IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SOUTH CAROLINA STATE CONFERENCE OF THE NAACP; MARVIN NEAL; ROBYNNE CAMPBELL; DE'ONTAY WINCHESTER, *Plaintiffs,* v. ALAN WILSON, in his official capacity as Attorney General of South Carolina, *Defendant.*	Case No. 2:23-cv-01121-DCN

CONSOLIDATED BRIEF RESPONDING TO DEFENDANT'S MOTION TO DISMISS AND REPLYING IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The South Carolina NAACP and a number of its individual members seek to exercise their First Amendment rights to provide tenants facing eviction with desperately needed legal assistance. Instead of grappling with the serious First Amendment issues presented in this case, Defendant urges this Court to either dismiss Plaintiffs' suit for lack of jurisdiction or stay the case and require Plaintiffs to try their luck in the South Carolina Supreme Court. These arguments are grounded less in caselaw—the law on standing, ripeness, and *Pullman* abstention stands firmly against Defendant, as Plaintiffs explain below—and more in the sentiment that regulating the practice of law is the special province of the South Carolina Supreme Court in which federal courts cannot intrude. *See* ECF No. 35-3 at 1–3. But the U.S. Supreme Court has long placed First Amendment limits on states'

ability to regulate the practice of law. *See, e.g., Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964) ("[I]n regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution."). Because this Court has jurisdiction and because the requirements for abstention are not met, Plaintiffs' suit should proceed in federal court and Defendant's motion should be denied.

As to Plaintiffs' motion for a preliminary injunction, Defendant again punts on the merits. Rather than addressing Plaintiffs' likelihood of success—which is typically the determinative factor in the preliminary injunction analysis for a First Amendment case, *see Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 254–55 (4th Cir. 2003)—Defendant argues only that the other preliminary injunction factors are not met. But those factors are "inseparably linked" to the likelihood of success on the merits of Plaintiffs' First Amendment claims, *id.* at 254, and, in any event, Defendant's arguments falter: both Plaintiffs and tenants facing eviction will suffer irreparable harm if preliminary injunctive relief is not granted, and there is no public interest in banning Plaintiffs' efforts to speak with tenants and provide free support amidst a statewide eviction crisis. This Court should grant Plaintiffs' motion for a preliminary injunction without delay.

ARGUMENT

I. This Court Has Jurisdiction.

At the threshold, Defendant urges that Plaintiffs' First Amendment suit "must be dismissed under Rule 12(b)(1)" because it "presents no case or controversy or justiciable controversy." ECF No. 35-3 at 13–14. In particular, Defendant claims that Plaintiffs lack standing and their claims are not ripe. But Plaintiffs clearly do have standing, and their

claims are ripe: Defendant does not contest that Plaintiffs' intended speech and association would qualify as the "unauthorized practice of law" (UPL) under current South Carolina Supreme Court caselaw, and Plaintiffs would engage in that protected activity today if not for the real risk of prosecution under the State's UPL restrictions.

A. Plaintiffs have standing and their claims are ripe.

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. "The doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Id.* at 157–58 (alteration in original) (quoting *Lujan*, 504 U.S. at 560–61).

Although injury in fact is required, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (alteration in original) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). In particular, "[w]hen contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" *Id.* (second and third alterations in original) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Instead, it is enough that a plaintiff faces

"a credible threat of prosecution." *Cooksey v. Futrell*, 721 F.3d 226, 237 (4th Cir. 2013). This is particularly true in First Amendment cases, where "the injury-in-fact element is commonly satisfied by a sufficient showing of 'self-censorship, which occurs when a claimant is chilled from exercising [their] right to free expression.'" *Id.* at 235 (quoting *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011)); *see also Grimmett v. Freeman*, No. 22-1844, 2022 WL 3696689, at *1 (4th Cir. Aug. 25, 2022) ("In the First Amendment context, the Supreme Court has recognized that a plaintiff who has 'alleged a credible threat of enforcement' may generally 'bring a preenforcement challenge' in federal court." (quoting *Susan B. Anthony List*, 573 U.S. at 159)).

The Article III requirement of ripeness concerns the appropriate timing of judicial intervention and is "inextricably linked to [courts'] standing inquiry." *Cooksey*, 721 F.3d at 240. Particularly in the context of First Amendment pre-enforcement challenges, "Article III standing and ripeness issues" often "boil down to the same question."[1] *Susan B. Anthony List*, 573 U.S. at 157 n.5 (internal quotation marks omitted); *see also Cooksey*, 721 F.3d at 240 ("That standing and ripeness should be viewed through the same lens is evident from [defendants'] arguments on this point."). Moreover, "First Amendment rights . . . are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss" and "the special need to protect against any inhibiting chill." *Id.* at 240

[1] While Defendant's brief addresses standing and ripeness in separate sections, Defendant admits that these arguments largely overlap. *See* ECF No. 35-3 at 11 ("This case is not ripe for reasons similar to why the Plaintiffs lack standing."). Plaintiffs generally will refer to Defendant's jurisdictional arguments through the lens of standing, except where Defendant's arguments differ.

