STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
CHRISTOPHER PARKER; GERE B. FULTON; IAN WHATLEY; and **MICHAEL BROWN**,	)	C.A. No.: 2022-CP-40-04891
Plaintiffs,	)	
vs.	)	**MEMORANDUM IN RESPONSE TO GOVERNOR MCMASTER'S MOTION TO DISMISS AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**
HENRY McMASTER, *in His Capacity as Governor of the State of South Carolina;* **RICHARD ECKSTROM**, *in His Capacity as Comptroller General for the State of South Carolina;* **CURTIS M. LOFTIS JR.**, *in His Capacity as Treasurer for the State of South Carolina*; and **MOLLY SPEARMAN**, *in Her Capacity as Superintendent of Education for the State of South Carolina,*	)	
Defendants.	)	

INTRODUCTION

Less than two years ago, the South Carolina Supreme Court held that discretionary federal tuition grants routed through the State Treasury for use by private educational institutions was unconstitutional. Adams v. McMaster, 432 S.C. 225, 851 S.E.2d 703 (2020). This suit involves a variation on that same theme.

This past summer, the State of South Carolina included an earmarked appropriation of $1.5 million to a private religious educational institution in the State's 2022–23 annual budget. (See 2022 South Carolina Laws Act 239.) The intended beneficiary of the taxpayer funds, Christian Learning Centers of Greenville County, is a private nonprofit organization, which—by its own characterization—has been providing Christian biblical instruction to Greenville County public

school students for more than two decades. The appropriation at issue is intended to provide seed funding for CLC to open a residential school, was signed by the Governor into law on or about June 29, 2022, and explicitly violates two separate provisions of the State Constitution. See S.C. Const. Art. XI, § 4 & Art. I, § 2.

Regardless, the Governor has sought dismissal from this suit. And his motion should be denied, specifically because the inferences reasonably deducible from the allegations of the Complaint support a finding that the Governor facilitated the unconstitutional appropriation to CLC, and further, that he is an appropriate party with respect to the declaratory relief sought.

Additionally, because precedent demonstrates that Plaintiffs are likely to succeed on the merits of their constitutional claims, and because disbursement of the public funds will cause irreparable harm, Plaintiffs respectfully request that Defendants be temporarily enjoined from authorizing and disbursing public funds to Christian Learning Centers of Greenville County, in furtherance of the earmarked appropriation, so that the funds at issue are preserved while a hearing on the merits of Plaintiffs' demand for a declaratory judgment and permanent injunctive relief may proceed.

FACTUAL BACKGROUND

The South Carolina Constitution prohibits public funds to be used to directly benefit any religious or private educational institution. S.C. Const. Art. XI, § 4 (also referred to as the no-aid clause). Additionally, the South Carolina Constitution includes an Establishment Clause prohibiting the General Assembly from making any "law respecting an establishment of religion." S.C. Const. Art. I, § 2.

The 2022–23 South Carolina budget includes a $1.5 million appropriation to "Christian Learning Center [*sic*] of Greenville County." (2022 S.C. Acts No. 239, Part IB, §

118.19(B)(78)(h).) Christian Learning Centers of Greenville County ("**CLC**") is a private religious educational institution. (Compl. ¶¶ 21–32.) It "exists to provide biblical instruction to school-aged children." Id. ¶ 25.

CLC's CEO sent a proposal for building a "residential school" to Governor McMaster in May 2022. (Id. ¶ 34.) CLC posted a press release when the appropriation for "seed funding for a residential school" was included in the State's final budget. (Id. ¶¶ 35–36.)

The earmark appropriation to CLC was co-sponsored by Representatives Mike Burns and John McCravy. (Id. ¶ 37.) Representative Burns provided information to Governor McMaster regarding the proposed appropriation, including a project proposal, a federal tax form, and architectural drawings of the proposed school. (Id. ¶ 38.)

The Defendant Governor requested information regarding earmark appropriations via a Letter to Members of the General Assembly. (See Exec. Or. No. 2022-19, at 2 (July 1, 2022); Ltr. from Gov. McMaster to Members of the General Assembly (May 16, 2022); Gov. McMaster's Memo. in Opp. to Pls.' Mot. for a TRO and/or Preliminary Inj. and in Supp. of Gov. McMaster's Mot. Dismiss ("**Gov. Memo.**") at 4.) Executive Order No. 2022-19 was issued as part of the Governor's "initiative" to improve the transparency in the earmark appropriations process. (Gov. Memo. 4–5; see Exec. Or. No 2022-19, at 1 (noting that, "in many instances, these earmarked appropriations are not accompanied by sufficient information identifying the intended recipient of the public funds or the purposes for which such funds were appropriated and are intended to be utilized").) The Executive Order explains that the Letter was sent to the Members of the General Assembly "to ensure that sufficient context, description, justification, and information regarding earmarked appropriations be made available for South Carolinians to evaluate the merit of those

entities or projects funded with public funds and to enable the proper exercise of the [Governor's] authority to approve or veto the same. . . ." (Exec. Or. No. 2022-19 at 2.)

