("[J]udicial review of a public official's actions serves an essential role in maintaining the constitutional structure of state government.").

3. Plaintiffs do not seek an "advisory opinion."

Defendants and *amici* also argue that cases resolved under the public importance exception are tantamount to "advisory opinions." Defs. Br. at 17; Amici Br. at 7. But again, this case proves otherwise. An advisory opinion is "[a] nonbinding statement by a court of its interpretation of the law." Black's Law

Dictionary (12th ed. 2024). Its hallmark is that it "[does] not affect the parties' legal rights," *Richards v. Spicer*, 415 S.C. 514, 915 S.E.2d 486, 521 (2025) (citing *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970)), and has "no practical effect on the outcome of the case," *Horry Cnty. v. Parbel*, 378 S.C. 253, 264, 662 S.E.2d 466, 472 (Ct. App. 2008) (citing *Shasta Beverages v. S.C. Tax Comm'n,* 280 S.C. 48, 56, 310 S.E.2d 655, 659 (1983) ("It is not the role of this [c]ourt . . . to render an advisory opinion on a hypothetical situation.")), *overruled on other grounds by State v. Oxner*, 391 S.C. 132, 705 S.E.2d 51 (2011). As the Court put it last year in *Richards v. Spicer*, the prohibition on advisory opinions merely ensures that litigants cannot "fish in judicial ponds for legal advice." 445 S.C. 514, 521, 915 S.E.2d 486, 490 (2025) (quoting *Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81-82, 742 S.E.2d 371, 374 (2013)).

Plainly, that is not what is happening here. If Governor McMaster asked the Court to answer a hypothetical question—for example, whether it would be lawful to send the SCNG to monitor elections in Atlanta—*that* would be an advisory opinion. By contrast, Plaintiffs challenge the *ongoing and repeated* deployment of SCNG troops to Washington, D.C. and ask that the Court declare *that* deployment exceeds the Governor's lawful authority. Because a declaration of law would have a practical effect on the Governor's present actions, an opinion in this case would not be "advisory."

4. The public importance exception works just fine.

Last, Defendants and their *amici* complain that the public importance exception is "unworkable" because "[t]here's no predictability." Defs. Br. at 18 ("[S]ometimes it [applies] . . . [o]ther times it doesn't."); Amici Br. at 8–10. True: unlike with statutory standing, an issue of public importance does not automatically confer standing. *Crews v. Beattie*, 197 S.C. 32, 14 S.E.2d 851 (1941). But the exercise

of judgment does not make the rule "unworkable;" indeed, many of this Court's actions are discretionary. *See State v. Price*, 441 S.C. 423, 435 n.5, 895 S.E.2d 633, 639 n.5 (2023) ("[T]he Court is not required to issue any writ, and doing so is in [its] discretion."). Rather, discretion ensures that the exception does not swallow the rule. *Accord Union Pac. R. Co.*, 91 U.S. at 355 (because "granting the writ is discretionary with the court, . . . it may well be assumed that it will not be unnecessarily granted."). And the Court's discretion has produced predictable results. *Accord Eidson*, 444 S.C. at 177, 906 S.E.2d at 350 ("We have consistently—but cautiously—held that our standing rules may be relaxed when the case involves a matter of wide public importance and resolution of the case is needed for future guidance affecting the public interest.").

Notably, the "predictability" that Defendants seek here is quite narrow—Defendants wish to be able to predict whether an unlawful action is likely to land them in court. But "[t]he Governor shall take care that the laws be faithfully executed," whether or not it is likely that a Plaintiff will have standing to sue them. S.C. Const. Art. IV, § 15. This Court need not preference Defendants' self-serving conception of predictability; perhaps an executive who knows they may have to defend their actions would *more* predictably take care to follow the law.