(quoting *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1500 (10th Cir. 1995)).

Plaintiffs have standing to bring a pre-enforcement challenge here, where the serious threat of criminal prosecution under South Carolina's UPL prohibition currently chills the exercise of their constitutional rights. Plaintiffs have alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt*, 442 U.S. at 298. As the U.S. Supreme Court has explained, that "satisfies the injury-in-fact requirement" for standing. *Susan B. Anthony List*, 573 U.S. at 159. Moreover, Plaintiffs have alleged that the credible threat of felony prosecution has caused them to refrain from speaking, making their standing even more apparent. *See Cooksey*, 721 F.3d at 235–36 (explaining that actual self-censorship based on a credible threat of prosecution is not required for standing but, when present, more than satisfies standing's injury-in-fact element).

Defendant does not dispute that Plaintiffs could be prosecuted for violating the UPL restrictions if they were to start engaging in their intended speech and associational activity. Nor could he: the South Carolina Supreme Court has issued multiple decisions prohibiting conduct similar to that in which Plaintiffs seek to engage. In *Doe v. Condon*, 532 S.E.2d 879 (S.C. 2000), the court held that a paralegal would engage in the unauthorized practice of law by "conducting unsupervised legal presentations for the public and answering legal questions for the public." *Id.* at 880. In light of *Doe v. Condon*, it is difficult to escape the conclusion that Plaintiffs' intended conduct—offering limited legal guidance about how

and when tenants should request hearings on their eviction actions and potentially raise certain defenses at those hearings—is also prohibited as UPL. And other cases from the South Carolina Supreme Court reinforce this conclusion: the court has designated as UPL providing "advice" to insureds by simply "pointing out the policy language." *See Linder v. Ins. Claims Consultants, Inc.*, 560 S.E.2d 612, 622 (S.C. 2002). The court has further explained that the fact that a non-lawyer "receive[s] no compensation" is "irrelevant" to whether their provision of advice is UPL, *Franklin v. Chavis*, 640 S.E.2d 873, 876 n.5 (S.C. 2007), so the fact that Plaintiffs' advice is free does not insulate them from possible UPL prosecution. *See also State v. McLauren*, 563 S.E.2d 346, 350 (S.C. Ct. App. 2002) (disregarding the fact that the individuals a non-lawyer is assisting free of charge are "without any other available means" of getting legal help).

The law does not require that the South Carolina Supreme Court weigh in on every case that the State wishes to prosecute as UPL: Defendant is free to prosecute so long as the "type of conduct" at issue has been deemed UPL in some prior case. *See* S.C. Code Ann. § 40-5-310 (2009). Plaintiffs have every reason to think that their intended speech and association is currently prohibited by the State's UPL restrictions, and Defendant does not disavow enforcement of the UPL restrictions against Plaintiffs.[2]

Defendant points to a handful of cases where the South Carolina Supreme Court has

[2] Even if Defendant were to disavow enforcement, Plaintiffs should not be forced to rely on the mercy of Defendant. *See, e.g.*, *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999) (noting with concern that "First Amendment rights would exist only at the sufferance of" the state if the court were to rely on the state's promise not to prosecute). Moreover, any promise from Defendant not to prosecute would not be binding on successors elected to his office.

allowed non-lawyers to engage in certain limited activities that touch on, but do not constitute, the practice of law. *See* ECF No. 35-3 at 4; *see also id.* at 9 (noting that "the Supreme Court has authorized other practices by non-lawyers"). Additionally, Defendant points to a pending proposal from paralegals, asking the South Carolina Supreme Court to carve out exceptions for certain legal activities that would otherwise be prohibited as UPL. *See* ECF No. 35-3 at 7–8 (citing ECF No. 35-1). Insofar as Defendant is invoking these examples to argue that Plaintiffs are bound to seek authorization from the Supreme Court, the law imposes no such exhaustion requirement. *See infra* Section I.B.

To the extent that Defendant suggests that the cited cases would apply to authorize Plaintiffs' intended activity, they do not: All were particularly context-specific, and, importantly, dealt with scenarios that either had "licensed South Carolina attorneys . . . involved at every critical step," *Boone v. Quicken Loans, Inc.*, 803 S.E.2d 707, 709 (S.C. 2017), or did not involve "giving . . . advice, consultation, explanation, or recommendations on matters of law," *Franklin*, 640 S.E.2d at 876; *see also id.* at 876–77 (holding that filling out a "straight-forward" probate form, "basically insert[ing] names, addresses, and dates," did not involve giving any "legal advice" and so was not the practice of law); *Medlock v. Univ. Health Servs., Inc.*, 743 S.E.2d 830, 831–32 (S.C. 2013) (holding that "complet[ing] a one-page standard form" for allowance of a claim in probate court likewise did not "entail specialized legal knowledge and ability" and so was not the practice of law); *Crawford v. Cent. Mortg. Co.*, 744 S.E.2d 538, 540, 542 (S.C. 2013) (holding that preparing and mailing loan modification documents, which did not involve "giv[ing] any legal advice," was not the practice of law).

