RECEIVED

Mar 20 2026

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN ITS ORIGINAL JURISDICTION

Appellate Case No. 2026-000032

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

v.

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

BRIEF OF DEFENDANTS

William David Kelly III
Agency General Counsel
OFFICE OF THE ADJUTANT GENERAL
1 National Guard Road
Columbia, South Carolina 29201
(803) 669-1965
deebo.kelly@scmd.sc.gov

Counsel for the Adjutant General

Wm. Grayson Lambert
Chief Legal Counsel
Erica W. Shedd
Deputy Legal Counsel
Tyra S. McBride
Deputy Legal Counsel
Cameron R. Cox
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
glambert@governor.sc.gov
eshedd@governor.sc.gov
tmcbride@governor.sc.gov
ccox@governor.sc.gov

Counsel for Governor McMaster

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Legislative Acts and Materials

Other Authorities

STATEMENT OF THE ISSUES

I. Whether the public importance exception should be overruled because it results in the unconstitutional exercise of judicial power.

II. Whether Plaintiffs may bring a claim under sections 25-1-1820 or 25-1-1840, when neither statute was enacted for Plaintiffs' special benefit.

III. Whether the Governor has the statutory or constitutional authority (or both) to deploy the National Guard to Washington, D.C. at the President's request.

INTRODUCTION

As the commander-in-chief of the National Guard, the Governor enjoys broad statutory and constitutional authority to call out the Guard and deploy it. The Governor's decision to activate the Guard and deploy it to Washington, D.C. at the President's request is consistent with the South Carolina Code of Laws, the South Carolina Constitution, and historical practice.

The decision to call out and deploy the Guard is significant, and this Court has rightly shown great deference to a governor's exercise of that authority. *See Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (1935). Plaintiffs are quick to cite *Hearon* to insist that judicial review is proper, but they disregard the deferential framework that *Hearon* established for that review.

That framework has two steps. At step one, the Court "may not" "enjoin[]" or even "review[]" the Governor's decision to call out the Guard. *Id.* at 397, 183 S.E. at 20. The Court may only recognize that the Governor determined that a condition for calling out the Guard existed. Then, at step two, the Court may "review" claims that "the acts of the Governor after" calling out the militia "are in excess of his constitutional and legislative authority," *id.* at 406, 183 S.E. at 23, to ensure that the Governor's actions "relate . . . to the purposes for which he . . . called out the militia," *id.* at 410, 183 S.E. at 25.

Applying that two-step framework here, whether conditions existed in Washington, D.C. that warranted calling out the Guard was the Governor's decision alone. But even if *Hearon* step one didn't preclude the Court from reviewing that decision, the situation in Washington meets the statutory requirements. State law allows the Governor to activate the Guard to "aid[] civil officers in the execution of the laws," S.C. Code Ann. § 25-1-1820, when there is a "tumult" or "a body of men acting together by force with intent to commit a felony, to offer violence to persons or property or by force and violence to break and resist the laws . . . of the United States." *Id.* § 25-1-1840. That describes the situation in the nation's capital when it was under "siege from violent crime" and people were "unable to live peaceably" there. Presidential Memorandum, *Restoring Law and Order in the District of Columbia* (Aug. 11, 2025).

Then, at step two, the Governor deployed the Guard to assist with enforcing the laws to bring peace and order to the capital. That's what Guard members are doing: directly assisting officials to address the specific issue for which the Governor called out the Guard.

Even if the statutes didn't authorize the deployment, the Constitution does. The Constitution gives the Governor the power to call out the militia to "execute the laws" and "preserve the public peace." S.C. Const. art. XIII, § 3. Between that broad language and centuries of historical practice of governors sending the militia outside South Carolina while under a governor's command, the deployment to Washington, D.C. fits comfortably within the Governor's constitutional call-out power as commander-in-chief.

On a most basic level, Plaintiffs object to the Governor deploying the Guard outside of South Carolina based on conditions outside of South Carolina. But Plaintiffs' geographical limitation on the Governor's authority is missing from both the South Carolina Code and Constitution. The better interpretation of those authorities permits these out-of-state deployments.

Indeed, our governors have repeatedly deployed South Carolina's militia to other jurisdictions based on those jurisdictions. Those "past practices"—without any serious pushback from the General Assembly—must be "accord[ed] weight" in determining what the Constitution and statutes mean. *Williams v. Morris*, 320 S.C. 196, 205, 464 S.E.2d 97, 102 (1995). Plaintiffs' claim therefore fails.

But for two reasons, the Court need not even reach the merits to reject this claim. First, Plaintiffs lack standing because they don't allege a particularized injury. They insist that they can bring their claim under the public importance exception. That exception, however, is unconstitutional. Our Constitution vests the State's courts with the "judicial power," S.C. Const. art. V, § 1, which is the power to decide cases. A case exists only when a plaintiff asserts an impairment of a legal right, a proposition this Court has recognized for centuries. Such a plaintiff, of course, doesn't exist in a case like this when the challenged government action did not harm him. On top of the constitutional text, allowing an uninjured plaintiff to sue without a legally invaded right threatens the separation of powers because it puts the courts in the position of deciding policy disputes. The Court should return to the longstanding rule of requiring an injured plaintiff. Text, separation of powers, and history demand it.

Second, the statutes under which Plaintiffs sue—sections 25-1-1820 and 25-1-1840—do not grant Plaintiffs a private right of action. These statutes were not "enacted for the[ir] special benefit." *Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 152, 886 S.E.2d 228, 233 (2023). They are instead regulations of a governor's authority that have nothing to do with Plaintiffs individually. Nor can Plaintiffs look to the Uniform Declaratory Judgments Act because it "is not an independent grant of jurisdiction." *Tourism Expenditure Rev. Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013).

So no matter which path the Court takes, Plaintiffs lose. The Court should therefore reject their claim and recognize that the Governor acted within his broad commander-in-chief power when he deployed the Guard to Washington, D.C.

STATEMENT OF THE CASE

A. The Governor deploys the National Guard to Washington, D.C.

1. The South Carolina National Guard is the largest part of South Carolina's organized (or volunteer) militia. It includes everyone who volunteers, is accepted into National Guard service, and continues to meet federal and state membership requirements. The unorganized militia, meanwhile, includes virtually "all able-bodied male citizens" between 18 and 45 years old who are not already members of the National Guard or State Guard. S.C. Const. art. XIII, § 1. The Governor is the commander-in-chief of all the State's militia. *Id.* art. IV, § 13.

National Guard members serve in one of three statuses at any given time: federal, state, or hybrid federal-state. The first is Title 10 status. In this status, the President calls Guard members "into Federal service," 10 U.S.C. § 12406, which is the only time they are in "active federal service" as part of the National Guard of the United States, *id.* § 12401. Colloquially known as "federalizing" the Guard, "a National Guard unit is integrated into the United States military command structure and ceases during that time period to be a state entity." *District of Columbia v. Trump*, No. 25-5418, 2025 WL 3673674, at *3 (D.C. Cir. Dec. 17, 2025) (cleaned up) (citing 32 U.S.C. § 325(a)(1)). When the Guard is federalized under Title 10, a governor is no longer in command, *Abbott v. Biden*, 70 F.4th 817, 822 (5th Cir. 2023), and a governor may not refuse the federal government's activation, *District of Columbia*, 2025 WL 3673674, at *7, unless Congress has specifically required gubernatorial consent, *see, e.g.*, 10 U.S.C. § 12301(d).

The second status is state active duty. "[W]hen operating in state active duty, the National

Guard is a state agency, under state authority and control," and (unsurprisingly) operates at state expense. *District of Columbia*, 2025 WL 3673674, at *3. Guard members are on state-active-duty status, for example, when assisting with natural disasters in South Carolina.

The third status—and the one that matters here—is Title 32. This is a hybrid federal-state status. "Guard members in Title 32 status act in service of the federal government and are funded by the federal government, but they remain state National Guard members under state control." *Id.* (cleaned up). Title 32 duty includes routine weekend training (often called "Drill Weekends"), as well as 15 days of annual training each year (once known as "summer encampment"). Title 32 duty can also include full-time service under the Active Guard Reserve program. 32 U.S.C. § 328(a). Guard members receive orders to perform a wide variety of missions under Title 32, such as drug interdiction missions, field exercises, airport security after September 11, border security, disaster relief, COVID-19 response efforts, and "[s]upport of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense," *id.* § 502(f)(2)(A); *District of Columbia*, 2025 WL 3673674, at *3 (collecting examples). Although the federal government pays the costs when Guard members are on Title 32 status and treats them as agents of the federal government for many purposes (such as Federal Tort Claims Act coverage and federal health and disability benefits) under Section 502(f)(2)(A), a governor must consent to activate the Guard for a mission, and he retains command. *District of Columbia*, 2025 WL 3673674, at *3, *7; *see also* 32 U.S.C. § 328(a). And Title 32 duty orders are issued by the Governor (or by our Guard officers under his authority).

Members of the South Carolina National Guard therefore "must keep three hats in their closets—a civilian hat, a state militia hat [for state active duty and Title 32 duty], and an army hat [for Title 10 duty]," but "only one [may be] worn at any particular time." *Perpich v. Dep't of Def.*,

496 U.S. 334, 348 (1990).

2. By August 2025, Washington, D.C. officials had "lost control of public order and safety in the city" such that people were "unable to live peaceably in the Nation's capital" because of the "siege from violent crime." Presidential Memorandum, *Restoring Law and Order in the District of Columbia* § 1 (Aug. 11, 2025). In response to this crisis, President Trump issued a memorandum to the Secretary of Defense on August 11, 2025, instructing the Secretary to restore law and order in Washington, D.C. *See id.* The President directed the Secretary "to mobilize the District of Columbia National Guard and order members to active service, in such numbers as he deems necessary, to address the epidemic of crime in our Nation's capital." *Id.* § 2. In addition to the D.C. National Guard, the President also ordered the Secretary "to coordinate with State Governors and authorize the orders of any additional members of the National Guard to active service, as he deems necessary and appropriate, to augment this mission." *Id.*

The Governor answered the federal government's call for help. On August 16, 2025, he "authorized the deployment of 200 South Carolina National Guardsmen to Washington, D.C." to "support federal law enforcement activities" under Title 32. *Gov. Henry McMaster Authorizes Deployment of National Guard to Washington, D.C.*, S.C. Governor (Aug. 16, 2025), https://tinyurl.com/mry6t9zj. These soldiers returned to South Carolina about a month later.

The Governor authorized deploying Guard members to Washington, D.C. a second time on December 4, 2025, also under Title 32. These soldiers completed their mission on March 15, 2026. Most are returning now to South Carolina, but about 100 of our Guard soldiers have volunteered to continue serving in the capital for at least a few more months. Gen. Stilwell Aff. ¶ 4.