The Executive Order cites certain constitutional and statutory provisions which require that public appropriations must specify the purpose for which the funds are to be expended. (Id. at 3.) Specifically, the Constitution requires that "[b]ills appropriating money out of the Treasury shall specify the objects and purposes for which the same are made. . . ." S.C. Const. Art. IV, § 21. Also, "[i]t shall be unlawful for any monies to be expended for any purpose or activity except for which it is specifically appropriated. . . ." S.C. Code Ann. § 11-9-10. The Governor acknowledged that the leadership of the Senate and House of Representatives recently started to publicly disclose sponsors and recipients of earmarked appropriations, but that "additional safeguards are necessary to ensure that appropriations serve a valid public purpose and that the recipients expend the appropriations in accordance with the Appropriations Act and comply with other applicable law." (Exec. Or. No. 2022-19 at 1.)

That being said, the appropriation to CLC does not identify any object or purpose other than merely asserting that $1.5 million of taxpayer funds should be provided to CLC. (2022 S.C. Acts No. 239, Part IB, § 118.19(B)(78)(h).) The appropriation is listed under subsection (78), which is titled "State Department of Education." (Id.)

Expenditures listed under Section 118.19(B) "shall" be disbursed by the State Treasurer by September 30, 2022. (2022 S.C. Acts No. 239, Part IB, § 118.19(B).) Plaintiffs now understand that the September 30 deadline is the date by which the funds were actually disbursed to the Department of Education, (Gov. Memo. 20), where they ostensibly remain. However, before the funds can be disbursed to CLC, CLC must comply with Proviso 117.21, which merely requires the Department of Education to collect a form from CLC. (2022 S.C. Act. No. 239, Part IB, § 117.21;

Gov. Memo. 20.) CLC must comply with Proviso 117.21 because the funds "are a direct appropriation to a non-profit organization." (2022 S.C. Act. No. 239, Part IB, § 117.21.) Upon CLC's submission of the form, though, the Department of Education can request that the Comptroller General and Treasurer authorize the disbursement of funds to CLC. (Gov. Memo. 21.)

In support of the appropriation at issue, Governor McMaster has cited to a statement from CLC that was made after the earmark was made, after the budget was ratified, after the purpose of the appropriated funds was announced by CLC, and after the Complaint in this action was filed. (Gov. Memo. 6.) In this public statement, CLC—for the first time—indicated it now intends to use the earmarked funds to work with a company to start a public charter school. (Id.) More specifically, it "has publicly stated its intention to work with Reason & Republic, LLC." (Id.) "Reason & Republic is an education management organization that already operates three charter schools in South Carolina." (Id.) This is in clear derogation of express representations that CLC made to Representatives Burns and McCravy about the purpose of the funds sought, on which the General Assembly and Governor ostensibly relied in order to evaluate the earmark, and for which the appropriation (albeit unconstitutional) was ultimately approved.

Plaintiffs are taxpayers in the State of South Carolina. (Compl. ¶¶ 43, 50, 57 & 63.) All Plaintiffs oppose the use of taxpayer funds for religious instruction. (Id. ¶¶ 43, 50, 57 & 63.) Two Plaintiffs are residents of Greenville County and are familiar with the educational mission of CLC. (Id. ¶¶ 47 & 58.) Plaintiff Parker is a parent of students currently attending Greenville County Schools and opposes the use of public funds to aid CLC's evangelism and infiltration into the county's schools. (Id. ¶¶ 44 & 48.) Because Plaintiffs do not share CLC's religious beliefs, the unconstitutional appropriation of taxpayer funds to aid CLC's religious educational mission offends them and makes them feel excluded. (Id. ¶¶ 49, 51, 53, 55, 60, 62 & 67.)

LEGAL STANDARDS

Rule 8(a) requires the plaintiff to present "a short and plain statement of the facts showing that the pleader is entitled to relief." "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper." Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 74–75, 753 S.E.2d 846, 850 (2014).