As a final point, Defendants' "predictability" argument rings particularly hollow given the track record of their alternative. Even its staunchest defenders must concede: federal Article III standing doctrine is far from a model of clarity and stability. *See*, *e.g.*, *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 583 (1985) (describing Article III as an "area of frequent arcane distinctions and confusing precedents."); *see also* Lauren Pezzi, *Struggling to Stay Standing: Circuit Courts' Varying Approaches to Civil Rights Testers and Article III Standing Requirements*, 66 B.C. L. Rev. 2019 (2025) (analyzing significant recent shifts in federal standing doctrine). Wholesale and exclusive adoption of Article III might well

make it harder on plaintiffs (which the political branches prefer), but it promises none of the predictability Defendants and *amici* profess to seek.

C. Public importance standing is commonplace and beneficial.

The public importance exception is an important check on the abuse of power. As this Court said in *Sloan v. Greenville County*, "[a]llowing interested citizens a right of action in our judicial system when issues are of significant public importance ensures this accountability and the concomitant integrity of government action." 356 S.C. 531, 551, 590 S.E.2d 338, 349 (2003). Unsurprisingly, the other branches would prefer to operate without the check of judicial review. *See generally* Def. Br. *and* Amici Br. But that is a reason to keep it—not eliminate it.

South Carolina is far from an outlier. *See, e.g.*, *Cannizzaro*, 138 Nev. at 262–63 (collecting cases). In fact, "[a]n *overwhelming majority* of states provide some exception to their constitutional standing requirements, meaning that the requirements are not 'irreducible' as in *Lujan*." Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 Ky. J. Equine, Agric. & Nat. Res. L. 349, 353 (2016). North Carolina, for example, "broaden[s] [the] parameters of [] declaratory judgment action[s] that are premised on issues of great public interest." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 616 (2004). And as the Nevada Supreme Court explained recently, "the ability of an appropriate party to obtain judicial review of a public official's actions serves an essential role in maintaining the constitutional structure of the state government and preventing government actors from either overstepping or abdicating their public duties." *Cannizaro,* 138 Nev. at 262–63. The Nebraska Supreme Court put it this way: "without an exception for matters of great public concern, elected representatives could flout constitutional violations with impunity." *Thompson v. Heineman*, 289 Neb. 798, 823 (2015).

The cost of eliminating the public importance exception is significant. Without it, important legal questions—like whether the governor satisfied the constitutional requirements for his office, *Sloan v. Sanford*, 357 S.C. 431, 435, 593 S.E.2d 470, 472-73 (2004), whether the Attorney General unlawfully entered a contingency fee agreement with private law firms and wrongfully disbursed $75 million in state settlement funds, *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 342, 878 S.E.2d 891, 895 (2022), or whether legislation violated the one-subject requirement of Article III, § 17, *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005)—would go unaddressed. As the North Carolina Supreme Court observed, that is a high price to pay merely "because the perfect civil action [] prove[s] elusive." *Hoke Cnty.*, 358 N.C. at 616.

II. Plaintiffs properly assert a long-recognized cause of action grounded in equity.

Plaintiffs allege that "Governor McMaster's deployment of SCNG troops to Washington, D.C. was *ultra vires*"—that is, that the deployment exceeded the Governor's lawful authority—because S.C. Code § 25-1-1840 does not authorize extraterritorial deployments for routine law enforcement. Plfs. Br. at 1–3, 14–28. Defendants respond that Plaintiffs "have no right to bring a claim under sections 25-1-1820 and 25-1-1840," because the statutes contain no express or implied right of action. Defs. Br. at 22. But that misses the point. "Equitable actions to enjoin *ultra vires* official conduct do not depend upon the availability of a statutory cause of action." *Sierra Club v. Trump*, 963 F.3d 874, 890–91 (9th Cir. 2020) (quoting *Armstrong v. Exception Child Ctr., Inc.*, 575 U.S. 320, 327 (2015), *vacated and remanded sub nom*. *Biden v. Sierra Club*, 142 S. Ct. 46 (2021); *see also S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 123-24, 804 S.E.2d 854, 861-62 (2017) (granting declaratory relief against unconstitutional and *ultra vires* action). In a statutory claim, courts must assess whether the legislature intended to create a private right of action. *Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 886 S.E.2d 228 (2023).