3. These two deployments to Washington, D.C. are not unique. South Carolina governors

have long ordered the National Guard to serve outside of South Carolina while under their command. *See* Gen. Stilwell Aff. ¶¶ 5–7, 9. Long before Title 32 status existed, the South Carolina militia served in the Seminole Wars in Florida during the 1830s. *See* Ashley Gonzalez, *Second Seminole War*, Flagler County Historical Society (Oct. 31, 2020), https://tinyurl.com/4yx9746a (discussing fortifications built by the South Carolina militia). The militia was also sent out of state for less combative purposes. The Air National Guard, for instance, was in Washington, D.C. for Harry Truman's inauguration in 1949 as part of the flyover. *See* Columbia Record, *Twelve Planes of S.C. Air Guard to Salute Truman*, at 15 (Jan. 17, 1949).

Since Congress enacted Title 32, South Carolina governors have repeatedly ordered the National Guard out of state under a governor's command to help enforce the law and provide security. *See* Gen. Stilwell Aff. ¶ 7. In 1996, the National Guard flew security missions in Atlanta for the Olympics. *See S.C. Air National Guard Periodic History from 1 January to 31 December 1996*, at vi (available at S.C. State Library). In 1998, the National Guard helped combat the flow of illegal drugs into the country near San Diego. *See* Index-Journal, *Guard's Accomplishments, Challenges Many, Widespread*, at 13 (June 10, 1998). Almost a decade later, "over 1,100 soldiers rotated for duty along Arizona's border with Mexico in 'Operation Jump Start' in support of the Border Patrol's mission to halt illegal entry and curb the flow of illegal drugs." Office of Adjutant General, *Annual Accountability Report, Fiscal Year 2006–2007*, at 3. Governors have repeatedly ordered the National Guard to Texas to assist with border security, sending soldiers there in 2007, 2016, and 2018. *See* Cindi King, *South Carolina National Guard to Provide Support to Texas Border*, Defense Visual Information Distribution Service (May 22, 2018), https://tinyurl.com/389csjnv. In the wake of the George Floyd riots, 445 members of the National Guard were deployed to the nation's capital to "conduct[] crowd control, general security, and

patrols for continued public safety and critical infrastructure security." *South Carolina Military Dep't Annual Report, FY20*, at 12. And the National Guard again served in Washington, D.C. for the 2021 and 2025 presidential inaugurations. *See South Carolina Military Dep't Annual Report, FY21*, at 10; *2025 Annual Accountability Report, Office of the Adjutant General*, at 6.

B. Procedural history.

A month into the National Guard's second deployment to Washington, the South Carolina Public Interest Foundation and James Weninger brought this case. Neither is a member of the Guard. The Foundation, as an organization, can't be, and Weninger does not serve in our State's Guard. *See* Compl. ¶¶ 11–12. Neither alleges any individualized harm from the Governor's decision to deploy the Guard to Washington.

Instead, they claim—on behalf of the general public—that the Governor lacks authority to deploy the Guard outside of South Carolina under Title 32 status. *See id.* ¶¶ 39–51. They seek a declaration that the Governor cannot do so. *See id.* ¶¶ 52–54. Along with that declaration, they ask for an injunction to vacate the Governor's current deployment order and to forbid him from ordering further deployments. And they want the Court to enjoin General Stilwell from implementing the Governor's deployment orders. *See id.* Prayer for Relief.

STANDARD OF REVIEW

The "Constitution is construed in light of the intent of its framers and the people who adopted it." *State v. Long*, 406 S.C. 511, 514, 753 S.E.2d 425, 426 (2014).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Although statutes are presumed constitutional, the Court must hold them unconstitutional when it is "clear" that a statute is "repugnan[t]" to the Constitution. *Doe v. State*, 421 S.C. 490, 501, 808 S.E.2d 807, 813 (2017).

ARGUMENT

I. Plaintiffs lack standing.

"A threshold inquiry for any court is a determination of justiciability." *Peoples Fed. Savings & Loan Ass'n of S.C. v. Resources Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004). This inquiry is mandatory. "The existence of an actual, justiciable controversy," this Court has explained, "is essential to jurisdiction to render a declaratory judgment." *Orr v. Clyburn*, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982). Without that jurisdiction, a court "act[s] ultra vires" and offers nothing more than "a hypothetical judgment." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998). Courts may not therefore assume jurisdiction and proceed to the merits.

The justiciability question here is standing. Plaintiffs claim standing under the public importance exception. *See* Compl. ¶¶ 13–14; Pls.' Br. 29–30. Under that exception, the Court "relax[es]" the general standing rules because a "matter of importance" warrants "court resolution for future guidance." *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012). Even if Plaintiffs meet these two elements, they can't proceed under this exception. The public importance exception is unconstitutional because it is inconsistent with the Constitution's text, separation of powers, and history.

Before getting into this argument, it's worth noting the obvious: This Court has applied the public importance exception in recent years, including in cases involving the Governor. *See, e.g.*, *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 177, 906 S.E.2d 345, 350 (2024). None of those cases, however, addressed the argument that the public importance exception is unconstitutional. Rather, those cases focused on whether the exception was satisfied. *See, e.g.*, *Adams v. McMaster*, 432 S.C. 225, 236, 851 S.E.2d 703, 708–09 (2020). Here, the Governor does not contest whether

Plaintiffs meet the exception. Instead, he argues only that the exception is unconstitutional. This case therefore squarely presents a question this Court has not yet answered: Is the public importance exception constitutional?

It is not.

A. The public importance exception is unconstitutional.

1. The exception is contrary to the Constitution's grant of judicial power. The "judicial power" is "vested" in the courts to decide "cases." S.C. Const. art. V, § 1 (vesting clause); S.C. Const. art. V, § 5 (Supreme Court has the power to decide "cases"); *id.* art. V, § 11 (same for circuit court). This "power" is "limited to resolving cases and the powers inherent in that function." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014).

So what is a "case"? The United States Supreme Court—which has a "case" requirement of its own—answered this question more than a century ago. Drawing on a decision from Chief Justice Marshall, the Court explained 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." *Muskrat v. United States*, 219 U.S. 346, 357 (1911); *see also Calderon v. Ashmus*, 523 U.S. 740, 746 (1998) (applying this definition). A *case* therefore "implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication." *Muskrat*, 219 U.S. at 357. Because courts have the power only to decide cases, judges "say what the law is" only when they decide "particular *cases*." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

The term "case" thus does not permit "courts to pass upon [legal issues] as abstract,

intellectual problems." *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.). Rather, it demands "a concrete, living contest between adversaries call[ing] for the arbitrament of law." *Id.* Opining on an abstract issue without a concrete injury to a plaintiff sounds a lot like resolving a question of public policy—or like issuing "advisory opinions," which "[c]ourts do not give." *State v. Harrison*, 432 S.C. 448, 464, 854 S.E.2d 468, 476 (2021). Such advisory opinions go beyond the courts' "sole[]" duty "to decide on the rights of individuals." *Marbury*, 5 U.S. (1 Cranch) at 170.

But the public importance exception allows anyone to sue about anything, so these lawsuits are rarely (if ever) about the rights of the individuals bringing them. *See Sloan v. Dep't of Transp.*, 365 S.C. 299, 304, 618 S.E.2d 876, 878 (2005) (rejecting the argument that a plaintiff must show a particular "nexus" to the case). In fact, these lawsuits aren't "cases" at all.

The textual limitation to "cases" is fatal to the exception. "[A]n indispensable part" of a "case" is "standing." *Town of Arcadia Lakes v. S.C. Dep't of Health & Env't Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013). And there is an "'irreducible constitutional minimum'" when it comes to standing, part of which is "an 'injury in fact'" to the plaintiff. *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting *Lujan v. Def. of Wildlife*, 504 U.S. 555, 559–61 (1992)). If that injury is a constitutional floor, there cannot be an exception to it.

2. The public importance exception infringes on the authority of other branches. Unlike the United States Constitution, our State's separation of powers is express. *See* S.C. Const. art. I, § 8. In essence, the Constitution requires that each branch both stay in its own sandbox *and* stay out of the other branches' sandboxes: "no person or persons exercising the function of one of said departments shall assume or discharge the duties of any other." *Id.* The public importance

exception flouts both these mandates.

First (and as just discussed), the public importance exception takes the judicial branch out of its sandbox. By going beyond "cases," the Court is extending its authority beyond the judicial power. That's a problem because abiding by this command is critical for "a properly functioning judicial branch." *League of Women Voters of S.C. v. Alexander*, 446 S.C. 591, 604, 921 S.E.2d 660, 667 (2025).

Second, the exception puts the judicial branch into sandboxes other than its own. When it decides more than "cases," the Court is doing something other than exercising judicial power. The only other powers that exist are legislative and executive, and these powers "are functionally identifiable." *INS v. Chadha*, 462 U.S. 919, 951 (1983). So if the judiciary isn't exercising judicial power, it is necessarily infringing on the other branches' power. *See* S.C. Const. art. III, § 1 (legislative vesting clause); *id.* art. IV, § 1 (executive vesting clause).

Process-of-elimination isn't the only way to see how the public importance exception oversteps the judiciary's role. As the United States Supreme Court put it, "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576. "Courts," on the other hand, "are not bodies for the resolution of public policy." *Carnival Corp.*, 407 S.C. at 81, 753 S.E.2d at 853. That's why, for example, "a public nuisance cause of action," which is "used to remedy harms by the public generally," can "typically only [be asserted by] the State." *Id.* at 78, 753 S.E.2d at 852. For a court to let a private litigant vindicate those public interests, he must assert a "special injury" "distinct and different from the injuries suffered by the public generally." *Id.* In other words, he must have the type of "nexus" to the issue that the public importance exception disregards. *Sloan*, 365 S.C. at 304, 618 S.E.2d at 878.

The public importance exception turns this separation of powers on its head. Lawsuits simply become tools for courts—rather than the political branches—to vindicate the public interest (or at least the plaintiff's conception of the public interest). The Ohio Supreme Court recently noted as much in overruling that State's version of the exception, recognizing that the exception "essentially allows this court to engage in policy-making by ruling on the legislation of the General Assembly in cases that lack an injured party." *Ohio ex rel. Martens v. Findlay Mun. Ct.*, 262 N.E.3d 304, 309 (Ohio 2024). Overruling the exception therefore keeps the courts in their sandbox and out of the other branches'.

3. South Carolina courts have historically required a plaintiff to show an injury to bring a case. The exception cannot be reconciled with that longstanding practice.

Well over a century ago, for instance, this Court explained that if a statute "invades or infringes upon the constitutional rights of any citizen, it is for such citizen to raise the question by some proper proceeding." *Ex parte Florence Sch.*, 43 S.C. 11, __, 20 S.E. 794, 796 (1895). Or as the Court put it the next decade, "it is only when some person attempts to resist [a statute's] operation, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained." *Jellico v. Conner*, 83 S.C. 481, ___, 65 S.E. 725, 728 (1909).

