

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2017-CP-40-04534

MOHSEN A. BADDOURAH, as member of
the City Council of the City of Columbia,

Plaintiff,

v.

HENRY MCMASTER, in his capacity as
Governor for the State of South Carolina,
Defendant.

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ORDER

DEC 20 2017

SC Court of Appeals

JEANNETTE W. HOSBRIDE
C.C.P. & C.S.

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RICHLAND COUNTY
FILED

This matter is before the Court on the August 30, 2017 Motion filed by Defendant Henry McMaster, in his capacity as Governor of the State of South Carolina ("Governor McMaster"), pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, seeking to dismiss with prejudice the Complaint filed by Plaintiff Mohsen A. Baddourah, as member of the City Council of the City of Columbia ("Plaintiff"). Counsel for Governor McMaster, Thomas A. Limehouse, Jr., Esq. and Richele K. Taylor, Esq., and counsel for Plaintiff, Tobias G. Ward, Jr., Esq. and Joseph M. McCulloch, Jr., Esq., presented argument on the record during a hearing held on October 26, 2017. Based on the Motion and the argument submitted in support thereof and all matters of record, for the reasons set forth below, the undersigned hereby grants Governor McMaster's Motion.

BACKGROUND

Accepting the truth of the factual allegations in Plaintiff's Complaint and viewing all inferences in the light most favorable to Plaintiff, the relevant facts, for purposes of ruling on Defendant's Motion, are set forth herein. Plaintiff is a member of the City Council for the City of Columbia, South Carolina, and his term expires on or about December 31, 2019. (See Pl.'s Compl.

¶ 1.) Following an altercation with his wife, Plaintiff was arrested on July 2, 2016, and subsequently indicted on a charge of Domestic Violence, Second Degree. (*See id.* ¶ 3.) Governor McMaster thereafter requested and received an Attorney General's Opinion, which concluded that "the crime of domestic violence 2nd degree is a 'crime of moral turpitude' for purposes of the Governor's suspension power provided in Article VI, § 8 of the South Carolina Constitution."¹ Accordingly, on March 13, 2017, Governor McMaster issued Executive Order No. 2017-05 ("Executive Order"), suspending Plaintiff from office pursuant to article VI, section 8 of the South Carolina Constitution. (*See id.* ¶ 5.) As stated in the Executive Order, Plaintiff's temporary suspension was effective "until such time as the above-referenced charge is resolved" and "in no manner addresses the guilt or innocence of [Plaintiff] and shall not be construed as an expression of any opinion on such question." (Executive Order, at 1-2.)²

Plaintiff previously challenged Governor McMaster's Executive Order by filing in the Supreme Court of South Carolina a Petition for Original Jurisdiction, Complaint, Motion for Temporary Injunction to Stay Enforcement of Executive Order 2017-05, and other related pleadings. By way of a May 25, 2017 Order, the Supreme Court of South Carolina denied Plaintiff's Petition for Original Jurisdiction and Motion for Temporary Injunction to Stay Enforcement of Executive Order 2017-05. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 130

1. At the October 26, 2017 hearing on Governor McMaster's Motion, Plaintiff's counsel did not object to the Court taking notice of or otherwise considering the March 9, 2017 Attorney General's Opinion. *See* 2017 WL 1095385, at *1 (S.C.A.G. Mar. 9, 2017).

2. Plaintiff's Complaint cites to the Executive Order as Exhibit B and incorporates the same by reference; however, it appears Plaintiff did not attach a copy of the Executive Order as indicated. Nevertheless, the Court may take judicial notice of executive orders. *See Heyward v. Long*, 178 S.C. 351, 183 S.E. 145, 152 (1935) ("The court, of course, takes judicial notice that these commissioners, and all other commissioners composing the state highway commission, have been ousted from office by the proclamation of the Governor declaring the state highway department to be in a state of insurrection.").


n.2, 754 S.E.2d 494, 497 n.2 (2014) (noting that the trial court's consideration of transcripts and court orders in an underlying class action did not convert a Rule 12(b)(6) motion into one for summary judgment).

On July 28, 2017, Plaintiff instituted the present action seeking, *inter alia*, a declaration that Plaintiff, "as a member of the legislative branch . . . is excepted from the Governor's suspension power under Article VI, § 8," (Pl.'s Compl. ¶ 18), and that "the Governor's Executive Order is not enforceable because the alleged crime is not a crime involving moral turpitude," (*id.* ¶ 38). In addition to his request for a declaratory judgment, Plaintiff also seeks mandatory injunctive relief staying enforcement of the Executive Order and an award of attorney's fees. (*Id.* ¶¶ 43, 46.)