Plaintiffs are entitled to temporary injunctive relief if they demonstrate that: (1) immediate, irreparable harm is likely to occur if an injunction is not granted; (2) their claims are likely to succeed on the merits; and (3) there is no adequate remedy at law. Greenville Bistro, LLC v. Greenville County, 435 S.C. 146, 160, 866 S.E.2d 562, 570–71 (2021). "To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is necessary to protect the legal rights pending in the litigation." Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005), holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010). The goal is to maintain the "status quo" and to prevent potentially irreparable harm during litigation. Greenville Bistro, 435 S.C. at 160, 866 S.E.2d at 569.

ARGUMENT

I. The Governor should not be dismissed from this suit because the inferences reasonably deducible from the factual allegations of the Complaint support the proposition that the Governor facilitated the unconstitutional appropriation to CLC.

Because of the historic lack of transparency in earmark appropriations, Governor McMaster sent a Letter to the Members of the General Assembly in May requesting detailed information for earmark appropriations. (Exec. Or. No. 2022-19, at 1–2.) Pursuant to the Governor's request for information, CLC's CEO pitched its proposed "residential school" project

with a request for funding to Governor McMaster by letter in May 2022, and Governor McMaster received information about CLC's proposed project from a co-sponsor of the earmark appropriation. An earmark appropriation to CLC was included in the 2022–23 budget. The budget, with the unconstitutional appropriation to CLC, was ratified in June 2022. (See 2022 S.C. Acts No. 239.)

A. The Governor is a key player in the earmark appropriation to CLC.

Laudably, Governor McMaster sent the Letter to the Members of the General Assembly requesting specific information regarding earmarks as part of his initiative for "additional safeguards" in the appropriation process. By sending the Letter and issuing the subsequent Executive Order No. 2022-19, the Governor inserted himself into the earmark appropriation process and, as a result, has placed himself in a position to help ensure proper accountability for the use of public funds. Which is appropriate, given the trust that the people of the State of South Carolina have reposed in his office.

Yet Governor McMaster insists that he is immune from participation in this suit. He is incorrect. The Governor is not entitled to legislative immunity because his actions go beyond the simple ministerial act of merely signing the appropriation to CLC into law. The Governor cites Charleston County School District v. Harrell, 393 S.C. 552, 713 S.E.2d 604 (2011), for the premise that a governor is not "an appropriate defendant in any suit where the constitutionality of a statute is challenged" simply because of his position as chief executive. Harrell, 393 S.C. at 561, 713 S.E.2d at 609. There must be a nexus between the governor and the challenged statute. Id. With the Letter to Members of the General Assembly and the subsequent Executive Order, Governor McMaster provided a nexus to earmarked appropriations, along with his admirable explanation for

doing so. Governor McMaster solicited information for the unconstitutional appropriation to CLC and approved of the unconstitutional funding.

Governor McMaster asserts that "the deliberations and information-gathering" stemming from his Letter cannot be the basis for any legal claims. (Gov. Memo. 10.) To allow these "internal deliberations" to support a lawsuit would hinder decision-making "for fear of litigation and discovery." (Id.) Unconvincingly, to support this assertion, the Governor cites only the infamous case in which the United States Supreme Court found that President Nixon had to provide such evidence in response to a subpoena. (Id. (citing United States v. Nixon, 418 U.S. 683 (1974).) Most damning for the Governor's assertion of privilege is the fact that the form attached to the Letter requesting the specific information about earmarks included the advisory that "any information provided would be subject to FOIA." (Gov. Memo. 5 & 10 n.3.) Perhaps the more appropriate takeaway from Nixon is that it was "the province and duty" of the Court to determine the scope of privilege. 418 U.S. at 705.

Governor McMaster, through his initiative to improve transparency in the earmark appropriations process, solicited and received information regarding the unconstitutional appropriation to CLC. Despite receiving information regarding CLC's proposed project from CLC and a co-sponsor, the purpose for the funds is not specified in the budget (other than to fund CLC directly), as required by statute and the Constitution. Aided by the Governor, the earmark appropriation stands as a direct and preferential appropriation to a private religious educational institution in violation of the South Carolina Constitution.

B. Governor McMaster should not be dismissed from suit because he is a proper party for a declaratory judgment to protect the rights of the public from future unconstitutional funding.

Plaintiffs have sought a preliminary injunction to stop the impending payment to CLC. Because Governor McMaster is not involved in the actual transfer of taxpayer funds out of the Treasury, Plaintiffs now concede that they are no longer pursuing a preliminary injunction as to Governor McMaster.