Nor does the pending proposal from paralegals that Defendant repeatedly cites cover Plaintiffs' intended activity. That proposal from the South Carolina Board of Paralegal Certification seeks authorization for certified paralegals to "provide limited legal services in the areas of (1) Adult Name Changes; (2) Uncontested Small Estate Matters; and (3) [certain] Uncontested Divorce Matters." ECF No. 35-1 at 4, ¶ 5. As the titles of each of those activities reveal, the paralegals' proposal deals solely with matters in which there is no opposing party and does not address housing matters at all. Moreover, any carveout as a result of that proposal would apply only to "South Carolina Certified Paralegals," *see id.* at 7—a class that does not include Plaintiffs.

Plaintiffs' claims are also ripe for adjudication: Plaintiffs are not asking for "an abstract interpretation" of law, but rather "a clarification of the conduct that [they] can engage in without the threat of penalty." *Va. Soc'y for Hum. Life, Inc. v. FEC*, 263 F.3d 379, 390 (4th Cir. 2001), *overruled on other grounds by The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012). Plaintiffs have presented a detailed training guide laying out the speech they intend to engage in, *see* ECF No. 1-1; they have explained how that speech would place them at imminent risk of criminal prosecution, *see* ECF No. 4-1 at 9–12; and they have attested that the only reason they are currently refraining from that speech is because they fear prosecution at the hands of Defendant, *see* ECF No. 5 at 4, ¶ 12; ECF No. 7 at 3, ¶ 10; ECF No. 10 at 3, ¶ 15; ECF No. 11 at 3–4, ¶ 12. Particularly given "the special need to protect against any inhibiting chill" in the First Amendment context, *Cooksey*, 721 F.3d at 240 (quoting *New Mexicans for Bill Richardson*, 64 F.3d at 1500), the time to review Plaintiffs' claims is now.

B. No exhaustion requirement bars Plaintiffs' claims.

According to Defendant, Plaintiffs' claims are not currently justiciable for two main reasons: First, he argues that Plaintiffs should have exhausted a potential state-court avenue for relief by seeking special authorization for their intended speech and associational activity from the South Carolina Supreme Court. *See* ECF No. 35-3 at 8–10 (characterizing this as a standing issue); *see also id.* at 12–13 (characterizing this alternatively as a ripeness issue). And second, Defendant claims that there is no current risk of prosecution because Plaintiffs have not yet implemented their program, which *might* be approved by the South Carolina Supreme Court. *See id.* at 11 (characterizing this as a ripeness issue). But ample caselaw establishes there is no exhaustion requirement before bringing a First Amendment claim under § 1983, and Plaintiffs should not be required to wait to see if the South Carolina Supreme Court approves an exception to its general UPL prohibition—all while Plaintiffs' First Amendment rights are being chilled.

First, Defendant argues that Plaintiffs could have filed a petition (or written a letter) asking the South Carolina Supreme Court to provide special authorization for their program and exempt them from criminal prosecution for the unauthorized practice of law. According to Defendant, Plaintiffs cannot currently satisfy the strictures of Article III "because the law would not be enforced against them *if their program is approved*." ECF No. 35-3 at 11–12 (emphasis added). In other words, Plaintiffs do not have standing to bring their constitutional claims in federal court, and those claims are not ripe, unless and until Plaintiffs exhaust any potential avenue for relief in state court.

As a preliminary matter, Defendant does not dispute that Plaintiffs' intended activity

is prohibited by existing caselaw, and he does not suggest that the South Carolina Supreme Court would find, in the declaratory judgment action he insists Plaintiffs should file, that Plaintiffs' conduct does not involve the practice of law. Rather, Defendant suggests that Plaintiffs could get special authorization to engage in the practice of law. *See* ECF No. 35-3 at 2 (asserting that "the Supreme Court has 'otherwise authorized' the practice of law by various nonlawyer individuals and entities" and citing as support a single case from 1992 where that court rejected the South Carolina Bar's proposed rules governing the unauthorized practice of law). The South Carolina Supreme Court has invited parties to file actions in its original jurisdiction "to determine whether the conduct at issue involves the unauthorized practice of law." *In re Unauthorized Prac. of L. Rules Proposed by S.C. Bar*, 422 S.E.2d 123, 125 (1992); *see also* ECF No. 35-3 at 4 (citing cases that invoke that mechanism). But it has never invited parties to seek special authorization to engage in legal activities that, under its caselaw, *do* qualify as the unauthorized practice of law. Defendant points to one unanswered letter as proof that such a mechanism exists, *see* ECF No. 35-1, but that is no proof at all. And the Clerk of the Supreme Court of South Carolina stated only that, "[i]n some instances, a letter request for . . . approval of a program may be addressed in the original jurisdiction of the Supreme Court." *Id.* at 5, ¶ 10. In short, a pathway that Defendant presents as available to all and commonly invoked seems to be anything but.[3]