LEGAL STANDARDS

I. Rule 12(b)(1) of the South Carolina Rules of Civil Procedure

Subject matter jurisdiction is the "power to hear and determine cases of the general class to which the proceedings in question belong." *Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005). "Subject matter jurisdiction is met if the case is brought in the court which has the authority and power to determine the type of action at issue." *Washington v. Whitaker*, 317 S.C. 108, 115, 451 S.E.2d 894, 898 (1994). A challenge to subject matter jurisdiction can be raised by motion to dismiss pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure. *Ballenger v. Bowen*, 313 S.C. 476, 478 n.2, 443 S.E.2d 379, 380 n.2 (1994); *Wheeler v. Morrison*, 313 S.C. 440, 442, 438 S.E.2d 264, 265 (Ct. App. 1993). By filing a Rule 12(b)(1) motion to dismiss, the movant challenges the power of the court to entertain and exercise jurisdiction over the subject matter. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "The question of subject matter jurisdiction is a question of law



for the court.” *Id.* (quoting *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993)).

II. Rule 12(b)(6) of the South Carolina Rules of Civil Procedure

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, “[a] defendant may move to dismiss the plaintiff’s complaint for ‘failure to state facts sufficient to constitute a cause of action.’” *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014). “A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true.” *Id.* (quoting *Disabato v. S.C. Ass’n of Sch. Adm’rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper.” *Id.* (quoting *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 74–75, 753 S.E.2d 846, 850 (2014)).

DISCUSSION

Having carefully considered the Parties’ arguments and the applicable case law, the Court concludes that the present action must be dismissed for want of subject matter jurisdiction. Accepting the truth of the factual allegations in Plaintiff’s Complaint and viewing all inferences in the light most favorable to Plaintiff, the Court alternatively finds that Plaintiff’s Complaint fails to state facts sufficient to constitute a cause of action. Accordingly, for the reasons outlined below, the Court grants Governor McMaster’s Motion and dismisses Plaintiff’s challenge to enforcement of the Executive Order.

Pursuant to article VI, section 8 of the South Carolina Constitution, “[a]ny officer of the State or its political subdivisions, except members and officers of the Legislative and Judicial

Branches, who has been indicted by a grand jury for a crime involving moral turpitude . . . may be suspended by the Governor until he shall have been acquitted.” S.C. Const. art. VI, § 8. Therefore, the constitution vests the Governor with discretionary suspension authority in those instances where public officials, other than members of the Legislative or Judicial Branches, are indicted for a crime involving moral turpitude. By using the word “may,” this provision represents a textual commitment of the question to the Governor, in the exercise of his discretion, and makes clear that the Governor’s suspension authority is neither automatic nor ministerial. *See Fowler v. Beasley*, 322 S.C. 463, 467, 468, 472 S.E.2d 630, 633 (1996) (“This Court has jurisdiction to review the ministerial acts of the governor.” (emphasis added) (citing *Easler v. Maybank*, 191 S.C. 511, 5 S.E.2d 288 (1939))).

Where the Governor’s authority is discretionary in nature, courts may not substitute judicial discretion for that of the executive without violating the separation-of-powers provision of the South Carolina Constitution. S.C. Const. art. I, § 8; *see Rose v. Beasley*, 327 S.C. 197, 204, 489 S.E.2d 625, 628 (1997) (“A de novo hearing on appeal of an order by an executive body acting in a quasi-judicial capacity [in removing an officer] violates the separation of powers provision of our State constitution because judicial discretion cannot be substituted for that of an executive body.” (footnote omitted) (citing *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981); *Bd. of Bank Control v. Thomason*, 236 S.C. 158, 113 S.E.2d 544 (1960))). Because the Court may not substitute its own discretion or second-guess Governor McMaster’s suspension of Plaintiff pursuant to article VI, section 8, “this matter must be left to the discretion of the Governor and this Court may not review that decision.” *McConnell v. Haley*, 393 S.C. 136, 138, 711 S.E.2d 886, 887 (2011); *see also Blalock v. Johnston*, 180 S.C. 288, 185 S.E. 51, 55 (1936) (“The governor, in the exercise of the supreme executive power of the State, may, from the inherent nature of the

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authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power" (quoting *State ex rel. Whiteman v. Chase*, 5 Ohio St. 528, 535 (1856)).³ Accordingly, where it is apparent that the Court lacks subject matter jurisdiction over the present matter, Plaintiff's Complaint must be dismissed pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure.