The Governor remains, however, a proper party for a declaratory judgment, because one purpose of a declaratory judgment "is to settle and to afford relief from uncertainty and insecurity with respect to rights." S.C. Code Ann. § 15-53-130. The Governor is in a position to ensure accountability for earmark appropriations and, specifically, his actions can reasonably be inferred to have facilitated the unconstitutional appropriation to CLC through his communications with CLC prior to ratification of the budget and his review of information about the appropriation pursuant to his Letter to the Members of the General Assembly soliciting such. Absent a declaratory judgment, there is a serious risk that Governor McMaster will continue to facilitate unconstitutional earmark appropriations that violate the rights of South Carolinians.

At this stage in this suit, the question is only whether the dots can be connected between Governor McMaster's actions to reasonably infer that he had *any* role in the unconstitutional appropriation to CLC making him a proper party in this suit under *any* theory. Plaintiffs have pled sufficient facts to support a plausible claim that connects the dots to the Governor's activity in the earmark process. Governor McMaster's communications with CLC and a co-sponsor of the unconstitutional appropriation placed himself in a position that facilitated the use of the public funds in an unconstitutional manner.

II. Plaintiffs have standing.

This matter concerns an unconstitutional act by government officials involving public funds. For these reasons, Plaintiffs have established legal standing based on a matter of public importance. Additionally, Plaintiffs have standing as taxpayers who will otherwise be negatively harmed by state funding given to a private religious educational institution and standing as individuals who will suffer harm in their local community.

A. Matter of Public Importance Standing

"[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004) (finding the question of whether a governor's eligibility to serve was affected by his holding a commission in the Air Force Reserve was an issue of public importance). Plaintiffs in a matter involving "the conduct of a government entity and the expenditure of public funds" have also satisfied standing as a matter of public importance. S.C. Pub. Int. Found. v. S.C. Dep't of Transp., 421 S.C. 110, 119, 804 S.E.2d 854, 859 (2017) (holding that the issue of whether the DOT may inspect bridges within private communities was a matter of public importance). Most recently, the South Carolina Supreme Court determined that the disbursement of state settlement funds is "indisputably" an issue of public importance. S.C. Pub. Int. Found. v. Wilson, No. 2021-000343, 2022 WL 4231250, at *3 (S.C. Sept. 14, 2022).

Most pertinent to this suit is the fact that the plaintiffs in a case involving unconstitutional funding in contravention of the no-aid clause established public importance standing. Adams, 432 S.C. at 236, 851 S.E.2d at 708. The Governor argues that Adams forecloses public importance standing in this case because no further or future guidance is needed given the fact that Adams was decided "less than two years ago." (Gov. Memo. 14.) Although the court in Adams did analyze the

same constitutional clause, it is not clear why future guidance is not required when government officials are attempting to circumvent the very same clause again but through a different method. The Governor seems to suggest that a declaratory judgment necessarily translates to precluding future guidance if the same constitutional clause is implicated. Unfortunately, there are no limits to the frequency or methods by which a constitutional mandate may be violated.

Additionally, the Governor is concerned that, if Plaintiffs establish public importance standing, it "would open up all manner of appropriations to legal challenges from *anyone* in the State." (Gov. Memo. 15 (emphasis in original).) Plaintiffs agree that *any* resident of South Carolina should be able to establish public importance standing when a matter of public importance requires future guidance, especially if the issue involves using public funds to contravene the South Carolina Constitution. Constitutional interpretation is the Court's duty. See Segars-Andrews v. Judicial Merit Selection Comm'n, 387 S.C. 109, 123, 691 S.E.2d 453, 461 (2010) ("It is the duty of this Court to interpret and declare the meaning of the constitution.").

Plaintiffs have established public importance standing because this matter involves the conduct of government officials and the unconstitutional expenditure of public funds through earmark appropriations to a private religious educational institution.

B. Taxpayer Standing

The State of South Carolina recognizes taxpayer standing to "challenge unauthorized or illegal governmental acts." Sloan v. Dep't of Transp., 379 S.C. 160, 169, 666 S.E.2d 236, 241 (2008). Allowing taxpayer standing provides "a system of checks and balances whereby taxpayers can hold public officials accountable for their acts." Sloan, 379 S.C. at 170, 666 S.E.2d at 241 (quoting Sloan v. Sch. Dist. of Greenville County, 342 S.C. 515, 523, 537 S.E.2d 299, 303 (Ct. App. 2000)).