[3] And Defendant's attempt to rely on the Access to Justice Commission report to suggest that the South Carolina Supreme Court would be likely to grant Plaintiffs special authorization is misleading: the language Defendant quotes comes from the civil society groups that produced the report, not the court that authorized it. *See* ECF No. 35-3 at 6–7.

In any event, Defendant's standing and ripeness analysis is wrong. Standing and ripeness requirements are "relaxed" in the First Amendment context—not heightened. *Cooksey*, 721 F.3d at 235, 240. And yet Defendant seeks to heighten the standard by effectively subjecting Plaintiffs' First Amendment claims to an exhaustion requirement. Contrary to Defendant's assertion, Plaintiffs are not required to "avail[] themselves," ECF No. 35-3 at 3, of every possible avenue for relief before coming to federal court to vindicate their constitutional rights. *See Porter v. Nussle*, 534 U.S. 516, 523 (2002) ("Ordinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court."); *see also Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 500 (1982) ("[W]e have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies.") (collecting cases)). "[T]he settled rule is that 'exhaustion of state remedies is *not* a prerequisite to an action under [42 U.S.C.] § 1983.'" *Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019) (second alteration in original) (quoting *Heck v. Humphrey*, 512 U.S. 477, 480 (1994)) (discarding state-litigation requirement for takings claims).

Indeed, such delay would itself cause harm. In a First Amendment case like this one, where one aspect of the injury is that First Amendment rights are currently being chilled, forcing plaintiffs to exhaust potential state remedies in order to attain standing would prolong that constitutional injury. *See N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 & n.1 (4th Cir. 1999) (rejecting state's standing and abstention arguments, which asserted that the statute might not encompass plaintiff's First Amendment activity, where statute

was actively "chilling [plaintiff's] First Amendment rights"). The chance that Plaintiffs' program "might be authorized" by the South Carolina Supreme Court one day, *see* ECF No. 35-3 at 3, is no comfort when their First Amendment rights are being chilled today. And whatever interest there may be in avoiding constitutional questions, that interest is weakest "when there is a danger of chilling free speech." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged."). Standing and ripeness were satisfied at the time Plaintiffs filed their Complaint, and nothing requires them to spend months or years—*see* ECF No. 35-1 at 7 (authorization request pending for almost a year)—seeking exceptions from state law before challenging the violation of their constitutional rights. *See Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) ("[A] cognizable injury under the First Amendment is self-censorship, which occurs when a claimant is chilled from exercising her right to free expression." (internal quotation marks omitted)).

Defendant cites a number of cases in support of its exhaustion-requirement argument, but none undermine standing here. The decision in *Brokamp v. James*, 573 F. Supp. 3d 696 (N.D.N.Y. 2021), perhaps comes closest: Defendant quotes at length from the district court opinion finding that the plaintiff there did not have standing to bring an as-applied challenge to licensing requirements that barred her speech where she had not submitted to the regulatory regime by applying for a license. *See* ECF No. 35-3 at 10. But that opinion's standing analysis is wrong. Indeed, the Second Circuit recently confirmed

as much, reversing the district court on this point:

> [A]n application requirement is apt when a party complains that he is being denied a benefit that is not itself constitutionally guaranteed—*e.g.*, a club membership, admission to a private school, a job, a parking permit—for unconstitutional (or other unlawful) reasons. In those circumstances, because there is no legally cognizable injury until there is a denial, a party must apply for the benefit or allege that application would be futile to plead the injury element of standing.
>
> The same conclusion does not obtain in this case. . . . Brokamp's alleged First Amendment injury does not arise only upon application for or denial of a license. Rather, injury arises from the very fact of a licensure requirement which *presently* silences Brokamp—under pain of criminal prosecution—from engaging in the professed protected speech.

Brokamp v. James, 66 F.4th 374, 2023 WL 3102704, at *7 (2d Cir. 2023). That same logic applies here: Plaintiffs have standing because they presently are being silenced by the State's UPL restrictions. As in *Brokamp*, the "present chilling effect" of the UPL restrictions on Plaintiffs' speech "demonstrates actual injury sufficient for standing without need to submit a license application"—or, here, request special authorization from the South Carolina Supreme Court through the filing of a letter or declaratory judgment action. *Id.* at *8.