As decades passed, the injury requirement stayed the same, even if the suit posed an important question. So when faced with a taxpayer suit in 1941 concerning a significant matter, this Court refused to consider the case. As the Court explained, "[t]he mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to invoke per se a judicial determination of the issue." *Crews v. Beattie*, 197 S.C. 32, __, 14 S.E.2d 351, 358 (1941). A plaintiff must have a "special or peculiar interest to protect" to sue. *Id.*; *see also Townsend v.*

Richland Cnty., 190 S.C. 270, 280, 2 S.E.2d 777, 781 (1939) ("A party cannot be permitted to harass others and take the time of the Courts in litigating matters in which they have no interest"); *Chesterfield Cnty. v. State Hwy. Dep't*, 191 S.C. 19, 54, 60, 3 S.E.2d 686, 702, 704 (1939) ("There is no party before the Court who can properly be heard to question the constitutionality of" portions of a challenged law "since it does not appear that they invade any right which any party to the cause is entitled to assert"); *Culbertson v. Blatt*, 194 S.C. 105, 112, 9 S.E.2d 218, 221 (1940) ("the constitutionality of . . . legislation may not be questioned by one who fails to show . . . that he has some personal interest in the situation other than that shared in common by other members of the public"); *Hampton v. Dodson*, 240 S.C. 532, 544, 126 S.E.2d 564, 570 (1962) ("Before a person can assail a law as unconstitutional, he must show that he has an interest in the question in that enforcement of the law would infringe upon his rights, and one not prejudiced by enforcement of a statute cannot question its constitutionality.").

In fact, in *Hearon* (a case on which Plaintiffs rely heavily), the claims didn't come from a concerned citizen. They came from the aggrieved highway commissioners. Those officials had been injured by the militia carrying out Governor Johnston's order to remove them from office. 178 S.C. at 385–86, 183 S.E. at 14–15. Even the narrow scope of judicial review the Court recognized was when a governor exceeds his authority and causes "injuries to the *personal* liberty and property rights of the citizens." *Id.* at 399, 183 S.E. at 20 (emphasis added). The Court didn't grant a *carte blanche* right for anyone to sue the governor simply because the issue was important.

Plaintiffs implicitly acknowledge this traditional rule. In their brief, they observe that "[g]enerally, judicial relief is available *to one who has been injured* by an act of a government official which is in excess of his express or implied powers." Pls.' Br. 14 (emphasis added).

After consistently requiring a plaintiff to have suffered an injury to sue and expressly

rejecting that "issue[s] . . . of public importance" alter that requirement, *Crews*, 197 S.C. at ___, 14 S.E.2d at 358, the Court did an about-face in the late 1970's with no explanation and created a public importance exception to standing. In *Thompson v. S.C. Commission on Alcohol & Drug Abuse*, the Court recognized that those plaintiffs had no individualized harm, but still, the Court was "of the opinion that the questions involved are of such wide concern, both to law enforcement personnel and to the public, that the court should determine the issues in this declaratory judgment action." 267 S.C. 463, 467, 229 S.E.2d 718, 719 (1976). The Court cited *no* authority for that proposition. And the Court didn't even apply that rule (at least not independently of traditional standing analysis) for another quarter-century until *Baird v. Charleston County* gave the doctrine a life of its own. 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999).

The exception's roots in the 1970s cannot connect it to the West Committee's work in a way that would justify the exception. Just as our Constitution currently limits courts to "cases," so too did the original 1895 constitution. *See* S.C. Const. art. V, §§ 4, 15 (1895). In fact, the West Committee "fe[lt] that the existing section of the Constitution on the jurisdiction of the Supreme Court is a good one and should be continued." *Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895*, at 63 (1969) ("*West Report*"). In the same way, the West Committee proposed "essentially keep[ing] the jurisdiction as it is currently given in the Constitution, except that it is treated in broad terms instead of spelling out authority in detail." *Id.* at 63, 65. The 1970s amendments to article V, in other words, marked continuity in the jurisdiction of South Carolina courts. *Thompson* cannot have recognized a constitutional change because no change was intended. *See Long*, 406 S.C. at 514, 753 S.E.2d at 426 (the "Constitution is construed in light of the intent of its framers and the people who adopted it").

Ultimately, the injury requirement essentially asks, "What's it to you?" Antonin Scalia,

The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk U. L. Rev. 881, 882 (1983). But after more than a century, this Court stopped asking "what's it to you?" and—without explanation—started asking "is the issue important?".

4. All of this prompts a question: From where in the Constitution could the public importance exception emanate? This Court has never said. And it's not clear. True, South Carolina courts are courts of general jurisdiction, bound by article V, not the U.S. Constitution's article III. But this Court has acknowledged that the South Carolina Constitution also confers only the "judicial power" to the courts to decide "cases"—and that term carries real "limit[ations]." *Carnival Corp.*, 407 S.C. at 81, 753 S.E.2d at 753; *see also Planned Parenthood S. Atl. v. State* ("*Planned Parenthood II*"), 440 S.C. 465, 472, 892 S.E.2d 121, 126 (2023) (noting the "limited (non-policy) role of the Court"). Article V does not contemplate an exception to the case requirement, and there is no other language anywhere else in the Constitution in which to ground that exception.

B. Stare decisis is no reason to cling to the public importance exception.

It's no answer that this Court has applied the public importance exception in recent cases. *Cf.* Pls.' Br. 29 (listing cases applying the exception). In fact, a challenged practice "appearing with increasing frequency" should "sharpen[] rather than blunt[]" the need to reconsider it. *Chadha*, 462 U.S. at 944. After all, "stare decisis is not an inexorable command." *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012). There is "no virtue in sinning against light or persisting in palpable error," and "[t]here should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." *Id.*

Under the traditional stare decisis framework, whether a case should be overruled involves multiple considerations. Factors include the quality of the precedent's reasoning, the workability

of the precedent, the precedent's consistency with other decisions, age of the precedent, and reliance interests. *See Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring in part). Plus, "stare decisis has reduced force" in constitutional decisions, *Planned Parenthood II,* 440 S.C. at 479, 892 S.E.2d at 129, which includes questions "that involve [separation of powers] and the establishment of the limits of judicial authority," *State v. Williams*, 13 S.C. 546, 555 (1880). Here, the factors all favor overruling decisions applying the public importance exception.

1. "[T]he quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 269 (2022). It is not enough to point to a line of cases applying a rule when those cases cite the rule "without regard to the" logic underlying it. *McLeod*, 396 S.C. at 654, 723 S.E.2d at 202. It's therefore no answer for Plaintiffs to paste the same string cite in their reply brief and say, "the end."

Here, the reasoning in those cases applying the exception aren't just "egregiously wrong" or "exceptionally weak." *Dobbs*, 597 U.S. at 231. These cases have *no* reasoning. It all began with the Court's unexplained "opinion" that it should "determine the issues" when "the questions involved are of such wide concern." *Thompson*, 267 S.C. at 467, 229 S.E.2d at 719. Since then, courts have simply assumed the power to decide these cases without explaining where that power comes from. These rubberstamping precedents do not strengthen the original. *See Williams*, 13 S.C. at 555 ("it is only where resort is had to the original sources and a concurring result obtained that the first decision can be said to be fortified by that which follows it").

The (understandable) desire to resolve legal questions on hot-button issues so that the People know what the law is does not give the Court the authority to assume extraconstitutional responsibilities. Some States have given their high court the power to issue advisory opinions. *See, e.g.*, Fla. Const. art. IV, § 1(c) (governor may request advisory opinion from supreme court). South

Carolina has not. The way for this Court to gain that power is for the People to amend the Constitution. *See* S.C. Const. art. XVI. It's not to create a loophole through the public importance exception.

2. The public importance exception is unworkable. There's no predictability in when it will apply. Sometimes it does. *See, e.g.*, *S.C. Pub. Int. Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017). Other times it doesn't. *See, e.g.*, *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44. And it often threatens to be "the exception that swallows the rule." *S.C Dep't of Transp.*, 421 S.C. at 125, 804 S.E.2d at 862 (Kittredge, J., dissenting). Indeed, this Court has acknowledged that the public importance exception is "the subject of much confusion and misapplication." *Bodman v. State*, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013).

No wonder. "How is a court to determine when something is of such great importance and interest to the public that it should allow parties to bypass the standing requirement and other normal judicial procedures?" *Ohio ex rel. Martens*, 262 N.E.3d at 309 (cleaned up). A clear line cannot be drawn. These cases have an "I know it when I see it" feel that does a disservice to the bench and bar. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). If "[c]ourts are not bodies for the resolution of public policy," *Carnival Corp.*, 407 S.C. at 81, 753 S.E. at 853, then neither are they bodies to decide which issues of public importance need to be resolved now.

3. The public importance exception is inconsistent with decades of decisions on standing and individualized harm. Until *Thompson* and then cases around the turn of the 21st century, this Court consistently required plaintiffs to be injured by some government action before they could challenge it. And that's still the usual rule. The public importance exception is (as its name suggests) a break with the past.

4. The public importance exception is relatively new. At best, it dates back half a century.

But caselaw requiring a plaintiff to have a personal stake in the outcome goes back centuries. *See, e.g.*, *McConico v. Singleton*, 9 S.C.L. 244, 352 (S.C. Const. App. 1818). In the big picture, then, the public importance exception is a novel creation, and a practice of "recent vintage" is not "probative . . . of a constitutional tradition." *Printz v. United States*, 521 U.S. 898, 918 (1997). This Court has not hesitated to overturn a case that is merely a few decades old, along with whatever cases relied on the original case. *See, e.g.*, *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021) (overturning a 40-year-old *Todd* rule on pleading special damages to "return[] to [the Court's] long-standing precedent pre-*Todd*").

5. No reliance interests would be affected. No private person presumably arranges his affairs around a right to sue on behalf of the public about any major issue because of the public importance exception. If anyone claims to be personally harmed by some government action, he can still sue. But no one is wronged by being unable to sue when he isn't harmed. Indeed, the reason that reliance interests are even a factor on a stare decisis question is because *you* might rely on some court precedent, but the public importance exception takes *you* out of the analysis.

6. Finally, a decision to uphold the public importance exception would be a constitutional decision, effectively defining what "the limited constitutional function of the 'judicial power'" is. *Carnival Corp.*, 407 S.C. at 67, 753 S.E.2d at 846 (quoting S.C. Const. art. V, § 1). And it would be a decision determining "the limits of judicial authority" and "the distribution of public authority among the principal agencies of government." *Williams*, 13 S.C. at 555. Such momentous decisions, which only "organic changes in the government itself" can correct, demand "careful scrutiny" and properly render the Court "bound . . . to re-consider the correctness of [a] conclusion" previously reached. *Id.*

* * *

Doubtless it is important that the law be followed. "But the Judiciary does not have unbridled authority to enforce this obligation—in fact, sometimes the law prohibits the Judiciary from doing so." *Trump v. CASA, Inc.*, 606 U.S. 831, 858 (2025). "In [South Carolina's] constitutional system of government with its separation of powers, courts exercise the limited constitutional function of the 'judicial power.'" *Carnival Corp.*, 407 S.C. at 81, 753 S.E.2d at 853 (quoting S.C. Const. art. V, § 1). Because the public importance exception cannot be reconciled with the Constitution's text, violates separation of powers, and departs from historical judicial practice, the Court should hold that the public importance exception is unconstitutional. As Ohio did with its exception recently, this Court should "consign [the exception] to the fate it deserves." *Ohio ex rel. Martens*, 262 N.E.3d at 310.