But in an *ultra vires* action, the court need only ensure that the legislature did not intend to *foreclose* review. *See Nuclear Regul. Comm'n v. Texas*, 605 U.S. 665, 681 (2025).

Defendants' "private right of action" argument makes the General Assembly's limits on gubernatorial war powers unenforceable. But as this Court held in *Hearon v. Calus*, "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." 178 S.C. 381, 404, 183 S.E. 13, 22 (1935)); *see also, cf., Dart v. United States*, 848 F.2d 217, 223 (D.C. Cir. 1988) ("When Congress limits its delegation of power, courts infer (unless the statute clearly directs otherwise) that Congress expects this limitation to be judicially enforced.").

III. The Governor's deployment is unlawful

Despite Defendants' warnings to this Court to "[s]tep back for a moment" in the face of a supposedly "remarkable" argument, Defs. Br. at 36–37, the disputed legal and factual issues are narrow. No one disputes the President's authority to federalize the SCNG under Title 10, the Governor's authority to deploy the Guard to other states under the terms of the EMAC or CAC, or the Governor's authority to deploy the Guard outside South Carolina for training exercises. *See* Plfs. Br. at 9 ("By treating 'training duty' distinctly from other types of 'active duty,' the General Assembly elected not to set specific limits on when the SCNG may be activated for training duty."); *contra* Stilwell Dec. ¶ 10 (suggesting that ruling the D.C. deployment unlawful would implicate "Guard-related training and readiness requirements.").

All that is left is a narrow question: Whether South Carolina law authorizes Governor McMasters's unprecedented extraterritorial deployment of 300 SCNG troops to provide "crime deterrence and passive patrolling [in Washington, D.C.]"

District of Columbia v. Trump, -- F. Supp. 3d --, 2025 WL 3240331, at *5 n. 7 (D.D.C. Nov. 20, 2025)

A. South Carolina law does not authorize extraterritorial deployments under the circumstances of this case.

Defendants' reading of South Carolina laws turn traditional notions of extraterritoriality on their head and contravene basic tenets of statutory and constitutional construction.

Defendants concede that the operative provisions of South Carolina law make no mention of extraterritorial National Guard deployments. Defs.' Br. at 32. But they counter that "no text 'make[s] any mention of' *forbidding* extraterritorial deployments." Defs. Br. at 32-33 (emphasis added). This *inverts* the well-established and longstanding presumption against extraterritorial application of state laws. *See* Plfs. Br. at 19–20. Defendants cite no case in which this Court has implied extraterritoriality into a South Carolina statute or constitutional provision, and they offer no basis for embracing such an extreme result here. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) ("The idea that Congress [granted] such broad and unusual authority through an implicit delegation . . . is not sustainable.").

Defendants' other arguments for implied extraterritorial authority are equally unpersuasive. Defendants point to S.C. Code Ann. § 25-3-160, which authorizes the Governor to deploy the *State* Guard extraterritorially to assist another state's forces in "actually engag[ing] in defending such state." Defs.' Br. at 35 (quoting Section 25-3-160). But this provision *reinforces* the presumption against extraterritoriality. By authorizing the State Guard to deploy extraterritorially in one very limited circumstance, the General Assembly was clearly aware that it could provide for such deployments and should do so affirmatively. *Cf.*, *e.g.*, *S.C. Coastal Conservation League v. S.C. Dep't of Health* & *Env't.*, 390 S.C. 418, 426, 702 S.E.2d 246, 251 (2010) ("[H]ad the legislature intended for the fifteen day time period to begin after receipt

of notice, the legislature knew how to draft the statute to accomplish this result.”). Given that, it would confound the ordinary methods of statutory interpretation to construe Section 25-1-1840 as impliedly and unconditionally conferring the same power that the legislature granted explicitly and conditionally in Section 25-3-160.