The remainder of the cases that Defendant invokes in support of his exhaustion requirement are inapposite. Defendant cites a series of out-of-circuit cases where plaintiffs alleged discriminatory decision-making or the denial of some government benefit, and, in those contexts, there was no cognizable injury until plaintiffs had actually sought and been denied that benefit. *See* ECF No. 35-3 at 9–10 (collecting cases). The fact that the exhaustion of some administrative process was necessary for standing in those circumstances does nothing to undermine the conclusion that Plaintiffs—who are currently

unable to exercise their First Amendment rights—have standing.[4]

Defendant's attempt to reframe his preference for a different process in the language of "prudential ripeness" fares no better. Defendant claims that, because the South Carolina Supreme Court has not reviewed Plaintiffs' program, Plaintiffs' case "present[s] an abstract issue that . . . is not subject to adjudication," comparing Plaintiffs' case to *Progressive N. Ins. Co. v. Chambers*, No. 2:19-CV-02684-DCN, 2020 WL 59608 (D.S.C. Jan. 6, 2020). ECF No. 35-3 at 13. This case is nothing like *Progressive*. The plaintiff in *Progressive* prematurely asked this Court for a declaratory judgment concerning its obligations to another private party in a theoretical future dispute that might never occur. *See Progressive*, 2020 WL 59608, at *2. But here, Plaintiffs' First Amendment rights are being curtailed now, and a decision from this Court enjoining enforcement action by Defendant would have real and immediate consequences. The possibility that the South Carolina Supreme Court might give Plaintiffs special dispensation to engage in their program, if such application were to be made, is beside the point and does not affect this Court's jurisdiction—whether the issue is characterized as one of standing or ripeness.

In a final effort to manufacture a jurisdictional problem, Defendant points out that "Plaintiffs have not implemented their program so no current risk of prosecution exists." ECF No. 35-3 at 11. That statement is true enough: Plaintiffs are refraining from

[4] And, in any event, a requirement to exhaust a state administrative proceeding is different in kind from the state-*litigation* requirement that Defendant seeks to impose here. *See Gracious Living Corp. v. Colucci & Gallaher, PC*, 216 F. Supp. 3d 662, 671 (D.S.C. 2016) (highlighting the distinction between a proceeding in the South Carolina Supreme Court and a "state administrative proceeding" and declining to send case to state court).

implementing their program to avoid prosecution. But Defendant further asserts that, because no current risk of prosecution exists, "[n]o injury is clearly impending in the instant case." *Id.* To the extent that Defendant suggests that Plaintiffs would not need to fear prosecution if their program were to be exempted from the UPL restrictions, that argument simply restates their exhaustion argument and is incorrect for the reasons stated above. Taken on its face, however, the argument fares just as poorly, as it is flatly contradicted by controlling precedent. The Supreme Court repeatedly has emphasized that, in a First Amendment pre-enforcement challenge, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (alterations in original) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Even though "[t]he plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution," it "does not eliminate Article III jurisdiction." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007).

The harm to Plaintiffs' First Amendment rights is not theoretical: it is happening now. A "case or controversy" exists here, and this Court has jurisdiction to address it.

II. This Court Should Not Abstain from Exercising Its Jurisdiction.

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). *Pullman* abstention provides a limited exception for "special circumstances" in which a court may decline to exercise its jurisdiction. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967); *see also Gracious Living Corp. v. Colucci & Gallaher, PC*, 216 F. Supp. 3d 662,

671 (D.S.C. 2016) ("The abstention principle is to be used only in very limited circumstances."). The Fourth Circuit has established that "[t]o apply the *Pullman* doctrine, at a minimum it must appear that there is (1) an unclear issue of state law presented for decision (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is potentially dispositive." *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 174 (4th Cir. 1983) (internal quotation marks omitted). Absent "difficult and unsettled questions of state law," a federal court should not abstain. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984).

Defendant argues that Plaintiffs' suit "should be stayed under *Pullman* abstention, while Plaintiffs apply to the [South Carolina] Supreme Court for the approval of their program." ECF No. 35-3 at 3. According to Defendant, "State law is most certainly unsettled"—and so *Pullman* abstention is warranted—"when the Supreme Court has provided an avenue to determine whether Plaintiffs' proposed program should be authorized, and Plaintiffs have not taken advantage of that opportunity." *Id.* at 15.

But this case presents no question of state law that is actually "difficult and unsettled." *Midkiff*, 467 U.S. at 236. "*Pullman* abstention is limited to uncertain questions of state law because '[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.'" *Id.* (alteration in original) (quoting *Colo. River*, 424 U.S. at 813). South Carolina's prohibition on UPL—which has existed since the early 1900s, *see State ex rel. Daniel v. Wells*, 5 S.E.2d 181, 183 (S.C. 1939) (interpreting UPL prohibition contained in 1932 Code), and was last updated in 2009—is not new, and the South Carolina Supreme Court has had frequent occasion to interpret the statute. *Cf. Shell Island Inv. v. Town of*

Wrightsville Beach, 900 F.2d 255, 1990 WL 41050, at *3 (4th Cir. 1990) (Table Opinion) ("The newness of the state statute and the absence of judicial precedent are significant considerations [for *Pullman* abstention]."). In those decisions, the South Carolina Supreme Court has left no significant doubt that the State's UPL prohibition covers the activities proposed by Plaintiffs. In none of those cases—including, as discussed, the precedents Defendant points to—has the South Carolina Supreme Court so much as suggested that anything about Plaintiffs' proposed activities would render them authorized in the eyes of the South Carolina Supreme Court. *See supra* Section I.A.