C. Plaintiffs have no other type of standing.

Plaintiffs cannot prevail under any other type of standing. That they don't allege other types of standing in their complaint should be enough to reach that conclusion. But because Weninger claims taxpayer standing and constitutional standing in the original jurisdiction petition, *see* Pet. 14–15, it's worth a brief explanation of why he lacks both.

1. Start with taxpayer standing. Weninger alleges that he's a "state taxpayer." Compl. ¶ 12. That's irrelevant. "[A] taxpayer lacks standing when he 'suffers in some indefinite way in common with people generally.'" *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008) (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923)). Ignoring this rule, Weninger cites an earlier decision about taxpayers needing "some mechanism of enforcing the law." *Sloan v. Dep't of Transp.*, 379 S.C. 160, 170, 666 S.E.2d 236, 241 (2008). Even if taxpayer standing still exists in this State in some form, *ATC South* leaves no doubt that a plaintiff needs a more particularized stake. As this Court "reaffirm[ed]" a few years later, a plaintiff's "status as a mere

taxpayer is insufficient to confer standing upon him." *Bodman*, 403 S.C. at 67, 742 S.E.2d at 366.

The deployment impacts Weninger no differently than his neighbors. And in any event, Plaintiffs admit that the National Guard is in a Title 32 deployment, which means that the federal government is footing the bill. So really, Weninger's stake in the litigation, already hopelessly generalized, is diluted even further.

2. Nor does Weninger have constitutional standing. Constitutional standing requires an injury in fact that "is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Freemantle*, 398 S.C. at 193, 728 S.E.2d at 43. Weninger says he's "directly harmed" by the deployment because the deployment "weakens the Guard's ability to respond to crises in Berkeley County" like "flooding, hurricanes, and other natural disasters." Pet. 15; *see also* Pls.' Br. 30.

But Weninger cannot allege that any weather event is sufficiently imminent to meet the "actual or imminent" requirement. *Freemantle*, 398 S.C. at 193, 728 S.E.2d at 43. Nor could he credibly claim to know what the weather will be in the weeks or months ahead. *Cf. Mark* 4:40 ("Who is this, that even the wind and the sea obey him?"). He therefore lacks an injury to establish constitutional standing.

And in any event, this injury theory ignores courts' limited roles in emergencies. Courts are ill-equipped to address emergencies, with all the uncertainties involved. *Cf. S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) ("Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect." (cleaned up)); *Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 276, 844 S.E.2d 390, 394 (2020) (leaving it to the General Assembly to change election laws in response to Covid).

II. Plaintiffs have no right to bring a claim under sections 25-1-1820 and 25-1-1840.

On top of their standing problem, Plaintiffs' claim fails for another threshold reason: They do not have a right of action.

A. A statute gives a plaintiff the right to sue only if the General Assembly intended to create that right. *Denson*, 439 S.C. at 151, 886 S.E.2d at 233. "Generally, when a statute does not expressly create civil liability, a duty will not be implied unless the statute was enacted for the special benefit of a private party." *Id.* at 151–52, 886 S.E.2d at 233. Thus, "the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability." *Id.* at 152, 886 S.E.2d at 233.

Plaintiffs invoke two statutes in their complaint: sections 25-1-1820 and 25-1-1840. *See* Compl. ¶¶ 47–48. Neither section creates an express private right of action, and neither includes an implied right because these statutes were not enacted for Plaintiffs' specific benefit. Section 25-1-1820 addresses when the National Guard may be "subject to active duty." S.C. Code Ann. § 25-1-1820. It never discusses individuals or even the public generally. Meanwhile, section 25-1-1840 discusses when "the Governor may order the National Guard of South Carolina . . . into the active service of the State and cause them to perform such duty as he shall deem proper." *Id.* § 25-1-1840. Like section 25-1-1820, section 25-1-1840 doesn't say anything about individuals or individual rights. If these sections never mention any class of individuals, there's no way these statutes could have been enacted for "the special benefit of a private party." *Denson*, 439 S.C. at 152, 886 S.E.2d at 233; *see also* Order 7, *Crook v. S.C. Election Comm'n*, No. 2025-CP-40-6539 (S.C. Comm. Pls. Oct. 1, 2025) (Coble, J.) (no private right action for election statutes).

The only "private party" for whose benefit these statutes could conceivably have been

enacted are members of the National Guard. And even then, it's unlikely these members could challenge their orders in civilian court. *See, e.g.*, *Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001) ("civilian courts have traditionally deferred to the superior experience of the military in matters of duty orders").

B. Plaintiffs cannot fall back on the Uniform Declaratory Judgments Act. *See* Compl. ¶ 53. That "Act is not an independent grant of jurisdiction." *Tourism Expenditure Rev. Comm.*, 403 S.C. at 81, 742 S.E.2d at 374. It instead "provides a remedy, not a right." Order Granting Motion to Dismiss 5, *S.B. v. McMaster*, No. 2021-CP-40-3774 (S.C. Comm. Pls. Aug. 13, 2021) (McIntosh, J.). In other words, the Act ensures that courts can hear a case when the only relief sought is declaratory. *See* S.C. Code Ann. § 15-53-20. The Act does not create a new basis on which a plaintiff can sue.

Were this not the rule and were the Court to stand by the public importance exception, the result would be that anyone could sue about anything government does (so long as a court thinks the issue is important enough). That creates the ultimate floodgates problem and amounts to taxpayer standing by another name.

III. The Governor has the authority to deploy the National Guard to Washington, D.C.

Even if Plaintiffs could get over the standing and private-right-of-action hurdles, they still lose on the merits. Everyone agrees that the National Guard is under the Governor's command when it is on Title 32 status, as it is here. The only question is therefore whether state law permits the Governor to deploy the National Guard to the nation's capital based on events taking place there. The Governor enjoys broad authority—both legislatively granted and constitutionally guaranteed—to do so.

A. This Court has established a deferential, two-step framework for reviewing challenges to the governor's calling-out authority.

Before getting to the specifics of the Governor's decision to deploy the Guard to Washington, D.C., it's important to set Plaintiffs' challenge to that decision in the proper legal framework. That framework comes from this Court's decision in *Hearon*. Plaintiffs have cherry-picked some language from that decision showing that there is some role for the Court to review challenges like this, *see* Pls.' Br. 32, but a closer review of *Hearon* confirms that this review is far more deferential than Plaintiffs let on.

Hearon arose from Governor Olin Johnston's declaration of an insurrection at the highway department, after which he used the militia to oust the commissioners from the office building, suspended habeas corpus, and seized the department's monies. 178 S.C. at 385–86, 183 S.E. at 14–15. The commissioners challenged Governor Johnston's actions, and this Court ultimately employed a two-step framework (also used by the United States Supreme Court) in holding for the commissioners against Governor Johnston.

That two-part framework matters, as do the facts there. The first part of the test is when a governor determines that there is a condition that allows him to call out the Guard. "[T]he established rule," this Court held, is "that the discretion of the Governor to determine the existence of" that condition "may not be interfered with by judicial authority." *Id.* at 406, 183 S.E. at 23; *see also id.* at 397, 183 S.E. at 20 (that decision "may not be enjoined by this court, nor reviewed by it"). In other words, at step one, all the Court may do is recognize that a governor determined that a condition to call out the militia exists. Whether circumstances present the need to "execute the laws" or "preserve the public peace," S.C. Const. art. XIII, § 3, or to prevent "the immediate danger of" "a body of men acting together . . . to resist the laws . . . of the United States," S.C. Code Ann. § 25-1-1840, that decision is exclusively and unreviewably the governor's. So in *Hearon*, this

Court could not—and thus did not—review Governor Johnston's determination that a state of insurrection existed at the highway department. 178 S.C. at 397, 413, 183 S.E. at 19–20, 26.

That immunity, however, does not leave aggrieved plaintiffs without recourse or courts powerless. The second *Hearon* step is that, "after the declaration" calling out the militia, a court may "review" claims that "the acts of the Governor after" calling out the militia "are in excess of his constitutional and legislative authority." *Id.* at 406, 183 S.E. at 23. "To that end," the Court "must relate the things [a governor] has done to the purposes for which he declared that" the condition "existed and called out the militia to suppress it." *Id.* at 410, 183 S.E. at 25. Still, this must be a deferential review because a governor, in calling out the militia, is exercising his commander-in-chief power. As this Court noted in another context, its "duty . . . to pass on the limitations of the . . . chief executive of the state is one of great delicacy," and the court should act "with care to find in the law support for . . . the action of the chief executive if it be possible." *McDowell v. Burnett*, 92 S.C. 469, ___, 75 S.E. 873, 874 (1912); *cf. Loving v. United States*, 517 U.S. 748, 778 (1996) (Thomas, J., concurring in the judgment) (noting the "heightened deference" owed to the President "by virtue of his constitutional role as Commander in Chief").

Of course, this deference isn't a rubberstamp (nor should it be). *Hearon* shows when a governor goes too far. Governor Johnston overtook the department by force and operated it under military control, "us[ing] . . . the militia to take possession, under the muzzles of machine gun and rifles, of the offices of plaintiffs as state highway commissioners." 178 S.C. at 414, 183 S.E. at 26. "He ordered the militia . . . to take immediate charge of . . . banks, depositories, or other institutions" that held highway funds. *Id.* He forcibly removed the "duly appointed" highway commissioners and, "by force and arms," compelled other employees to "submit their resignations." *Id.* at 387, 183 S.E. at 15. And he "suspend[ed] the writ of habeas corpus." *Id.* at

407, 183 S.E. at 24. This was all to remove a political opponent who ran the highway department and with complete disregard for the statute that created a process for removing state officials (including that opponent). *Id.* at 414, 183 S.E. at 26–27. So although the Court could "not enjoin [Governor Johnston's] declaration of a state of insurrection" at step one, the Court "ha[d] the power to review what he did thereafter" at step two. *Id.*, 183 S.E. at 26. And what Governor Johnston did thereafter was unlawful. His excessive actions were "wholly unrelated to the power given him by the Constitution and the Statutes to declare a state of insurrection" and detached from his reason for that declaration. *Id.*

This Court didn't create the two-step framework out of whole cloth. Instead, this Court drew from U.S. Supreme Court precedent. In *Martin v. Mott*, that Court held that when Congress "confided" to the Executive the authority to call forth the militia upon the existence of an exigency, "the authority to decide whether the exigency has arisen belongs exclusively to the President." 25 U.S. (12 Wheat) 19, 29–31 (1827) (Story, J.). His decision "is conclusive upon all other persons." *Id.* at 30. The U.S. Supreme Court reaffirmed this understanding a century later in *Sterling v. Constantin*, 287 U.S. 378 (1932), which this Court cited throughout *Hearon*. *Sterling* confirmed the conclusiveness of the executive's threshold determination while permitting review only of subsequent executive measures. *Id.* at 399, 401–02.