Defendants then offer up a policy argument—that if Plaintiffs are correct, missions resembling the D.C. deployment could happen only if the President federalized the National Guard or if another state requested assistance via EMAC. Defs. Br. at 36-37. Defendants call this “remarkable,” but the EMAC was passed, in part, precisely to facilitate certain extraterritorial National Guard deployments. *See*, *e.g.*, 142 Cong. Rec. 24, 369 (Sept. 24, 1996) (Remarks of S.C. Rep. Inglis) (explaining the compact is intended to address situations like “the State of North Carolina may be requesting the State of South Carolina to send its organized National Guard troops to North Carolina.”). As the National Emergency Management Association’s history of the EMAC notes, prior to the EMAC’s predecessor compact, Governor Chiles of Florida “had wanted to support Governor Campbell of South Carolina” in “the aftermath of Hurricane Hugo . . . but was not allowed by law to send National Guard troops across state lines.” Nat’l Emergency Mgmt. Assoc., *The Emergency Management Assistance Compact* 1, 5 (2021) https://perma.cc/5NWC-ZK88. And the EMAC came decades after the Federal Civil Defense Act of 1950, which sought in part to “encourage the States to negotiate and enter into interstate civil defense compacts” to “permit the furnishing of mutual aid for civil defense purposes,” that would be “transmitted promptly” to Congress and automatically consented to within sixty days. Pub. L. 920, § 201(g), 64 Stat. 1245, 1249 (1951). Defendants’ position that the Governor possesses inherent, blanket authority to deploy the state’s Guard outside its borders is ahistorical.

South Carolina law already allows for the extraterritorial deployment of National Guard troops for active-duty missions under Title 10, training missions

under Title 32, and mutual assistance missions under the EMAC and CAC. It also authorizes the extraterritorial deployment of the State Guard to, "upon the request of the Governor of another state, . . . defend[]" another state. S.C. Code § 25-3-160. Defendants might prefer that the Governor have additional avenues for extraterritorial deployments available to him, but it is a "central feature of separation of powers" that "[t]his Court … does not make policy determinations," and only "the legislature makes policy decisions." *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 483, 892 S.E.2d 121, 131 (2023).

Finally, Defendants say that the D.C. deployment is lawful because it does not violate "another jurisdiction's sovereignty." Defs. Br. at 35. That is irrelevant.

Plaintiffs do not argue that the deployment is unlawful because it violates the District of Columbia's sovereignty, but rather that state sovereignty buttresses the legal presumption against extraterritorial application of South Carolina's National Guard laws. The Governor's position is that the operative statutory and constitutional provisions should be read extraterritorially; it does not distinguish between the District of Columbia and the 50 states.

In defense of its own sovereignty, South Carolina prohibits foreign National Guard troops from entering this state "without the permission of the Governor." S.C. Code § 25-1-90. Out of respect for other states' sovereignty, when the General Assembly authorizes extraterritorial deployments, it always conditions such deployments on the consent of the receiving state. *See, e.g.*, S.C. Code 25-9-420 (EMAC); S.C. Code Ann. § 1-3-490 (CAC); S.C. Code § 25-3-160 (State Guard). It's a simple statutory argument: given the deep respect for state sovereignty shown by South Carolina law, Section 25-1-1840 cannot be read to implicitly authorize extraterritorial deployments—much less, the one challenged here.

B. Even if the relevant constitutional and statutory provisions implied extraterritorial reach, they would not authorize this deployment

If this Court does reach the interpretation of the terms in S.C. Const. art. XIII, Section 25-1-1820, and Section 25-1-1840, it should not give those provisions the near-limitless reach that Defendants propose. The Supreme Court recently rejected an overly expansive interpretation of the President's authority to call out the National Guard under Title 10, finding it unlikely that "execut[ing] the laws" encompassed "protect[ing] federal personnel and property." *Trump v. Illinois*, 607 U.S. --, 146 S. Ct. 432, 434 (2025). This Court should be similarly cautious.

Several aspects of the D.C. deployment are undisputed. Defendants do not dispute that the only explanation of the Governor's reasoning in deploying the Guard are the post-hoc arguments in their brief. Defendants do not dispute that the activities the National Guard are being ordered to undertake include "national monument security," "area beautification," and "traffic control points." Plfs. Br. at 12. Nor do they dispute that the role of the Guardsmen in the District is "crime deterrence" and "passive patrolling," in places such as local subway stations. *Id.* at 13. And Defendants don't dispute that the Guard's mission includes enforcing local laws of the District of Columbia, rather than the laws of South Carolina or the federal government. *Id.* at 12-13, 18.