Notably, Defendant does not contend that South Carolina's UPL prohibition is unclear—or that it does not currently bar Plaintiffs' proposed program. Instead, Defendant again argues that Plaintiffs should ask the South Carolina Supreme Court to change its views about the reach of South Carolina's UPL prohibition. *See* ECF No. 35-3 at 15. But abstaining in these circumstances would make *Pullman* abstention the rule, not the exception: No matter how clearly state courts have previously interpreted a state law issue, a plaintiff who seeks to challenge an unconstitutional application of a state law in federal court could always hope that a state court might reverse course on that issue. Just as "[a] federal court may not properly ask a state court if it would care in effect to rewrite a statute," *City of Houston v. Hill*, 482 U.S. 451, 471 (1987), this Court should not ask the South Carolina Supreme Court "if it would care in effect to rewrite" its prior precedent or grant Plaintiffs an exception.

Nor do "principles of comity," ECF No. 35-3 at 15, require this Court to abstain from deciding this case. This Court has previously rejected a similar contention, in the

related context of *Burford* abstention,[5] that "traditional notions of comity" mean federal courts must abstain on any issue that involves the South Carolina Supreme Court's regulation of the practice of law. *Gracious Living Corp.*, 216 F. Supp. 3d at 671 ("[J]ust because South Carolina state courts have a role in policing the practice of law within the state does not mean that *Burford* abstention is appropriate here."). Where, as here, there is no "difficult or unsettled" question of state law, granting *Pullman* abstention simply as a matter of comity would unduly expand what should be a narrow exception to the courts' duty to exercise jurisdiction.

Finally, abstention is particularly unwarranted in this case in light of the nature of Plaintiffs' urgent First Amendment challenge. In a First Amendment case, "to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Koota*, 389 U.S. at 252; *see also Courthouse News Serv. v. Planet*, 750 F.3d 776, 787 (9th Cir. 2014) ("As in virtually every other First Amendment case, abstention here risks stifling the expression of both the plaintiff and the public."). Here, abstaining *would* continue to chill Plaintiffs' First Amendment rights. The overly broad decisions of the South Carolina Supreme Court have created a credible threat of prosecution, so, without

[5] *Burford* abstention applies only "when federal adjudication would 'unduly intrude' upon 'complex state administrative processes' because either: (1) 'there are difficult questions of state law whose importance transcends the result in the case then at bar'; or (2) federal review would disrupt 'state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *Gracious Living Corp.*, 216 F. Supp. 3d at 671 (quoting *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350, 361–63 (1989)). Defendant has not invoked *Burford* abstention, and it does not apply in this case.

injunctive relief, Plaintiffs cannot offer desperately needed legal assistance in the middle of an eviction crisis to the tenants they would like to help. And the delay caused by abstaining is likely to be considerable: The unrelated authorization request Defendant repeatedly cites to from the South Carolina Board of Paralegal Certification, *see* ECF No. 35-1 at 7–8, has been pending for nearly a year and "has been referred to the South Carolina Bar for comment," ECF No. 35-3 at 8—without any indication that the matter will soon be resolved. So, "[a]bstaining in this case portends particularly egregious damage to First Amendment rights because it stifles the free discussion of governmental affairs that the First Amendment exists to protect." *Planet*, 750 F.3d at 787 (internal quotation marks omitted); *see also S.C. State Conf. of NAACP v. Kohn*, No. 3:22-01007-MGL, 2023 WL 144447, at *5–6 (D.S.C. Jan. 10, 2023) (reasoning that the "value of respecting the policy decisions of the state judicial branch" is "outweighed by the importance of the [First Amendment] constitutional questions presented before the Court," and rejecting *Burford* and *Pullman* abstention in case challenging South Carolina Chief Justice and Court Administration's policy limiting access to court records).

As the Supreme Court has underscored, if the state law question "is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction." *Harman v. Forssenius*, 380 U.S. 528, 535 (1965). That rule is especially true here, where the South Carolina Supreme Court has left no ambiguity about the reach of

South Carolina's UPL prohibition, and where that prohibition bars Plaintiffs from exercising vitally important First Amendment rights.