Since this matter may be disposed of pursuant to Rule 12(b)(1) motion, the undersigned need not decide any factual or legal question other than whether this Court has subject matter jurisdiction. *Murphy v. Owens-Corning Fiberglas Corp.*, 356 S.C. 592, 599 n.5, 590 S.E.2d 479, 482 n.5 (2003). However, in the alternative, the Court notes that, accepting Plaintiff's factual allegations as true for purposes of this Motion, Plaintiff's Complaint fails to allege facts sufficient to state a cause of action or claim for relief and therefore is also subject to dismissal pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Plaintiff's claims for declaratory and injunctive relief raise purely legal questions which do not require further discovery and can be disposed of at this stage.

First, the Court need not reach or decide the question of whether Domestic Violence, Second Degree, constitutes a "crime involving moral turpitude" for purposes of article VI, section

3. See generally *Brown v. Ansel*, 82 S.C. 141, 63 S.E. 449, 449 (1909) ("Even if the Governor is subject to our writ of mandamus, a question noticed, but not decided, in *State v. Ansel*, 76 S. C. 406, 57 S. E. 185 [(1907)], it appears from the petition that the act sought to be compelled is not a plain ministerial duty, but involves the exercise of discretion, and is therefore not compellable by mandamus."); *State v. Williams*, 10 S.C.L. (1 Nott. & McC.) 26, 28 (1817) ("The people of this state, have, by the constitution assigned to the respective branches of the government, the several powers therein specified, according to the various provisions of that instrument, and in the exercise of those powers, each must necessarily be governed by its own judgment and discretion. The governor, in the discharge of his official duties, must follow what appears to him the most correct construction of the constitution, and wherever he has by official acts given a construction to any part of it which relates to his particular department, this court will not readily interfere to arrest the progress of his measures.").



8. Because this phrase is not defined in the text of the constitution, its application must be left to the determination of the Governor in the exercise of his discretion. *See McConnell*, 393 S.C. at 138, 711 S.E.2d at 887 (“Because there is no indication in the Constitution as to what constitutes an ‘extraordinary occasion’ to justify an extra session of the General Assembly, this matter must be left to the discretion of the Governor and this Court may not review that decision.”). Particularly where, as here, Governor McMaster requested and received an Attorney General’s Opinion further confirming his conclusion that Domestic Violence, Second Degree, is a crime involving moral turpitude, it cannot be said that Governor McMaster’s exercise of his discretion to temporarily suspend Plaintiff was arbitrary. *Cf. State ex rel. Thompson v. Seigler*, 230 S.C. 115, 123, 94 S.E.2d 231, 235 (1956).

Second, Plaintiff’s argument that he is a member of the Legislative Branch by virtue of his position on the Columbia City Council is wholly without merit. The exclusion of “members and officers of the Legislative and Judicial Branches” from section 8 of article VI is derived from the separation of powers prescribed in the Constitution of 1895. This separate, tripartite structure is expressly memorialized in article I, section 8, which mandates that “[i]n 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 departments shall assume or discharge the duties of any other.” S.C. Const. art. I, § 8. As a textual matter, by specifically referencing the “legislative, executive, and judicial powers” as functions of “one of said departments,” the framers are referring to the distinct “departments” addressed in separate articles of the constitution.⁴ Also, specifically with regard to the Legislative Branch or

4. Indeed, by capitalizing “Legislative and Judicial Branches” in section 8 of article VI, the framers essentially employed defined terms, craving reference to their use elsewhere in the constitution—namely, in articles III and V, which address the Legislative and Judicial



Department, section 1 of article III expressly provides that “[t]he legislative power of this State shall be vested in two distinct branches, the one to be styled the ‘Senate’ and the other the ‘House of Representatives,’ and both together the ‘General Assembly of the State of South Carolina.’” S.C. Const. art. III, § 1. Thus, the relevant text is unambiguous and does not mention municipal officials or contemplate that they will be viewed as members of the Legislative Branch. Indeed, municipal government is separately addressed elsewhere in the constitution. *E.g.*, S.C. Const. art. VIII (“Local Government”).