One other point about these federal cases: Like *Hearon*, they remain good law, even if some federal district judges have wrongly treated them as fact-bound "relic[s]." *Trump v. Illinois*, 146 S. Ct. 432, 440 (2025) (Alito, J., dissenting) (old Supreme Court has "never been overruled, narrowed, or questioned by th[at] Court"); *see also Baker v. Carr*, 369 U.S. 186, 213 (1962) (citing *Martin* for the proposition that "calling up of [the] militia" is nonjusticiable). Even the Ninth Circuit has recognized that these cases remain good law and that the executive receives deference

on military issues. *Newsom v. Trump*, 141 F.4th 1032, 1047–51 (9th Cir. 2025).

So far from some sweeping precedent to scrutinize how a governor exercises military authority, *see* ACLU Br. 32–33, *Hearon* represents a deferential two-step framework that avoids infringing on a governor's commander-in-chief power while still protecting the People's "freedom and liberty" from being infringed by a tyrannical executive. 178 S.C. at 399–400, 183 S.E. at 20. This deferential review ensures that the ultimate check on a governor's commander-in-chief power remains open to the People: the ballot box.

Plaintiffs' failure to apply *Hearon* properly is problematic enough. But their argument gets worse. At the end of their brief, they invoke *Abbeville II* to insist that this Court grant them relief. *See* Pls.' Br. 33. But as this Court well knows, *Abbeville II* was overruled. The Court "vacated [its] continuing jurisdiction over th[at] matter" and declared that "*Abbeville II* was wrongly decided as violative of the separation of powers" for the reasons then-Justice Kittredge had laid out in his dissent. Order 1, *Abbeville Cnty. Sch. Dist. v. State*, No. 2007-065159 (S.C. Nov. 17, 2017). So *Abbeville II* is an awkward place to look for having the Court forcefully inject itself into something committed to another branch.

With that background, turn now to the statutory and constitutional authority that the Governor enjoys to call out the National Guard.

B. The South Carolina General Assembly has authorized the deployments.

Statutes must "be read as a whole," and when they "are part of the same legislative scheme," they must "be read together." *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). Here, the statutory scheme in sections 25-1-1820 and 25-1-1840 give the Governor the authority to deploy the National Guard to Washington, D.C. based on conditions there.

1. Sections 25-1-1820 and 25-1-1840 allow the deployment.

i. The statutory text allows out-of-state deployments.

a. Section 25-1-1820 provides some instances when the National Guard may be called into active duty. One instance is "for aiding civil officers in the execution of the laws." S.C. Code Ann. § 25-1-1820. For this purpose, a governor may "order out for active service" Guard members "as provided for in Section[] 25-1-1840." *Id.*

Even at a quick glance, this text in 25-1-1820 fits squarely with the facts here. The President directed the Secretary of Defense to seek any needed assistance from governors and their States' National Guard as part of the mission "to protect law-abiding citizens from the destructive forces of criminal activity" after local officials had "lost control of public order and safety in the city." Presidential Memorandum, *Restoring Law and Order in the District of Columbia*, § 1. Enforcing criminal laws to protect society is perhaps government's most essential function. *See, e.g.*, John Locke, *Second Treatise of Government*, §§ 88–89, in *John Locke: Political Writings* 305 (David Wootton ed. 1993).

If somehow more were needed about "aiding civil officers in the execution of the laws" in section 25-1-1820, that language comes from a 1905 act that established a new military code in South Carolina. *See* 1905 S.C. Acts No. 405, § 10. The General Assembly kept this language in later amendments to this section. *See* 1950 S.C. Acts No. 756 § 15; 1964 S.C. Acts No. 996, § 1; 2001 S.C. Acts No. 85, § 21. Even by the 1950 act, the idea of an executive calling out the militia to aid in executing the laws was well established. For instance, militia units were dispatched by Governor Tillman to enforce state law on alcohol dispensaries in 1894 in Darlington, and the National Guard deployed multiple times to keep order amid textile strikes during the Great Depression and to keep order after a fire near a state prison furniture factory in 1932. *See* James

Steele, Eric W. Plaag, & Steven D. Smith, *A Brief History of the South Carolina Army National Guard* 41–42, 161–64 (2013).

In short, the executive calling out the militia to assist in enforcing the law is a longstanding American practice, and when the General Assembly "obviously" kept this language "from another legal source" in the 1950, 1964, and 2001 acts, this language "br[ought] the old soil with it." *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019).

b. Turn now to section 25-1-1840, which is cross-referenced in section 25-1-1820. Under section 25-1-1840, a governor may call out the National Guard to assist with enforcing the law for, among other things, "tumult" or "a body of men acting together by force with intent to commit a felony, to offer violence to persons or property or by force and violence to break and resist the laws of this State or of the United States" or "the imminent danger of" those events. S.C. Code Ann. § 25-1-1840.

The Court need not wade into what these terms mean or whether they are satisfied here. Under *Hearon* step one, a governor's declaration that a condition to call out the militia is met "may not be enjoined by this court, nor reviewed by it." 178 S.C. at 397, 183 S.E. at 20. The Governor deployed the Guard "to restore law and order to our nation's capital," *Gov. Henry McMaster Authorizes Deployment of National Guard to Washington, D.C.*, S.C. Governor (Aug. 16, 2025), where people were "unable to live peacefully" because they were "under siege from violent crime," Presidential Memorandum, *Restoring Law and Order in the District of Columbia* § 1. Concluding those conditions met the standard in section 25-1-1840 was solely within the Governor's discretion. That should be the end of any analysis here, and the pages that Plaintiffs spend arguing why this standard is not met should be ignored. *See* Pls.' Br. 26–28. The Court should reject Plaintiffs' unspoken plea to overrule *Hearon* step one.

But if the Court were to abandon this long-standing rule, it would be easy enough to uphold the Governor's conclusion that the requirements of section 25-1-1840 are met. In just the first six months of 2025, there were countless crimes in Washington, D.C. On January 27, multiple people "took out their handguns and stole property from" an innocent victim at 7th and Pennsylvania Avenue. *DC Police Search for Suspects in Southeast Armed Robbery, Officials Say*, ABC7 News (Jan. 27, 2025), https://tinyurl.com/bdfrv7c8. On February 7, two suspects were arrested for shooting a 15-year-old the day before. *See Suspects Sought*, 1st District MPD Citizens Advisory Council (Feb. 7, 2025), https://tinyurl.com/3uyf4pd5. Two people were arrested on March 27 for two attempted carjackings at gunpoint, one on March 25 and the other on March 26. *MPD's Helicopter Tracks Carjacked Vehicle, Two Suspects Arrested*, Metropolitan Police Dep't (Mar. 27, 2025), https://tinyurl.com/yc7jhaem. In late April and early May, two people committed six armed robberies in northeast Washington. *MPD Arrests Juveniles in Six Armed Robberies*, Metropolitan Police Dep't (July 21, 2025), https://tinyurl.com/4st5vzxp. Later in May, police were investigating 16 armed carjackings over just one week. John Gonzalez, *DC Police Arrest 5 Teens in Recent Armed Carjackings as Wave of Incidents Raise Concerns*, ABC7 News (May 12, 2025), https://tinyurl.com/2mdsn93m. In June, three people were implicated in the murder of a congressional intern. *See* Nadine El-Bawab and Alexander Mallin, *2 Teens Arrested, 3rd Suspect at Large in DC Murder of Congressional Intern*, ABC News (Sept. 5, 2025), https://tinyurl.com/smx972bh. Those are just some of many examples.

Plaintiffs try to downplay the situation in Washington, D.C. Rather than grapple with the crime wave overwhelming the capital, they say that the Governor's interpretation of "tumult" would "violate[] the people's constitutional rights," including their "right to peaceably assemble." Pls.' Br. 27. (Of course, Plaintiffs don't claim that *their* right to assemble is threatened.) Nothing

about the Governor's decision infringes on people's right to gather peaceably and petition their government. Indeed, none of the examples just listed can be described as peaceful. "Tumult" is "commotion or agitation of a multitude, usually accompanied with great noise, uproar, and confusion of voices" or "[v]iolent commotion or agitation, with confusion of sounds." *Webster's International Dictionary* 1550 (1907); *see* 1905 S.C. Acts No. 405, § 7 (first adopting "tumult"). D.C. was full of violent commotion as people could not safely go about their daily routines. And these examples of crime in D.C. involve multiple suspects—or a "body of men" who were "commit[ting] a felony" or "offer[ing] violence to persons or property." S.C. Code Ann. § 25-1-1840. Washington, D.C. was therefore far from being "as calm, quiet, and peaceful as a May morn." *Hearon*, 178 S.C. at 410, 183 S.E. at 21.

c. With those statutes in mind and moving to *Hearon* step two, this Court may review "the acts of the Governor after the declaration" that calls out the militia to determine whether those acts "are in excess of his constitutional and legislative authority." 178 S.C. at 406, 183 S.E. at 23. The Court "must relate the things [a governor] has done to the purposes for which he declared that" the condition "existed and called out the militia." *Id.* at 410, 183 S.E. at 25.

Unlike *Hearon*, when Governor Johnston's actions went far beyond his declaration, Governor McMaster's deployment of the Guard here is a related and proportional response to the problem that prompted him to call out the Guard. That problem was the crime epidemic in Washington, D.C. The Governor's response was deploying Guard members to Washington to assist officials suppress that epidemic. It's hard to imagine a more "directly related" response. *Sterling*, 287 U.S. at 400 (decision cited multiple times in *Hearon*). And it's impossible to claim the Governor's actions after calling out the Guard exceeded his authority. Far from suspending habeas corpus with "no pretense that the courts were not open and functioning" or declaring martial

law without a "particle of evidence . . . that there existed a state of war," *Hearon*, 178 S.C. at 401, 413, 183 S.E. at 21, 26, Governor McMaster simply tasked Guard members with assisting federal law enforcement in an area under siege of lawlessness. And they are doing just that: "aiding" in enforcing the law, S.C. Code Ann. § 25-1-1820, by providing security, traffic control, and law enforcement patrol, *see* Pls.' Ex. C, at 13 (MOU § 2). This action falls within both the statutory text and the "range of honest judgment as to the measures to be taken" to which courts must defer—a range which ensures the Governor's "power itself" as commander-in-chief "would [not] be useless." *Sterling*, 287 U.S. at 399–400.

ii. Plaintiffs' arguments to the contrary are flawed.