There is no reason to abstain in this case. But even if this Court ultimately chooses to abstain on the merits, it should grant preliminary injunctive relief. While Defendant seems to assume that abstention would moot the motion for a preliminary injunction, *see* ECF No. 35-3 at 16, a "federal court may give whatever interim relief is appropriate to protect the party during the period of abstention." 17A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 4243 (3d ed. 2022); *see also Harrison v. NAACP*, 360 U.S. 167, 178–79 (1959) ("[T]he District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the appellees while [the state case] goes forward."); *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1144 (8th Cir. 2005) ("[W]e believe the proper balance was struck . . . where the court held that plaintiff's showing of a substantial likelihood of success on his federal claim, taking into account the uncertainty created by the issue prompting abstention, supported the grant of federal preliminary relief where the other equities strongly favored it.").

III. This Court Should Grant the Preliminary Injunction.

Finally, Plaintiffs are entitled to the preliminary injunction they seek. To prevail on their motion for a preliminary injunction, Plaintiffs must demonstrate that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As

explained in Plaintiffs' opening brief, Plaintiffs easily satisfy all four factors.

In just two-and-a-half pages of his brief, Defendant argues that this Court should not grant Plaintiffs' Motion for a Preliminary Injunction. *See* ECF No. 35-3 at 16–18. While entirely forgoing any defense on the merits, Defendant primarily argues that Plaintiffs have failed to show irreparable harm because their "program to assist tenants is not yet implemented." *Id.* at 17. Defendant argues that this conclusion "necessarily results in a failure to meet two other requirements, that the balance of the equities are in [Plaintiffs'] favor and that the public interest would be served by an injunction." *Id.* at 17. But, as will be explained below, Defendant is wrong on the law concerning irreparable harm, and thus wrong on all three of these factors.

A. Plaintiffs are likely to succeed on the merits.

Plaintiffs have demonstrated that they are likely to succeed on the merits of their First Amendment claims.[6] Plaintiffs rely on the arguments in their motion for a preliminary injunction, which Defendant has not made any effort to rebut. *See* ECF No. 4-1 at 13–35. Rather than responding to these arguments and "addressing the merits of Plaintiffs' proposed program," Defendant predicts that the Court will not need to reach this factor—and then asks this Court to allow Defendant another round of briefing if that prediction proves incorrect. ECF No. 35-3 at 18. Like any litigant responding to a motion, Defendant had one chance to argue against Plaintiffs' request for a preliminary injunction, and he has

[6] Plaintiffs are likely to prevail on both of their First Amendment claims, but injunctive relief is warranted so long as Plaintiffs demonstrate a likelihood of success on at least one of their claims. *See Roe v. Dep't of Def.*, 947 F.3d 207, 234 (4th Cir. 2020), *as amended* (Jan. 14, 2020).

failed to identify any reason for denying the injunction.

In deciding not to address the merits, Defendant has accepted the risk that this Court will view any arguments against the merits of Plaintiffs' First Amendment claims as forfeited for purposes of the preliminary injunction. And, indeed, this Court should consider such arguments forfeited: when Plaintiffs consented to Defendant's request for a 28-day extension to respond to their preliminary injunction motion, Plaintiffs assumed that the extra month was meant to give Defendant a chance to thoroughly address the merits of that motion. *See* ECF No. 13. Under these circumstances, and given the relentless pace of South Carolina's eviction crisis, Defendant should not be given another chance to do so.

In any event, there is reason to think that Defendant would agree with Plaintiffs' First Amendment analysis. Defendant very recently signed an amicus brief in the U.S. Supreme Court supporting broad First Amendment protection for speech and resisting the efforts of some states to restrict speech through licensing regimes. *See* Brief for Idaho et al. as Amici Curiae Supporting Petitioner, *Tingley v. Ferguson*, No. 22-942 (Apr. 26, 2023). In that brief, Defendant forcefully argued that "[s]peech itself is not a proper object of state police power," *id.* at 15, and cautioned that "[t]he line between speech and conduct must be vigilantly guarded to preserve the freedom of speech," *id.* at 14. The Fourth Circuit has also recently reaffirmed its commitment to "vigilantly guard[ing]" the line between speech and conduct: In *People for the Ethical Treatment of Animals, Inc. v. North Carolina Farm Bureau Federation, Inc.*, 60 F.4th 815 (4th Cir. 2023), the court held that "creating" information is subject to the same First Amendment scrutiny as "disseminating" information—declining to place plaintiff's undercover newsgathering activities on the

conduct side of the speech/conduct line—and therefore enjoined North Carolina from applying statutory provisions that would have restricted the plaintiff's activities. *Id.* at 841. Perhaps Defendant's silence on the merits of Plaintiffs' First Amendment claims reflects the knowledge that Plaintiffs' First Amendment arguments are fundamentally correct.