The logical conclusion that “members and officers of the Legislative . . . Branch[]” does not include members of municipal councils is further reinforced by the text of other, unrelated constitutional provisions. By way of example, in addressing the adoption of the constitution and the terms of elected officials already serving, the framers referred to “[a]ll officers, State, executive, legislative, judicial, circuit, district, County, township and municipal” S.C. Const. art. XVII, § 11. Because the drafters were therefore capable of distinguishing, and took care to differentiate, “legislative” officers from “County, township and municipal officers,” Plaintiff’s proposed interpretation would require ignoring “the canon of construction ‘*expressio unius est exclusio alterius*’ or ‘*inclusio unius exclusio alterius*’ [which] holds that ‘to express or include one thing implies the exclusion of another, or the alternative.’” *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (quoting *State v. Bolin*, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008)).

In addition to being inconsistent with the text and context of the remainder of the constitution, Plaintiff’s proffered interpretation, if adopted, would also lead to an absurd result.

Departments, respectively. *See* S.C. Const. art. III (“Legislative Department”); S.C. Const. art. V (“Judicial Department”).

Assuming, *arguendo*, that Plaintiff was considered a member or officer of the Legislative Branch, his status as such would effectively render meaningless the Governor's suspension and removal authority by withdrawing a significant category of public officials from the ambit of article VI, section 8. The framers of the constitution could not have intended such a reading of article VI, section 8, and the Court should not sanction an interpretation that will necessarily lead to an absurd result. *See State v. Long*, 406 S.C. 511, 515 n.5, 753 S.E.2d 425, 427 n.5 (2014) ("This Court will construe a constitutional amendment in a similar manner as it does a statute. When construing a statute, this Court will reject a meaning when it would lead to a result so plainly absurd that it could not have possibly have been intended by the General Assembly or would defeat the plain legislative intention." (citing *Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 574 S.E.2d 717 (2002); *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994))).

Aside from being untethered from the text of the constitution, Plaintiff's argument ignores longstanding precedent for governors suspending members of municipal councils, of which the Court takes judicial notice. *See, e.g.*, Executive Order No. 2017-16 (suspending member of Norway Town Council upon indictment for crime involving moral turpitude); Executive Order No. 94-05 (suspending member of Atlantic Beach Town Council upon indictment for crime involving moral turpitude). *Compare* S.C. Code Ann. § 8-13-560(1) ("A member of the General Assembly who is indicted . . . for a crime that involves moral turpitude . . . must be suspended immediately without pay by the presiding officer of the House or Senate, as appropriate.").

In sum, Plaintiff's Complaint fails to allege sufficient facts, which, taken as true for present purposes, state a cause of action or plausible claim for relief, whether declaratory or injunctive in


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nature. Therefore, in the alternative, Plaintiff's Complaint is subject to dismissal pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, Governor McMaster's Motion is **GRANTED** and Plaintiff's Complaint is hereby **DISMISSED**.

AND IT IS SO ORDERED.



G. Thomas Cooper, Jr.
Circuit Judge

November 9, 2017
Candace, South Carolina

December 20, 2017

HAND DELIVERY

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DEC 20 2017
SC Court of Appeals

Jenny Abbott Kitchings
Clerk of Court of Appeals
Columbia, South Carolina 29201

Re: Mohsen A. Baddourah v Henry McMaster, in his capacity as
Governor for the State of South Carolina
Case No.: 2017-CP-40-4534

Dear Ms. Kitchens:

Enclosed for filing are the original and four (4) copies of the Notice of Appeal, Proof of Service upon the Respondent, and a copy of the Order being challenged. Also enclosed is a check for \$100.00 for the filing fee.

Please check the extra copies and return it with our courier.

Sincerely,

TOBIAS G. WARD, JR., PA

J. Derrick Jackson

JDJ: wrc
Enclosure

cc: The Honorable Jeanette W. McBride (w/enclosure)
Thomas Ashley Limehouse, Jr., Esquire (w/enclosure)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2017CP4004534

Moshen A Baddourah

Henry McMaster

PLAINTIFF(S)

Governor For State Of South Carolina
DEFENDANT(S)

Submitted by: _____ Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

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DEC 20 2017
SC Court of Appeals

ORDER INFORMATION

This order ends does not end the case. Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code 2126 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 7 day of Nov, 2017 and a copy mailed first class or placed in the appropriate attorney's box on this 13 day of Nov, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Tobias Gavin Ward Jr. Richele Keel Taylor Thomas Ashley Limehouse Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. ...