The South Carolina Code does not limit where the Governor can deploy the Guard, and Plaintiffs' efforts to read a geographic restriction into these statutes fail.

a. Plaintiffs say that two interstate compacts "occupy the field when it comes to state-commanded deployments" to other jurisdictions. Pls.' Br. 16. To be sure, there are two compacts (the Emergency Management Assistance Compact and the Counterdrug Activities Compact), but there's no sort of field preemption in them. That preemption exists only when a "statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field." *S.C. State Ports Auth. v. Jasper Cnty.*, 368 S.C. 388, 397, 629 S.E.2d 624, 628 (2006). But nothing in either compact even hints that it precludes other out-of-state deployments, and Plaintiffs do not point to any such provision. In fact, their argument admits that the Counterdrug Activities Compact is "narrow[]," which is the opposite of occupying an entire field. Pls.' Br. 16.

b. Plaintiffs also search the statutory text for help, *see id.* 17–19, but they draw the wrong conclusion from that text. They start by noting that section 25-1-1840 (like the Constitution) does not "make any mention of extraterritorial deployments." *Id.* at 17. That's true. But at the same

time, no text "make[s] any mention of" forbidding extraterritorial deployments.

Without an explicit textual prohibition, Plaintiffs turn to related provisions and theories for help. For instance, a central feature of Plaintiffs' argument is that the Governor was without authority to send the Guard to Washington, D.C. because he can't enforce laws other than those of South Carolina or call out the Guard to help do so. *See* Pl. Br. 17–18, 22. But that's wrong.

Take Plaintiff's invocation of article IV, section 15's Take Care Clause. Plaintiffs limit the Governor's obligation to faithfully execute the laws to South Carolina law. But this ignores his oath. The Governor has sworn to "preserve, protect, and defend the Constitution of this State *and of the United States*." S.C. Const. art. VI, § 5 (emphasis added). Guard officers similarly swear to "support and defend the *Constitution of the United States* and the Constitution of the State of South Carolina." S.C. Code Ann. § 25-1-540 (emphasis added). When the President requested the Governor send National Guard members to help enforce federal laws in the nation's capital, that falls squarely within the oaths that state officials took about the enforcing the laws. *Cf.* U.S. Const. art. I, § 8, cl. 17 (giving Congress plenary authority over Washington, D.C.). And because the Governor must consent to providing this help, there's no anti-commandeering problem. *See Printz*, 521 U.S. at 935.

Worse yet, Plaintiffs' argument ignores the plain text of the statute they say limits the Governor's authority. If the Governor's power to "execute the laws" under the Constitution refers only "to *South Carolina's* laws," Pls. Br. 22, why would the legislature give the Governor the authority to resist "bod[ies] of men . . . break[ing] and resist[ing] the laws of this State *or of the United States*," S.C. Code Ann. § 25-1-1840 (emphasis added)? These words must mean something—and that something means that the Governor's power is broader than Plaintiffs say. *See Thompson v. Killian*, 447 S.C. 177, 191–92, 924 S.E.2d 606, 614 (2025) (rule against

superfluity).

Plaintiffs try to draw support for their argument from section 25-1-90, which prohibits other States from sending their soldiers into South Carolina without our governor's consent. *See* Pls.' Br. 18–19. Their argument on this statute backfires several times over. For starters, the Governor did not deploy the Guard to Washington, D.C. without consent. He sent them at the President's request. So the same consent that South Carolina would require for another State's Guard to come here was received before the deployment that Plaintiffs challenge.

For another, section 25-1-90 shows that the General Assembly knows how to prohibit militia from crossing state lines when the General Assembly wants to. This Court has repeatedly observed that "it is clear the legislature knows how to" do certain things by statute and it is "significant" when "the legislature cho[o]se[s] not to" do so. *Connelly v. Main St. Am. Grp.*, 439 S.C. 81, 96, 886 S.E.2d 196, 204 (2023). That the General Assembly hasn't imposed such a limit on the South Carolina National Guard when it did on other States' militia indicates that the General Assembly did not intend to prohibit the governor from deploying the Guard outside South Carolina.

In fact, section 25-1-90 assumes that other States may send their Guard to South Carolina. If sending militiamen across state lines was so inherently taboo, as Plaintiffs say, South Carolina would not need a provision like section 25-1-90. This section therefore confirms that the legislature did not view interstate Guard deployments as inherently problematic. Nor did the nation's Framers think that such deployments were problematic. Alexander Hamilton called it "natural and proper" that a State's militia would be sent to a neighboring State to "resist a common enemy, or to guard the republic against the violence of faction or sedition." *Federalist No. 29*, p. 183 (Hamilton) (C. Rossiter & C. Kelser eds. 2003). "[T]his mutual succor is, indeed, a principal end of our political

association." *Id.*

Chapter 3 of Title 25, which Plaintiffs ignore, erodes their argument yet further. The State Guard—which is "additional to and distinct from the National Guard," S.C. Code Ann. § 25-3-10—generally may "not be required to serve outside the bounds of this State," *id.* § 25-3-150. Still, "the Governor . . . may . . . order any portion of or all of such force to assist the military or police force of such other state who are actually engaged in defending such state." *Id.* § 25-3-160. (Returning to Plaintiffs' initial argument about compacts, this statute about the State Guard does not contemplate out-of-state deployments only under a compact.) If a governor may deploy the *State* Guard to another jurisdiction, he must also be able to order the *National* Guard to another jurisdiction, especially when the National Guard has no general restriction on where it can serve like the State Guard has in section 25-3-150. *Cf. City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011) (*expressio unius* rule).

c. The presumption against extraterritoriality doesn't help Plaintiffs either. *See* Pls.' Br. 19–20. Of course laws apply within the jurisdiction that enacted them. That's an unremarkable point. And under that rule, South Carolina law governs *when* the Governor may deploy the South Carolina militia. It also governs *where* he may deploy the militia. So if South Carolina law permits him to send the militia beyond the State's borders, South Carolina law isn't violated. Perhaps another State might prohibit the South Carolina National Guard from coming into that State (like section 25-1-90 does where the governor withholds consent), but that's not a question of South Carolina law.

Nor is another jurisdiction's sovereignty violated. *See* Pls.' Br. 20 (noting the equal sovereignty of the States). The Governor hasn't deployed these soldiers to some random, unconsenting State. Rather, he has deployed them at the request of the Secretary of Defense, under

an order from the President of the United States, to our nation's capital. *See District of Columbia*, 2025 WL 3673674, at *8 (noting the President's authority). And in any event, "the deployment of out-of-state guard members to the District" does not "rais[e] a serious federalism question under the Constitution" given "the District's unique constitutional status as . . . the Nation's Capital" and "the President's consent to receive these forces." *Id.* at *11.

The last extraterritoriality point Plaintiffs raise is that the conditions giving rise to the Governor's decisions arose "entirely outside the state." Pls.' Br. 20. No statutory text requires that the conditions exist in South Carolina. Nor does history. Governors have sent the militia to other States to combat conditions in those other States for at least two centuries—without the Guard being federalized or under some compact. *See* Ashley Gonzalez, *Second Seminole War*, Flagler County Historical Society; Gen. Stilwell Aff. ¶ 7. States have long assisted each other. *See infra* p. 43 (discussing the ratification debates). And if the call-out conditions could only happen within the State whose militia was needed for assistance, then there would have been no way for States to help other States before Congress ratified the Emergency Management Assistance Compact in 1996. At the very least, the Court should resist Plaintiffs' invitation to make sweeping, generalized statements about the scope of the governor's commander-in-chief power when the deployment that they are challenging fits comfortably within historical practice. *Cf. Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024) ("For a host of good reasons, courts usually handle constitutional claims case by case, not en masse.").

Step back for a moment and recognize the implication of Plaintiffs' argument. If they are correct, then a governor may never respond to a President's request to send the National Guard to somewhere outside of South Carolina. The President would be forced to federalize the South Carolina National Guard for it to serve. (So much for comity.) And another State would have to

use the Emergency Management Assistance Compact to get South Carolina's help, no matter that State's law or the urgency of the need. That is a remarkable result without any historical basis.

iii. History confirms this conclusion.

"[C]ourts should accord weight to past practices." *Williams*, 320 S.C. at 205, 464 S.E.2d at 102. And when the executive has a decades' old practice "acquiesced in by the legislative department," that's strong evidence that the legislature agrees with the executive's interpretation, so that interpretation should receive "great regard" from the courts. *Pocket Veto Case*, 279 U.S. 655, 689–90 (1929).

Here, that history confirms the Governor's textual analysis that the statutes allow him to deploy the National Guard to another jurisdiction. Since section 25-1-1820 and its predecessor statute took effect, governors have repeatedly activated the National Guard and ordered it to serve out of South Carolina while under a governor's command based on events taking place outside of South Carolina. From presidential inaugurations in 1949, 2021, and 2025 to border operations since the 1990s to preserving order during mass protests during the George Floyd aftermath, *see* Gen. Stilwell Aff. ¶¶ 7, 9, governors have deployed the Guard as Governor McMaster did here.

So for decades, the General Assembly has witnessed governors order the National Guard out of state. If the General Assembly thought these deployments violated a state statute, the General Assembly could have—and presumably would have—responded by amending the statute and expressly limiting a governor's power to deploy the Guard. *Cf. Chadha*, 462 U.S. at 959 (the legislature may legislate to override executive action with which it disagrees); 1986 S.C. Acts No. 463 (enacting the Tort Claims Act in response to *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)). But the General Assembly never did so. That inaction speaks loudly. *Cf. Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) (on some occasions,

legislative inaction is telling). And it undercuts all Plaintiffs' statutory interpretation arguments that would limit the Governor's authority on this front.

The thrust of Plaintiffs' argument is that the lack of express reference to out-of-state deployments means the Governor lacks authority to order them. That's wrong. The longstanding practice of governors doing exactly that points to the opposite conclusion. The lack of an express limitation confirms that the Governor *retains* authority to deploy forces beyond the State.

* * *

In sum, the Governor's decision to call out the Guard is unreviewable, and his acts after doing so comply with the South Carolina Code. His actions therefore unsurprisingly satisfy *Hearon*'s two-step framework. This puts the Governor's "authority at its maximum, for it includes all that he possesses in his own right plus all that [the legislature] can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Nothing that Plaintiffs argue proves otherwise.

2. Sections 25-1-20 and 25-1-30 implicitly authorize the deployment.

Even if section 25-1-1820 and 25-1-1840 didn't authorize the Governor's deployment of the Guard to Washington, D.C., sections 25-1-20 and 25-1-30 do.

Section 25-1-20 "accept[s]" the National Defense Act of 1916, Pub. L. 64-85 39 Stat. 166 (June 3, 1916), "so far as applicable and not in conflict with" state law. S.C. Code Ann. § 25-1-20; *see also* 1917 S.C. Acts No. 2, § 1 (first adopting this provision). To that end, section 25-1-30 requires the Governor to "cause the National Guard of South Carolina always to conform to all such Federal laws and regulations" that don't conflict with state law. S.C. Code Ann. § 25-1-30.