What is in dispute is whether the activities above can fit (even awkwardly) within the categories of deployments contemplated by South Carolina law. They cannot.

1. <u>The South Carolina Constitution does not grant the unchecked deference Defendants claim.</u>

Plaintiffs and Defendants agree that *Hearon v. Calus* is critical precedent. *See* Defs. Br. at 1 (citing *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (1935)). But

Defendants misread and over-formalize *Hearon* to grant the governor far broader power than the *Hearon* Court endorsed.

The *Hearon* Court did, as Defendants press, state that "the discretion of the Governor to determine the existence of insurrection may not be interfered with by judicial authority." 183 S.E. at 23. But *Hearon* also made clear that "the acts of the Governor after the declaration . . . are subject to review by the courts." *Id.* The Court found it relevant that "the Governor's proclamation discloses that he has not declared any county or city to be in a state of insurrection." *Id.* The Court also found that "at the time of the proclamation . . . there was no violence existent in or threatened by the state highway department or the state highway commission." *Id.* at 24. And the Court was clear that it was incumbent upon the Governor to "relate the things he has done to the purposes for which he declared that insurrection existed and called out the militia to suppress it." *Id.* at 25.

Ultimately, *Hearon* found that the actions the Governor took—for example, sending armed officers to take possession of the offices of the state highway commissioners—exceeded his authority, despite the declaration of an insurrection. *Id.* at 26–27. Thus, Defendants' insistence that the Governor's conclusion that the conditions in the District of Columbia "met the standard in section 25-1-1840 was solely within the Governor's discretion" and that that "should be the end of any analysis here" cherry-picks language from *Hearon* but misses the gravamen of the Court's holding. Defs.' Br. at 29. *Hearon* need not be read to forbid the Governor from *ever* ordering the National Guard to reclaim state offices seized by violent insurrectionists (as Defendants' reading would imply); instead, *Hearon* shows that this Court may consider whether a deployment strays too far from the conditions that emergency authority is intended to address.

Hearon teaches that it is right for this Court to scrutinize the specifics of the Governor's proclamation, the facts on the ground relating to the Governor's

proclamation, and the relationship between the problems he identified and the actions he took. *Hearon*, 183 S.E. at 23-27.

And here, it is revealing that the Governor issued no proclamation *at all* until Defendants filed their brief. Even now, all they muster is that the deployment addresses a "crime wave overwhelming the capital," Defs. Br. at 30, evidenced only by local news articles about particular crimes between January and June 2025. *Id.* Many of the articles are self-defeating, as they are *about suspects being arrested by local law enforcement* for the crimes that had supposedly overwhelmed the capital. Defendants ignore that crime *rates* in Washington were historically low and had been in substantial *decline* when Governor McMaster deployed South Carolina troops. *See*, *e.g.*, Plfs. Br. at 28 (citing substantial annual decline in homicides between 2023 and 2024); Plfs. OJP at 6 ("[W]hen Governor McMaster first deployed National Guard personnel to Washington, the Capital's violent crime rate was at a 30-year low.").

Finally, Defendants warn this Court not to "forcefully inject itself into something committed to another branch" when interpreting the Constitutional and statutory terms at issue, Defs. Br. at 27, all while arguing that those terms should be interpreted so expansively as to authorize deployments policing common street crime in a city 200 miles from the state line. *See* Defs. Br. at 30 (highlighting instances of crime in the District of Columbia in the first six months of 2025). By contrast, Plaintiffs argue that the operative terms should be understood to describe "a narrow set of emergency circumstances," Plfs. Br. at 21, where the militia is deployed as "an act of last resort," *id.* at 23, rather than for "routine law enforcement." *Id.* at 26.