The Governor incorrectly asserts that "South Carolina has abolished taxpayer standing." (Gov. Mot. Dismiss, ¶ 4.) He cites Bodman v. State, 403 S.C. 60, 742 S.E.2d 363 (2013), as support. (Id.) While the plaintiff in Bodman did not establish taxpayer standing, a concurrence is clear that taxpayer standing survives in South Carolina. 403 S.C. at 75–76, 742 S.E.2d at 371 (Pleicones, J., concurring) ("While we permit generalized taxpayer standing when an individual seeks equitable relief . . . Bodman does not seek an injunction but rather requests we strike down numerous statutory provisions."). Plaintiffs here seek an injunction and declaratory relief.

Taxpayer standing has also been satisfied since Bodman in a case originating in Richland County regarding the transportation penny tax. S.C. Pub. Int. Found. v. Richland County, 436 S.C. 271, 280–81, 871 S.E.2d 599, 604 (Ct. App. 2021) ("The circuit court ruled at the beginning stage of this case that Appellants possessed both taxpayer standing and public importance standing. . . . We will not rule on this argument. The County did not argue lack of standing on appeal.") The decision by the trial court judge is instructive: "Plaintiffs possess standing as citizens and taxpayers to seek declaratory and injunctive relief for an *ultra vires* act." S.C. Pub. Int. Found. v. Richland County, C.A. No. 2016-CP-40-02875, p. 7 (Mar. 3, 2017, Richland County Circuit Court) (Cooper, J.). The court differentiated Bodman and another case in which taxpayer standing was not established because "[t]he case at bar is not a mere zoning challenge nor is it a challenge to a legislative action by the General Assembly to provide tax exemptions to certain categories of commerce. This case constitutes a challenge to the method by which Defendants are using tax dollars the Plaintiffs claim is unlawful." Id. at 10 (internal citations omitted).

Likewise, Plaintiffs in this suit challenge the *ultra vires* actions of the Defendants and the unconstitutional use of tax dollars. The requirements for taxpayer standing are satisfied.

C. Individual Standing

Plaintiffs have alleged harms that are sufficient for standing purposes in cases involving governmental preference for particular religions. Under federal Establishment Clause jurisprudence, "[f]eelings of marginalization and exclusion are cognizable forms of injury." Moss v. Spartanburg County Sch. Dist. Seven, 683 F.3d 599, 607 (4th Cir. 2012) (citing McCreary County v. ACLU, 545 U.S. 844, 860 (2005)). These spiritual and value-laden injuries are sufficient Establishment Clause injuries-in-fact, "because one of the core objectives of modern Establishment Clause jurisprudence has been to prevent the State from sending a message to non-adherents of a particular religion 'that they are outsiders, not full members of the political community.'" Id. As such, these injuries "need not rest on a single isolated fact but can instead arise from multiple related factors." Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 258–59 (4th Cir. 2018), vacated on other grounds, 138 S. Ct. 2710 (2018); see also Deal v. Mercer County Bd. of Educ., 911 F.3d 183 (4th Cir. 2018).

All of Plaintiffs oppose State financial sponsorship of a religious institution with religious views different from their own, causing them to feel excluded by the official favoritism. Two of the individual plaintiffs are personally familiar with CLC's efforts in schools and expansion in Greenville County, reside in Greenville County, and oppose the sponsorship of the evangelical Christian organization that espouses religious beliefs contrary to their own.

III. Plaintiffs are entitled to a preliminary injunction against the Treasurer, Comptroller General, and the Superintendent of Education for the State of South Carolina.

Regardless of CLC's recently publicized and evolving future plans, the earmark appropriation directly benefits and preferentially funds a private religious educational institution. The facts justify the need for a preliminary injunction because Plaintiffs are at risk for irreparable harm with the impending payment to CLC. Plaintiffs are likely to succeed on both constitutional

claims because precedent compels a finding of constitutional violations, and there is no adequate remedy at law once public funds transfer to CLC.

A. Plaintiffs are at risk of imminent and irreparable harm with the impending unconstitutional funding to CLC.

The Governor argues that Plaintiffs are at no risk of irreparable harm from unconstitutional funding because "money is fungible." (Gov. Memo. 19 (quoting City of Myrtle Beach v. Tourism Expenditure Rev. Comm., 407 S.C. 298, 308, 755 S.E.2d 425, 430 (2014) (Hearn, J., dissenting)). Additionally, the Governor argues that "abstract" injuries such as feelings of marginalization claimed by Plaintiffs are not a recognized harm in South Carolina courts. (Gov. Memo. 20.) South Carolina case law does, however, recognize that the public suffers irreparable harm when a government entity does not follow the law, even when it involves fungible money. See Richland County v. S.C. Dep't of Revenue, 422 S.C. 292, 311, 811 S.E.2d 758, 768 (2018) (granting a preliminary injunction to halt misuse of a transportation penny tax because "the taxpayers of Richland County would suffer irreparable harm if the County is not required to follow the law"). Finding irreparable harm suffered by the Plaintiffs and other members of the public when the South Carolina Constitution is violated is a necessary corollary.