This isn't some throw-away provision with little real-world impact. Far from it. Guard members are often under Title 32 orders when it comes to training. For instance, from October

2024–September 2025, South Carolina Army National Guard members performed 9,568 of these weekend-training days outside South Carolina, generally at Forts Stewart and Eisenhower in Georgia. Gen. Stilwell Aff. ¶ 6. And National Guard units and personnel frequently received 15-day annual training orders sending them to Texas, Louisiana, Alaska, Georgia, and California, and some Guard members went to longer courses or schools in other states like the Army Judge Advocate General's Legal Center and School at the University of Virginia campus in Charlottesville. *See id.* While on this training, Guard members were on Title 32 status: They were ordered to their training under the Governor's command but paid by the federal government.

Nothing in sections 25-1-20 or 25-1-30 prohibits where Guard members can go for this training. And for good reason. Guard members go all over the country under Title 32 status. And there's no basis to distinguish going outside of South Carolina for a Title 32 training mission and any other Title 32 mission. Any Title 32 mission comes under the same gubernatorial authority. Plaintiffs try to treat training as "distinct[]" from other active duties, Pls.' Br. 9, but that effort fails under Plaintiffs' own reasoning. Plaintiffs say that state law does not expressly grant the governor the power to send the National Guard out of state for other active duties. *See, e.g.*, *id.* at 17. But neither does state law expressly grant the governor the power to send the Guard out of state for training. Section 25-1-1820 is, after all, silent on where the Guard can be sent for training. Plaintiffs offer no reason to treat this lack of text one way in one context and a different way in another.

Ensuring that Guard members can complete this training is critical. The federal government can withhold federal funds if the South Carolina National Guard fails to meet various federal requirements. *See* 32 U.S.C. § 108. In fact, the federal government has no other remedy when a State's Guard fails to comply with those requirements. *See Ass'n of Civilian Technicians v. United States*, 603 F.3d 989, 994 (D.C. Cir. 2010). Losing federal money is significant because almost

90% of the funding for the Adjutant General's Office comes from the federal government (and that funding doesn't include pay that goes directly to Guard members under Title 32 orders). *See* Gen. Stilwell Aff. ¶ 10; 2025 S.C. Acts No. 69, Part I.A., § 100.

It's unlikely, to say the least, that the General Assembly would implicitly keep the State from receiving more than $100 million in federal funds for such a critical purpose without explicitly saying so. After all, the legislature "does not hide elephants in mouseholes." *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 677 (2023) (internal quotation mark omitted). Plus, the General Assembly accepts this money every year in the appropriations act and authorizes the Adjutant General's Office to use it for Guard-related activities. So if the Court were to accept Plaintiffs' conclusion that the Governor cannot deploy the National Guard outside the State, the Court would effectively be holding that the National Guard is not allowed to fulfill the federal requirements and must—despite the General Assembly's annual acceptance—give up its federal funding.

C. At the very least, the Constitution authorizes the deployments.

If these statutes do not expressly support the Governor's deployment, the Court must either interpret them to implicitly permit the deployment, *see Edwards v. State*, 383 S.C. 82, 91–92, 678 S.E.2d 412, 417 (2009) (doctrine of constitutional avoidance), or hold that these statutes are unconstitutional to the extent that they would prohibit that deployment. That's because the Constitution gives the Governor broad authority as the commander-in-chief, S.C. Const. art. IV, § 13, to call out the militia to "execute the laws" and "preserve the public peace," *id.* art. XIII, § 3. Here, he exercised that power within the parameters this Court established in *Hearon*, and a statute cannot prohibit what the Constitution allows.

1. The governor has long enjoyed the constitutional power to call out the militia and deploy it outside of South Carolina.

i. From the State's earliest days, the governor has been the head of South Carolina's militia

with the power to deploy the militia outside of South Carolina. Although he did not always have the explicit constitutional authority to call out the militia, South Carolina's first constitution "vested" the "executive power" in a chief executive called the "president and commander-in-chief," S.C. Const. art. IV, XXX (1776), but that executive could not "make war or peace . . . without the consent of the general assembly and legislative council," *id.* art. XXVI. The 1776 constitution did not speak to the power to call out the militia. The 1778 constitution changed the title from president to governor but changed nothing else about this office's commander-in-chief power. *See* S.C. Const. art. III (1778).

Although neither the 1776 nor the 1778 constitution specifically addressed a governor's power to call out the militia, the "commander-in-chief" possessed primary—though not exclusive—control to do so. A 1779 statute gave the governor authority to call out the militia for any mission with "the advice and consent of the Privy Council" if it could be "timely convened." Act No. 1116, § 5 (Feb. 13, 1779), 4 *Statutes at Large of South Carolina* 465 (Thomas Cooper ed. 1838). If the council couldn't be convened quickly enough, the Governor could call out the militia without the council's consent. *Id.*

Interstate deployments were permissible from the outset, too. "[T]he Governor and Commander-in-chief" could send up to "one third" "of the militia of this State" abroad "when a sister State shall be invaded by any enemy, or any insurrection or rebellion shall happen therein." *Id.* § 1. Such out-of-state deployments required "the consent of the Privy Council" but were to last "so long as the Governor or Commander-in-chief . . . shall think expedient," up to three months. *Id.*

After the Revolution, South Carolina adopted a new constitution. This constitution vested "executive authority" in "a governor." S.C. Const. art. II, § 1 (1790). The governor was the

"commander-in-chief of the army and navy of this State, and of the militia, except when they shall be called into the actual service of the United States." *Id.* art. II, § 6. The 1861 Constitution kept this same structure for the governor's commander-in-chief power, though it changed "United States" to "Confederate States of America." S.C. Const. art. II, §§ 1, 6 (1861). When the Civil War ended and South Carolina adopted yet another constitution, the commander-in-chief provisions returned to what they had been under the 1790 constitution. *See* S.C. Const. art. II, §§ 1, 10 (1865).

These subsequent social compacts, like the Revolutionary-era constitutions, lacked a specific provision regarding the call out power, but the Governor's statutory power continued to grow. The commander-in-chief was still charged with calling forth the militia, and the legislature moved away from requiring consent for each out-of-state deployment the way it had under that 1779 law. By 1794, the General Assembly allowed the governor to call out the militia within the State and to send up to one-third of the militia out of State for up to two months at the request of any other governor who feared an invasion. *See* 1794 S.C. Acts No. 1582, §§ 25, 11, 8 *Statutes at Large of South Carolina* 485 (May 10, 1794) (David J. McCord ed. 1840). Sending troops to other States was not conditioned on advice and consent. It was exclusively "at his discretion." *Id.* § 11. The General Assembly kept this statutory scheme for decades to come. *See, e.g.*, 1832 S.C. Acts No. 2560, §§ 1–2, 8 *Statutes at Large of South Carolina*, at 562 (Dec. 20, 1832); 1813 S.C. Acts No. 2026, §§ 1, 7, 8 *Statutes at Large of South Carolina*, at 518–19 (Sept. 24, 1813).

Granting the governor exclusive power during these years is significant. The Revolution was one thing, where America had to rely on "requestion[ing]' each state for its proportionate 'quota' of men," which meant "rely[ing] on state governmental compliance." Akhil Reed Amar, *America's Constitution: A Biography* 114 (2006). During that struggle, it would make sense that South Carolina provided a legal mechanism to contribute its fair share. But after the adoption of

the federal Militia Clauses, the federal government had a way to deploy militiamen state-to-state, so individual state compliance was no longer required. That South Carolina continued to provide its governor with the authority to send troops abroad demonstrates the entrenched power to do so.

It also undermines Plaintiffs' historical argument. *See* Compl. ¶¶ 19–29. George Mason wanted to prevent the federal government from ordering state militias across the country. Mason's line about "dreadful oppressions" was while discussing Congress's power under article I, section 8. 3 *Debates on the Constitution* 378 (J. Elliot ed. 1888). That was a common Antifederalist objection. *See, e.g.*, *Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, Pennsylvania Packet and Daily Advertiser (Dec. 18, 1787), in *The Anti-Federalist*, at 220–21 (Herbert J. Storing ed., 2d ed. 1985). Contrary to Plaintiffs' reading, this objection had *nothing* to do with a State's ability to voluntarily send its militia to other States. During an extended debate with Mason at the Virginia ratification convention, James Madison responded to explain the need to allow Congress to act to protect the entire country (essentially solving a collective action problem of States not responding to Congress's call for troops) and to observe that States retained the power to call out their own militias. 3 *Debates on the Constitution*, at 381–83, 424–25; *see also Federalist No. 29*, pp. 182–83 (same).

There was ultimately no "compromise," as Plaintiffs claim. Compl. ¶ 26. George Mason lost this debate. The Constitution was drafted in final form by the time Mason made the argument that Plaintiffs cite. Virginia (like the other States) was debating whether to ratify it. And Virginia did—over Mason's objections. *See* 2 *Documentary History of the Constitution of the United States of America, 1786-1870*, at 145–60 (1894), https://tinyurl.com/2urt8xzx.

Of course, South Carolina ratified the Constitution too. If South Carolina specifically and the Founding Era generally was so fearful of interstate deployments, ratifying the Constitution that

allowed the federal government to order state militias across state lines made no sense. Nor would keeping that power with the governor in this State make sense. But that's what happened. From the Revolution to the Civil War, the Governor enjoyed substantial control in calling out the militia, and out-of-state deployments were well understood to be part of this authority.

ii. After the Civil War, South Carolina constitutionalized a governor's call-out power. The 1868 constitution again "vested" "supreme Executive authority" in the governor, S.C. Const. art. III, § 1 (1868), and the governor was the "Commander-in-Chief of the militia of this State, except when they shall be called into the actual service of the United States," *id.* art. III, § 10. This constitution also expressly defined the militia ("all able-bodied male citizens of the State between the ages of eighteen and forty-five," with a few exceptions, *id.* art XIII, § 1) and gave the governor the "power to call out the militia to execute the laws, repel invasions, repress insurrection, and preserve the public peace," with no express limitation on his ability to send troops outside the State, *id.* art. XIII, § 2. This call-out power was exclusive to the Governor, unlike the power to decide how the militia would be "organized, armed, equipped and disciplined," which belonged to the General Assembly. *Id.* art. XIII § 1.

The 1868 convention left relatively little record on these provisions. *See Proceedings of the Constitutional Convention of South Carolina* 571, 751–52 (1868) (minor wording changes only). But there is one telling thing about the call-out power in the convention records. When debating whether to include "compulsory" in an education provision, one delegate asked whether "the gentleman propose[d] to educate children at the point of the bayonet, through the militia?" *Id.* at 689. Benjamin Randolph, a Union veteran and state senator who was later assassinated in October 1868 while campaigning, replied that "we may call out the militia to enforce the law." *Id.* No one took issue with that assertion. That demonstrates a broad understanding of the governor's

power to call out the militia to enforce the law, undercutting the "extraordinary circumstance" gloss Plaintiffs seek to impose on this provision. *See* Pls.' Br. 22–23.