But whatever Defendant might think of the merits of Plaintiffs' First Amendment claims, he can have more time to argue the merits at a subsequent stage of this litigation—not now. If Defendant is willing to defer consideration of the merits, he should also be willing to allow preliminary injunctive relief in the interim—for this kind of delay is precisely why preliminary injunctive relief is so necessary.

B. Plaintiffs will suffer irreparable harm in the absence of an injunction.

Despite forfeiting his response on the merits, Defendant asserts that the "irreparable harm" factor of the preliminary injunction standard is not satisfied because "Plaintiffs' program to assist tenants is not yet implemented" and "[n]o irreparable harm can come from leaving that status in place." ECF No. 35-3 at 17. That is doubly wrong.

First, Defendant's proposition that there is no irreparable harm in continuing to chill speech is anathema to the First Amendment. "[T]he Supreme Court has explained that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Indeed, the Fourth Circuit has found that plaintiffs satisfied the especially demanding standard for an injunction pending appeal where they "credibly alleged" that their speech would "be chilled" by a state criminal prosecution. *See Grimmett v. Freeman*, No. 22-1844, 2022 WL

3696689, at *2 (4th Cir. Aug. 25, 2022). And in this case, the irreparable harm to those who would receive Plaintiffs' speech is also apparent: every day that Plaintiffs are prevented from speaking is a day that unrepresented South Carolinians go without the assistance they need to understand their eviction proceedings and fight to keep their homes. Defendant seeks to discount this harm on the basis that "[i]ssues affecting landlord tenant relations are not new." ECF No. 35-3 at 17. But the fact that South Carolina's eviction crisis is "not new" does not mean that the fresh harm to individual tenants evicted from their homes means nothing: for them, it means everything. The fact that so many tenants in South Carolina are suffering from a lack of information and advice—and that Plaintiffs seek nothing more than to provide that information and advice to them, for free—makes temporary equitable relief especially appropriate in this case.

Second, there is no categorical rule against temporary injunctions that would alter the status quo by, for example, making plaintiffs *more* able to exercise their constitutional rights. To the contrary, courts are perfectly capable of granting preliminary injunctive relief that alters the status quo, when such relief is warranted. *See, e.g.*, *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004) (finding that preliminary injunctive relief that altered status quo was appropriate).

To be sure, the irreparable harm analysis in a First Amendment case is, typically, "inseparably linked" to the merits of the First Amendment claim. *Newsom*, 354 F.3d at 254; *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002) (beginning with the merits of plaintiff's First Amendment claim because the merits and irreparable harm analyses were inseparably linked). But Defendant has made the curious

choice to argue against irreparable harm without reaching the question of Plaintiffs' likelihood of success on the merits. Thus, for purposes of the irreparable harm analysis, Defendant is necessarily arguing that there is no irreparable harm *even if* Plaintiffs would be likely to succeed on the merits of their First Amendment claims. That is an argument Defendant cannot win.

C. The remaining factors favor granting a preliminary injunction.

Finally, the remaining preliminary injunction factors also favor relief: the balance of equities strongly favors Plaintiffs, and injunctive relief serves the public interest. Defendant's only real argument in this regard is that allowing a preliminary injunction would somehow "substitute the United States District Court for the South Carolina Supreme Court and preempt [that court] in its duty to regulate the practice of law in South Carolina." ECF No. 35-3 at 17. This simply is not true. This Court, were it to grant preliminary injunctive relief, would not be making any judgment about what constitutes the unauthorized practice of law under South Carolina law; it would only be enforcing the outer bounds that the First Amendment places on any state's ability to prohibit speech—and even that it would be doing only on a temporary basis, until the merits of the case were decided. The courts have long enforced constitutional limits on states' ability to regulate the practice of law; that is nothing new. *See, e.g.*, *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 6 (1964) ("[I]n regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution."); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957) ("We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an

arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association.").

And even Defendant seems to acknowledge, if inadvertently, that allowing Plaintiffs to engage in their proposed speech and associational activity would benefit the public. *See* ECF No. 35-3 at 7 (noting that non-lawyer legal assistance may be especially appropriate, and especially necessary, in the housing space).

Ultimately, Defendant suffers no harm from the "issuance of a preliminary injunction which prevents it from enforcing a regulation, which . . . [as applied] is likely to be found unconstitutional." *Newsom*, 354 F.3d at 261. "If anything, the system is improved by such an injunction." *Giovani Carandola, Ltd.*, 303 F.3d at 521; *see also Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977) ("[T]he possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted."); *Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011) (noting that "upholding constitutional rights is in the public interest"); *Chandler v. Tech. Coll. of Lowcountry*, No. 9:22-CV-01969-DCN, 2022 WL 2670806, at *9 (D.S.C. July 11, 2022) ("Certainly, the public has a significant interest in upholding free speech principles . . . .").

This Court should grant Plaintiffs' motion for a preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' Motion for a Preliminary Injunction and deny Defendant's Motion to Dismiss.

Respectfully submitted,

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