Plaintiffs' approach hews closer to the *Hearon* Court's guidance. *Hearon* explained that there have been situations in which courts have adopted an "extreme rule" of expansive deference to Governors deploying their militias; but those cases involved "the state [] contending with conditions of riot and violence approaching a

state of internal war." *Hearon*, 183 S.E. at 20-21. The *Hearon* court favorably quoted West Virginia's Supreme Court, explaining:

> The substitution of military for the civil law in any community is an extreme measure. Socially, economically, and politically, it is deplorable and calamitous. Its sole justification is the failure of the civil law fully to operate and function, for the time being, by reason of the paralysis or overthrow of its agencies, in consequence of an insurrection, invasion, or other enterprise hostile to the state, and resulting in actual warfare.

Hearon, 183 S.E. at 24 (quoting *Ex parte Lavinder*, 88 W.Va. 713, 108 S.E. 428, 429 (1921)); *see also id.* ("Martial rule can never exist when the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.") (quoting *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866)).

Following *Hearon*'s guidance would also accord with U.S. Supreme Court precedent about the scope of the Commander-in-Chief power. In *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the Court held that the Executive Branch could not authorize a naval seizure beyond the limits of what Congress had established. *Id.* at 179. Even as Commander-in-Chief, the President could not authorize a mission that Congress had not allowed. And in *Sterling v. Constantin*, 287 U.S. 378 (1932), the Court made clear that a Governor's role as Commander-in-Chief did not allow unfettered power to deploy military forces at will. "It does not follow from the fact that the executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat." *Id.* at 400; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 662 (1952), (Clark, J., concurring in the judgment) ("I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis[.]").

2. The operative statutory and constitutional terms do not authorize the D.C. deployment

Against that backdrop, this deployment clearly fails muster. The parties largely agree that the only potentially applicable authorities are the Governor's statutory authority to deploy the Guard to (1) address a "tumult," S.C. Code Ann. § 25-1-1840(a); or (2) address "a body of men acting together by force with intent to commit a felony, to offer violence to persons or property by force and violence to break and resist the laws of this State or of the United States," *id.* § 1840(b); and the constitutional power to "execute the laws," S.C. Const. art. XIII, § 13; *see also* S.C. Code Ann. § 1820(f) (allowing for active Guard duty "for aiding civil officers in the execution of the laws"); and to "preserve the public peace." S.C. Const. art. IV, § 13.

None of those terms should be read to authorize the deployment to D.C.

"Tumult" and "*body of men"*: Defendants argue that because crime existed in the District of Columbia, the city was "full of violent commotion" that constituted a "tumult," or, alternatively, a "body of men" engaged in violence that warranted deployment. Defs. Br. 31. The examples of "violent commotion" Defendants point to are a disparate series of criminal incidents in various parts of the city over the course of six months. *See id.* at 30. Defendants don't state that these various crimes were connected to one another, triggered by any common event, taking place in any particular location within the city, that the individuals committing them were working together, or that these individuals even know that, collectively, the Governor of South Carolina considered them to be part of a "tumult" or a particular "body of men." To Defendants, the simple fact that crimes occur (in any city) gives the Governor the authority to deploy the National Guard to address it. That interpretation is inconsistent with the notion that the use of military forces for law enforcement is hugely disfavored in American law, and should only occur in exceptional circumstances. *See Hearon*, 183 S.E. at 24.

Defendants' broad view of "tumult" swallows the rule. If run-of-the-mill street crime can justify the extraterritorial deployment of military troops, then the statute is a dead letter. The word "tumult" must be interpreted in the context of its surrounding context—"war, insurrection, rebellion, invasion, riot and mob"—conditions that simply are not and were not present in D.C. *See* Plfs. Br. 26-27 (citing *Eagle Container Co., LLC v. Cnty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895-96 (2008)). Defendants do not acknowledge this argument, or provide any reason to depart from standard tools of statutory interpretation.