The Governor also asserts that, because the September 30, 2022 deadline for disbursal of the public funds only means the money is required to be disbursed to the South Carolina Department of Education, not CLC, by that date, there is no imminent risk for the funds to transfer "beyond the reach of this Court." (Gov. Memo. 20.) The Governor then explains that the funds cannot be paid to CLC until it submits the requisite form with the plan of how the funds will be spent to the Department of Education. (Gov. Memo. 20; see 2022 S.C. Acts No. 239, Part IB, §§ 117.21, 118.19(D).) Only once the form is submitted and the Department of Education authorizes payment can the appropriation process be completed by the Comptroller General and the

Treasurer. (Gov. Memo. 20–21.) In summary, the *only* step remaining before CLC can receive the unconstitutional appropriation is completing a form. Plaintiffs contend that these circumstances satisfy the definition of an imminent risk.

Nothing in the Appropriations Act or Proviso 117.21 provides an opportunity to stop the unconstitutional payment once the requisite form is completed. Even if the recipient has disclosed its intention to use the funds for a purpose other than the purpose for which the appropriation was made, in violation of State law, "there is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money." See State ex rel. Condon v. Hodges, 349 S.C. 232, 245, 562 S.E.2d 623, 630 (2002). As the Governor correctly recognizes, Plaintiffs do not allege that CLC has submitted the requisite form. (Gov. Memo. 20.) The reason for this omission is simple: Plaintiffs have no way to learn, on a timely basis, whether and when CLC may have submitted the form. Even if Plaintiffs submitted a FOIA request to the Department of Education on the very same day that CLC were to submit its form, Plaintiffs could not realistically anticipate a response to the FOIA request for at least thirty days. Consequently, absent an injunction to stop the appropriation process, CLC needs only to fill out a form to receive the public funds to use for whatever purpose it designates. Damage done, and none the wiser.

B. Plaintiffs are likely to succeed on the merits.

Plaintiffs' constitutional claims are likely to succeed on the merits because they satisfy standing on several bases, and the preferential funding of a private religious educational institution violates both the no-aid clause and the Establishment Clause of the South Carolina Constitution. To use a turn of phrase from the Governor's memorandum, the no-aid clause claim is on all fours with the analysis in Adams v. McMaster, 432 S.C. 225, 851 S.E.2d 703 (2020), the case in which

the South Carolina Supreme Court held that routing federal relief funds for tuition aid through the State Treasury to private schools violated the South Carolina Constitution. Additionally, the Establishment Clause claim is likely to succeed because there is no case law to support the Governor's interpretation that preferential public funding of a religious entity is allowed, let alone required. The Establishment Clause prohibits preferential funding of religious entities.

1. The appropriation to CLC violates S.C. Const. Art. XI, § 4 (no-aid clause).

The South Carolina Constitution protects the State's public education system by ensuring that "religious or private educational institution[s]" cannot directly benefit from public funds. S.C. Const. Art. XI, § 4.

CLC is a private religious educational institution. Per CLC, it *exists* to provide Christian biblical instruction. The appropriation to CLC for $1.5 million in the 2022–23 Appropriations Act is directed to CLC with no other purpose indicated. (2022 S.C. Acts No. 239, Part IB, § 118.19(B)(78)(h).) *Regardless* of CLC's plans for the public funds, this is an appropriation directly benefiting a private religious educational institution.

The Governor incorrectly argues that this claim fails because CLC made a statement that it has begun the process of planning a public charter school. (Gov. Memo. 17.) This argument fails on several levels. First, it does not matter what CLC plans to use the funds for; the appropriation is directed to CLC, and, as long as CLC is a private religious educational institution, the no-aid clause is violated. Second, CLC has not yet begun the process to become a charter school. See S.C. Code Ann. § 59-40-10 et seq. Working with "an education management organization" is not a step in the statutory process to becoming a charter school. Id. The Governor compares the appropriation to CLC to appropriations for established charter schools in the Appropriations Act. (Gov. Memo. 17.) Notably, the Governor does not cite to any appropriations to charter schools prior to their

existence. If and until CLC establishes a charter school, it remains a private religious educational institution.