This also undercuts Plaintiffs' reliance on the federal Calling Forth Clause in article I, section 8. *See* Pls.' Br. 4–5, 23–25. Though the federal and state clauses may use similar language, that does not mean that these terms must mean the same thing. The federal ratification debates were focused on fears about the federal government, not fears about governors. *See supra* pp. 42–43. In the same way, early congressional action on the federal clause limited only when the president could call forth the militia. *See* Act of May 2, 1972, § 2, 1 Stat. 264 (1792). This had nothing to do with governors calling out their own militias.

Plaintiffs' historical work gets no better on the "preserving the public peace" language. *See* Pls.' Br. 25–26. They equate that language with "our notion of 'terrorism.'" *Id.* at 25. That misreads the eighteenth-century sources. Blackstone explained how the 1328 Statute of Northampton from Edward III's reign made it "a crime against the public peace" to "go[] armed" and "terrify[] the good people of the land." 4 W. Blackstone, *Commentaries on the Laws of England* 148–49 (1769). This law prohibited "conduct" that "disrupted the 'public order' and 'led almost necessarily to actual violence.'" *United States v. Rahimi*, 602 U.S. 680, 697 (2024) (quoting *State v. Huntly*, 25 N.C. 418, 421–422 (1843) (per curiam)). This conduct was, in other words, not the stuff of suicide bombers or airplane hijackers, but uncontrolled men imposing their will by force and violence on citizens. The crime wave in Washington, D.C. fits squarely in that historical tradition (if the Court were to abandon *Hearon* step one and evaluate for itself the existence of the call-out condition).

The federal Militia Clauses mean little when it comes to the South Carolina Constitution. The Founders had good reason to fear the national government more than the state governments. They had, of course, just prevailed in a war against a tyrannical king who had unleashed his large

standing army on the colonies. But Plaintiffs cannot impute this federal background onto the South Carolina Constitution's language adopted almost a century later.

iii. For whatever changes Ben Tillman and his allies would bring to the South Carolina Constitution in 1895, that convention didn't significantly change a governor's authority over the militia. The governor remained the "Commander-in-Chief of the militia of this State, except when they shall be called into the active service of the United States." S.C. Const. art. IV, § 10 (1895). He retained "the power to call out the volunteer and militia forces, either or both, to execute the laws, repel invasions, suppress insurrections and preserve the public peace," still with no geographic restrictions. *Id.* art. XIII, § 3. These provisions—including the minor wording changes—were adopted without recorded debate. *See Journal of the Constitutional Convention of South Carolina* 415 (1895).

iv. These powers remained unchanged after the West Committee's work. In discussing these provisions related to the militia, the West Committee called the Commander-in-Chief Clause "an historic provision in state constitutions" and "a power which should be assigned to the Governor by the Constitution." *West Report*, at 55; *see also* Committee to Make a Study of the Constitution of South Carolina, 1895, *Working Paper #7*, at 25 (calling this a "traditional[]" gubernatorial power).

In the Call Out Clause, the committee did not propose changes to the bases on which a governor may call out the militia. *Id.* at 113. Nor did those terms generate any debate in the West Committee's meetings. *See* Committee to Make a Study of the Constitution of South Carolina, 1895, *Minutes of Committee Meeting* 146 (Oct. 27, 1967) (no further debate on article XIII, section 3 after long discussion of types of militia); Committee to Make a Study of the Constitution of South Carolina, 1895, *Working Paper #4*, at 32 (calling the Call Out Clause's language

"standard").

Ultimately, the General Assembly decided that article XIII needed no changes. So the governor is still the "Commander-in-Chief of the organized and unorganized militia of the State." S.C. Const. art. IV, § 13; *cf. West Report*, at 113 (proposing to add the commander-in-chief language to article XIII, but the General Assembly did not adopt that recommendation). And he continues to enjoy "the power to call out the volunteer and militia forces, either or both, to execute the laws, repel invasions, suppress insurrections and preserve the public peace" with no restriction on out-of-state deployments, S.C. Const. art. XIII, § 3—a power he has constitutionally possessed for over 150 years.

Since the General Assembly decided to leave the governor's constitutional authority as is, governors have continued to deploy the National Guard outside of South Carolina. The Guard has served at presidential inaugurations in 2021 and 2025, assisted in border operations since the 1990s, and helped preserve order during mass protests without being federalized under Title 10 or requested by an interstate compact. *See supra* pp. 6–8. This consistent (and until now, unchallenged) practice confirms "the intent of [the] framers and the people who adopted" the Constitution to allow a governor to exercise his commander-in-chief power this way. *Long*, 406 S.C. at 514, 753 S.E.2d at 426. The constitutional decision to call out the militia to execute the laws or preserve the public peace therefore belongs exclusively to the Governor and authorizes this deployment.

2. The General Assembly has never expressly tried to infringe on the Governor's constitutional power.

i. Since South Carolina constitutionalized the governor's power to call out the militia in 1868, the General Assembly has never explicitly tried to curtail that authority despite repeated out-of-state deployments. A little over a decade after this constitutionalization, the General Assembly,

in its first militia act after Reconstruction, adopted a statute like section 25-1-1820. This statute provided that the militia was not "subject to active duty except in case of war, or for the preventing, repelling, or suppressing invasion, insurrection, or riot, or of aiding civil officers in the execution of the laws." 1882 S.C. Acts No. 528, § 5. A couple decades later, in response to the Militia Act of 1903 (better known as the Dick Act, for Ohio Representative Charles Dick), Pub. L. 57-33, 32 Stat. 775 (Jan. 21, 1903), the General Assembly amended this provision to allow for active duty for training. *See* 1905 S.C. Acts No. 405, § 10.

Three observations here: One, the legislature was not asserting any role in deciding to call out the militia. Two, this statutory language generally tracked the governor's constitutional authority. *See* S.C. Const. art. XIII, § 3 (1895). Although it didn't include "the public peace," "public peace" can be interpreted as encompassed within the statutory terms because stopping riots and invasions is keeping the peace. Plus, that interpretation avoids a constitutional problem. *See Edwards*, 383 S.C. at 91–92, 678 S.E.2d at 417. And three, this statute included no geographic restriction.

Meanwhile, the original version of section 25-1-1840 came in the 1905 law. *See* 1905 S.C. Acts No. 405, § 7. In this section, the General Assembly codified the governor's power "to order into active service of the State" the militia "in case of insurrection, invasion, tumult, riot, or breach of the peace, or imminent danger thereof." This section was first cross-referenced into the predecessor statute to section 25-1-1820 in 1922. *See* 1922 S.C. Acts No. 501, § 14.

Four things about this early version of 25-1-1840 stand out. First, it did not give the legislature any say over the governor's decision to call out the militia on particular facts. That's a contrast with the State's earliest laws on this front during the Revolution. Second, it merely codified part of the governor's constitutional authority. *See* S.C. Const. art. XIII, § 3 (1895). Third,

it too contained no geographic limitation. And fourth, by 1922, this statute expressly contemplated the militia being used to help enforce "the laws of . . . of the United States." 1922 S.C. Acts No. 501, § 7.

In the following years, the General Assembly would continue to revise the State's military code, often after Congress had legislated on the National Guard. *Compare* 1917 S.C. Acts No. 2; 1922 S.C. Acts No. 501, *with* National Defense Act of 1916, Pub. L. 64-85 39 Stat. 166 (June 3, 1916); National Defense Act of 1920, Pub. L. 66-242, 41 Stat. 759 (June 4, 1920). But all the points made about both early statutes remain true today.[*] *See* 1917 S.C. Acts No. 2, §§ 7, 10 (codified at S.C. Code Civil §§ 547, 550 (1922)); 1922 S.C. Acts No. 501, §§ 7, 14; 1950 S.C. Acts No. 756, §§ 8, 15; 1964 S.C. Acts No. 996, § 1; 2001 S.C. Acts No. 85, § 21.

ii. Of course, during these years, governors were deploying the militia outside of South Carolina, based on events outside of South Carolina. Yet the General Assembly *never* sought to amend any of these statutes to try to limit the authority that governors were exercising. Instead, amendments to the State's military code followed changes to federal law (which typically came after major wars). That's significant. If the General Assembly had ever thought that a governor were going beyond his constitutional power, it could have passed legislation to try to limit the governor's power over the militia. Yet the General Assembly never did so.

3. The deployment to Washington, D.C. fits comfortably within the Governor's constitutional power.

This history shows that, for more than a century, the governor has enjoyed the

[*] In all the recent challenges to deployment of the National Guard over the past year, a federal district court in Washington, D.C. wrote in a footnote that section 25-1-1820 is "clearly a prohibition, not a grant of affirmative authority." *District of Columbia v. Trump*, No. 25-CV-3005 (JMC), 2025 WL 3240331, at *17 n.21 (D.D.C. Nov. 20, 2025). That court, however, never considered the governor's authority under the South Carolina Constitution, and its passing comment about this statute should carry no weight here.

constitutional power—without legislative infringement—to call the militia into active service and order it wherever in the United States that he deems appropriate. He has broad authority to call out the militia to "execute the laws" and "preserve the public peace." S.C. Const. art. XIII, § 3. Crime was rampant in Washington, D.C., and when the chief executive there asked for help, the Governor agreed to send it.

Governors have exercised this authority consistently for decades: Help with inaugurations, help with border security, help with the drug war, help with maintaining public order and security. All based on conditions in other jurisdictions, with the Guard sent to those jurisdictions under a governor's command. And under the Governor's calling-out power. *See* Gen. Stilwell Aff. ¶ 7. The Governor's decision to call out the Guard and deploy it to Washington, D.C. fits within both the text and historical practice as it has long been understood. *See Long*, 406 S.C. at 514, 753 S.E.2d at 426. So no matter what any statute may say, the Governor's constitutional power authorizes the deployment that Plaintiffs challenge.

CONCLUSION

For these reasons, the Court should reject Plaintiffs' claim and deny their requested relief.

Respectfully submitted,

s/William David Kelly III
William David Kelly III
(S.C. Bar No. 64864)
Agency General Counsel
OFFICE OF THE ADJUTANT GENERAL
1 National Guard Road
Columbia, South Carolina 29201
(803) 669-1965
deebo.kelly@scmd.sc.gov

Counsel for the Adjutant General

s/Wm. Grayson Lambert
Wm. Grayson Lambert (S.C. Bar No. 101282)
Chief Legal Counsel
Erica W. Shedd (S.C. Bar No. 104287)
Deputy Legal Counsel
Tyra S. McBride (S.C. Bar No. 103750)
Deputy Legal Counsel
Cameron R. Cox (S.C. Bar No. 107824)
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
glambert@governor.sc.gov
eshedd@governor.sc.gov
tmcbride@governor.sc.gov
ccox@governor.sc.gov

Counsel for Governor McMaster

March 20, 2026
Columbia, South Carolina