"Execute the laws": As Plaintiffs explained in their opening brief, the phrases "execute the laws" or "executing the laws" should be generally understood to mean executing *South Carolina* laws. Plfs. Br. at 18, 22. Defendants say that the South Carolina Constitution and the oaths of Guardsmen make reference to the laws of the United States, so Guardsmen should also be permitted to "help enforce federal laws in the nation's capital." Defs. Br. at 33. But it is uncontested that the Guard is enforcing *local D.C. laws*, and their mission in the District of Columbia includes activities described as "beautification." Surely the drafters of the South Carolina constitution did not intend for the phrase "execute the laws" to mean ticketing fare evaders in a distant city's transit system or spreading mulch in its parks.

Further, for the reasons described in Plaintiffs' opening brief, the phrase "execute the laws" should be understood to include "situations … in which ordinary civil authority has broken down and military intervention is the last remaining option." Plfs. Br. at 23; *see also id.* at 22-25 (explaining that militia enforcement of the laws is a last resort). *Hearon*'s reasoning (in the context of "insurrection") is instructive here as well: while the Governor may have been frustrated by political opponents in charge of the state highway department, and while it was within his discretion to use the term "insurrection," the Court did not believe the Governor was within his rights to remove officials at gunpoint when there was not even a "pretense

that the courts were not open and functioning," and when existing laws provided a mechanism "by which officers may be removed by the Governor." 183 S.E. at 26. Defendants offer no real justification for interpreting the phrase "execute the laws" to include open-ended deployments to conduct routine law enforcement, besides a stray remark from the 1868 convention implying that a delegate believed the militia could be called out to enforce compulsory education. Defs. Br. at 44.

"Preserve the public peace": As with the other terms at issue, Plaintiffs noted in their opening brief that, read in "constitutional and historical context," the authorization to use the National Guard to preserve the public peace should not be read expansively to address straightforward local infractions. *See* Plfs. Br. at 23, 25. Otherwise, the Governor could send out thousands of soldiers to break up a barroom fistfight. Nor should the term be construed to authorize National Guard deployments absent a breakdown in the state's normal legal mechanisms. *See Hearon*, 183 S.E. at 26 (actions taken to quell a supposed insurrection were not justified given that courts were functioning and legal mechanisms for achieving the Governor's goals existed). Indeed, Defendants at one point make a similar argument, conceding that there would be "a constitutional problem" if the term "public peace" was not "encompassed within the statutory terms" of "riots and invasions." Defs. Br. at 48. In their view, statutory language that fails to mention the constitutional power to preserve the public peace can only be saved by an understanding that preserving the public peace falls within the other statutory terms. *Id.* Plaintiffs do not take issue with reading the statutory terms that way, but such a reading *reinforces* a narrower interpretation of "preserving the public peace" that more closely approximates the other terms in Section 25-1-1840, rather than (as Defendants would suggest) extending far beyond the reach of the other provisions.

C. Defendants' reliance on historical deployments is fraught with error.

Defendants argue that governors have deployed the National Guard across state lines many times—and that, therefore, state law must permit it. Defendants are right that statutory construction often looks to historical practice. Def. Br. at 37. But that is as far as their argument takes them, because history confirms that using Section 25-1-1840 to send the National Guard to police out-of-state street crime is unprecedented.

To start: if Defendants intend to use history as a tool for interpreting a law, then Defendants must point to times when *that law* was used to justify an out-of-state deployment. It is not enough for Defendants to say that the South Carolina National Guard has been deployed out of state before—that fact needs no history lesson. The Guard has been deployed many times through EMAC to assist other states with disaster relief and border security. *See*, *e.g.*, Letter from Governor Henry McMaster to Major General R. Van McCarty (Oct. 8, 2024), https://perma.cc/4FRK-5H9A (disaster relief); *Governor Abbott Urges Nation's Governors to Help Combat Border Crisis*, Office of the Texas Governor (May 16, 2023), https://perma.cc/A8PL-5CRF (Texas Governor requesting border security assistance via EMAC); *Gov. Henry McMaster Directs Deployment of National Guard Troops to Southern Border*, Office of the South Carolina Governor (May 31, 2023), https://perma.cc/B7W5-V3JL (South Carolina deployment). And of course, the Guard has participated in combat overseas after being federalized under Title 10. Further, as Plaintiffs noted in their opening brief, training duty (which covers many Title 32 deployments) is a distinct category of deployments separate from the various provisions of Sections 25-1-1820 and 25-1-1840, and is not at issue in this case.