Third, even if CLC successfully pursues the opening of a charter school, it is beyond Plaintiffs' comprehension as to how either CLC or the Governor perceives CLC could operate a charter school to provide Christian biblical education. The South Carolina Supreme Court has specifically and explicitly held that charter schools are state actors:

> Section 59-40-40(2)(a) of the South Carolina Code provides that a charter school "is, **for purposes of state law and the state constitution**, **considered a public school** and part of the South Carolina Public Charter School District, the local school district in which it is located, or is sponsored by a public or independent institution of higher learning." S.C. Code Ann. § 59-40-40(2)(a) (Supp. 2013). Section 59-17-10 of the South Carolina Code provides, in part, that "[e]very school district is and shall be a body politic and corporate . . . of . . . the State of South Carolina." S.C. Code Ann. § 59-17-10 (Supp. 2013); *Camp v. Sarratt*, 291 S.C. 480, 481, 354 S.E.2d 390, 391 (1987). In its order awarding attorney's fees, the trial court found that under section 59-40-40(2), when read together with sections 59-40-40(1) and 59-40-50, **a charter school is considered a state entity** and is subject to the provisions of section 15-77-300. We agree with the trial court's conclusion.

McNaughton v. Charleston Charter Sch. for Math & Science, Inc., 411 S.C. 249, 266, 768 S.E.2d 389, 398 (2015) (emphasis added).

Plaintiffs are aware of no legal theory under which a South Carolina public school could lawfully provide a Christian biblical education to its students. And we are skeptical that CLC or the Governor are aware of such authority, either.

Ultimately, the information regarding CLC's plans for the use of public funds has been provided only by CLC, despite the constitutional and statutory requirements that the purpose for public expenditures must be specified. See S.C. Const. art. IV, § 21, S.C. Code Ann. § 11-9-10. As it stands, the appropriation is simply stated as "Christian Learning Center [sic] of Greenville County"—$1.5 million. The State is not permitted to fund CLC, as it existed at the time of the appropriation, as it exists today, and ostensibly how CLC intends to exist in the future.

In any event, when CLC submits the required form to comply with Proviso 117.21 to receive the earmark appropriation, there is no oversight to ensure that CLC's plans for the funds at that date will actually align with the purpose ostensibly relied upon by the General Assembly and Governor McMaster. A response to a FOIA request from the Governor's office confirms that, in May, CLC presented a project proposal for a residential school, in which CLC intends to continue Christian biblical instruction.[1] The only requirement per the Appropriations Act is that the public funds be directed to CLC, a private religious educational institution. Public funds for the purpose of CLC violates the no-aid clause.

2. The appropriation to CLC violates S.C. Const. Art. I, § 2 (Establishment Clause).

"The General Assembly shall make no law respecting an establishment of religion. . . ." S.C. Const. Art. I, § 2. Plaintiffs agree with the Governor that federal law controls interpretation of the South Carolina Establishment Clause. See Hunt v. McNair, 258 S.C. 97, 103, 187 S.E.2d 645, 648 (1972), aff'd, 413 U.S. 734 (1973) (finding that the federal Establishment Clause and South Carolina's Establishment Clause "are, for all intents and purposes, the same"). The Establishment Clause prohibits the government from directly using taxpayer money for religious instruction. See, e.g., Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 778–79 (1973) (striking down government-subsidized maintenance and repair of nonpublic schools), McCollum v. Bd. of Educ., 333 U.S. 203, 210 (1948) (finding that the use of the tax-supported public school system to aid religious groups in religious instruction "falls squarely under the ban of the First Amendment").

[1] See **Exhibit O**, which are documents provided by Governor McMaster to Plaintiffs' counsel on Nov. 20, 2022, in response to a FOIA request.

Recent federal Free Exercise cases, such as Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017), limit the exclusion of religious organizations from defined public benefit programs. However, the recent cases involving public funding of schools are more closely related to the issue in this suit. There, it is clear that "a State need not subsidize private education." Carson v. Makin, 142 S. Ct. 1987, 1997 (2022) (quoting Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020)).

The primary difference between the earmark appropriation to CLC and the funding in Trinity Lutheran, Espinoza, and Carson is that the latter cases involved government defined *programs*. 137 S. Ct. at 2017 ("playground resurfacing program"); 140 S. Ct. at 2254 ("scholarship program"); 142 S. Ct. at 1993 ("program of tuition assistance"). The Governor contends that "State-appropriated money is available to the public generally, and earmarks go to a wide variety of public recipients;" therefore, State funds, including earmarks, are a generally available benefit. (Gov. Memo. 18.) Because Trinity Lutheran and its companions hold that a religious entity cannot be denied "a generally available benefit solely on account of religious identity," the Governor makes the leap to alleging that CLC must be given access to State funds because it is a religious organization. 137 S. Ct. at 2019. Trinity Lutheran, in fact, contradicts this conclusion because the Court was clear that the church did "not claim[] any entitlement to a subsidy. It instead assert[ed] a right to participate in a government benefit program. . . ." Id. at 2022.

The Free Exercise Clause does not require specially earmarked public funding to a religious organization. To assert that CLC is entitled to an earmark appropriation misinterprets Trinity Lutheran. Without this appropriation, CLC is not excluded from any government benefit program. Additionally, Espinoza and Carson clearly state that public education can be prioritized to the exclusion of all private education. South Carolina prioritizes public education.

The Establishment Clause does not allow unrestricted public funding to CLC. The earmark appropriation is not a generally available benefit; it is preferential funding of a religious organization.

C. There is no adequate remedy at law once CLC receives unconstitutional funding.

"[P]reservation of the property at issue" is the only adequate remedy "until the matter has been adjudicated." Grosshuesch v. Cramer, 367 S.C. 1, 5, 623 S.E.2d 833, 835 (2005) (finding that a preliminary injunction was appropriate when financial accounts were in dispute). As discussed previously, taxpayers suffer irreparable harm when a government entity is not required to follow the law. See Richland County v. S. C. Dep't of Revenue, 422 S.C. 292, 311, 811 S.E.2d 758, 768 (2018).

The Governor argues that money is fungible and, "[i]f CLC receives the appropriation and the courts ultimately determine CLC is not entitled to that appropriation, CLC can return the funds." (Gov. Memo. 19–20.) Even if money is legally fungible, there is no remedy for the irreparable harm caused by misuse of public funds and the state extending credit to CLC. It is also extremely unlikely that the $1.5 million will be able to be recouped and returned to the Treasury once it is spent by CLC on its school construction project, much less voluntarily returned. And that leads to the ultimate question: *if CLC receives funding which is later determined to have been an unconstitutional appropriation, and CLC won't give it back to the State, who will make them?* The Governor has not volunteered his services, and it does not seem as though he has any answers.

Once the funds are distributed to the private entity CLC, Plaintiffs and other taxpayers of South Carolina may have no legal remedy to recover the funds, and they have no remedy to address the credit that the State leant to CLC, which is also prohibited under S.C. Const. Art. XI, § 4.

III. A bond of $100 is sufficient.

Per Rule 65(c), Plaintiffs must post security in an amount that the Court deems proper. In this case, since Defendants will not be harmed by an injunction, if any bond is required, a small bond should be sufficient. Although the Governor does not specify an amount, he indicates that a substantial bond would be required. (Gov. Memo. at 22.) This contravenes the meaning and purpose of Article XI, § 4, which could only be enforced by wealthy individuals if the constitutional provision is allowed to be violated unless a bond is paid. This suit involves private citizens acting to further the State's interests, to enjoin the State from making an unlawful distribution in order to preserve the State's assets, which means a bond requirement of any significant amount makes little sense.

In Adams, the Honorable Edgar W. Dickson, Circuit Court Judge, ordered a bond of $100 "as there [was] minimal risk of financial harm to the State." See Am. TRO in Adams v. McMaster, July 22, 2020, C.A. No. 2020-CP-38-0074. Governor McMaster asserts that the bond should be in an amount "sufficient to protect the General Assembly's $1.5 million appropriation challenged." (Gov. Memo. 22.) The best protection for public funds is that they remain in the custody of the State Treasury until a hearing on the merits. Defendants will not suffer any loss whatsoever by maintaining the status quo.

CONCLUSION

The Governor's Motion to Dismiss must be denied as Plaintiffs have properly asserted standing and the Governor is not immune from suit for declaratory relief relating to his solicitation and approval of unconstitutional earmarks under S.C. Const. Art. XI, § 4, and Art. I, § 2. Plaintiffs' Motion for a Temporary Restraining Order and for a Preliminary Injunction should be granted, enjoining the Secretary of Education, Treasurer, and Comptroller General from administering,

processing, or transferring public funds to Christian Learning Centers of Greenville County under the appropriation provided in Part IB, item 118.19(B)(78)(h) of the 2022–23 annual budget. An order providing for this relief, and such other and further relief as may be deemed just and proper, is respectfully requested.

Respectfully submitted,

s/ Steven Edward Buckingham

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham, LLC
16 Wellington Avenue
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

November 23, 2022
Greenville, South Carolina