In his affidavit, General Stilwell lists several deployments performed under Title 32. Stilwell Decl. ¶ 7. But none bears on this case. General Stilwell admits that "[s]ome of these were certainly performed" under training authority. *Id.* He thinks

others were "likely" performed under separate, non-training Title 32 authority. But he doesn't say which is which (or even that he's certain), making it difficult to ascertain which deployments Defendants believe are instructive. *Id.*

None of these deployments resembles the one in this case. Defendants identify *zero* instances of the Guard being deployed to police street crime outside the state, let alone doing so for months on end, or conducting "area beautification."

A number of these examples are also clearly inapposite. For example, General Stilwell cites the Guard's participation in the security effort at the 1996 Olympics in Atlanta, in which nearly 14,000 National Guard personnel from 47 states assisted. Stilwell Decl. ¶ 7.A. But this deployment was likely undertaken pursuant to the Guard's training authority. As Maj. William Carraway of the Georgia National Guard explained, "[i]nitially, National Guard personnel were to be mobilized in state active-duty status; however, *due to myriad state laws*, [the National Guard Bureau] authorized the use of annual training status which cleared the way for all participating states to equally fund their assigned units." Maj. William Carraway, *The National Guard and the 1996 Centennial Olympic Games*, Defense Visual Information Distribution Service (July 16, 2021), https://perma.cc/FJ6E-BQGQ. It was precisely *because* of state-law limits on deploying National Guards that the security effort proceeded under annual training status.

Similarly, the Guard's support of presidential inaugurations, Stilwell Decl. ¶¶ 7.H—I, were almost certainly conducted under authority not at issue here. National Guard support for inaugurations dates back to the time of George Washington, 2nd Lt. Deborah Ou-Yang 113th Wing D.C. Air National Guard, *DCNG plays historical role in presidential inaugurations,* National Guard (Dec. 21, 2020), https://perma.cc/HT57-22R7, and predates the statutory authority that the federal government and Defendants have invoked for the D.C. deployment. Pub. L. No. 88-621, 78 Stat. 999 (1964) (creating 32 U.S.C. § 502(f)).

Even if Defendants managed to identify a previous deployment that transgresses Plaintiffs' legal analysis (which they haven't), that would change nothing. An unchallenged act does not, by its mere existence, carry the imprimatur of the Court. Courts may only rule on the questions before them. As a result, courts routinely conclude that a prior practice—even a common practice—is deficient. *See, e.g.*, *Lucia v. SEC*, 585 U.S. 237 (2018) (holding, for the first time, that the SEC's administrative law judges, appointed pursuant to the decades-old Administrative Procedure Act, exercised powers reserved to "Officers of the United States" subject to Constitutional appointment procedures). Finally, Plaintiffs reiterate that the question is narrow: whether the deployment in *this* case can be justified under *the authorities that the Defendants have cited* for it. Plaintiffs do not ask this Court to strike down the President's authority to call up South Carolina's Guard under Title 10, the Governor's ability to send the Guard on training missions under Title 32, the ability of other states to seek South Carolina's assistance under the EMAC, or South Carolina's ability to counter drug operations under the CAC—all of which provide potential alternate sources of authority for the types of historical deployments Defendants invoke. *See*, *e.g.*, Stilwell Decl. ¶¶ 7.C (counterdrug operations), 7.G (responding to civil unrest). Plaintiffs do not ask the Court to make new rules, but to enforce those that the General Assembly enacted long ago. Far from asking the Court to "forcefully inject itself" into the executive branch's authority, Plaintiffs merely urge that it reject the Governor's power grab and require his deployment of military forces to be justified in accordance with the law. *Contra* Defs. Br. at 27.

CONCLUSION

WHEREFORE, the Court should declare that the Governor's deployment of SCNG troops to Washington, D.C. was *ultra vires* and enjoin the same.

RESPECTFULLY SUBMITTED this Third day of April 2026.

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