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

Justice 360, Plaintiff, vs. Bryan P. Stirling, Director of the South Carolina Department of Corrections; and Alan Wilson, South Carolina Attorney General, Defendants.	Civil Action No. 3:20-cv-03671-MGL DIRECTOR STIRLING'S MOTION TO DISMISS AND OPPOSITION TO MOTION FOR INJUNCTIVE RELIEF

This case presents a classic example of when a federal court should abstain from exercising jurisdiction over an action. Through its amended complaint, the Plaintiff asks this Court to essentially serve as an appellate court for a state-level decision, consider a South Carolina statute that has never before been construed by the State Supreme Court, assume a construction that has never been articulated by any court, and then declare that assumed construction to be unconstitutional. The Court should abstain from going down this path of last resort pursuant to the *Rooker-Feldman* doctrine, *Younger* abstention, and *Pullman* abstention.

Moreover, even if the Court declines to abstain, the relief the Plaintiff seeks finds no precedent in jurisprudence nationally. The Plaintiff argues that, as a matter of its attorney-client relationship with inmates, it must be entitled as a constitutional matter to access certain information regarding the State of South Carolina's execution protocols that the State has determined to be confidential.[1] But courts reviewing similar claims by inmates themselves hold that an inmate—

[1] To this point, the Department of Corrections ("SCDC") offered to allow Plaintiff to confidentially review the execution protocols, but Plaintiff declined the offer. Thereafter, SCDC sent a letter to Plaintiff disclosing each of the three drugs used in the lethal injection process,

that is, the client in the attorney-client relationship alleged by this Plaintiff—does not have such a right.

Accordingly, the Court should both deny the request for injunctive relief and dismiss this case because, as explained below, the Court lacks jurisdiction to consider the Plaintiff's case, which also fails as a matter of law if considered on its merits.

BACKGROUND

The facts underlying this case are simple and straightforward. The General Assembly has deemed certain information regarding executions in South Carolina to be confidential:

> A person may not knowingly disclose the identity of a current or former member of an execution team or disclose a record that would identify a person as being a current or former member of an execution team. However, this information may be disclosed only upon a court order underseal for the proper adjudication of pending litigation. Any person whose identity is disclosed in violation of this section shall have a civil cause of action against the person who is in violation of this section and may recover actual damages and, upon a showing of a willful violation of this section, punitive damages.

S.C. Code Ann. § 24-3-580. This statute was passed in 2010, and it does not appear to have been construed or addressed by any appellate decision in South Carolina since its passage, though the South Carolina Attorney General has opined that the statute should be construed broadly to accomplish the remedial purpose for which it was passed. *See generally* Op. S.C. Atty. Gen., 2015 S.C. AG LEXIS 62 (July 27, 2015).

---

potentially mooting this matter without any need for further judicial involvement. *See, e.g.*, *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1209–11 (10th Cir. 2012) (dismissing as moot litigation when a coordinate branch of government had already provided a remedy similar to that sought by the plaintiff, and finding such dismissal necessary for separation-of-powers purposes); *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 25–26, 630 S.E.2d 474, 477–78 (2006) (affirming dismissal of a FOIA suit as moot when the public body voluntarily provided the plaintiff with records sought through the litigation).

The Plaintiff alleges that it is a "non-profit organization that provides legal representation to death sentenced inmates," including in South Carolina. (Am. Compl. ¶ 4 (Dkt. No. 21).) It alleges that, as counsel, it must have access to information regarding the State's execution protocols and that its "professional speech rights," "political speech," and "associational rights" are impaired if it does not have such access. (*E.g.*, *id.* ¶ "Wherefore"(a), (b), (c).) To this end, the Plaintiff asks the Court to declare South Carolina Code § 24-3-580 to be unconstitutional pursuant to the First and Eighth Amendments. (*Id.*)

The Plaintiff filed this constitutional challenge on October 19, 2020. Shortly thereafter, the Plaintiff or its affiliates blanketed the state judiciary with new litigation attacking this same statute. On November 12, 2020, the Plaintiff filed a suit in the Richland County Court of Common Pleas in which it claims an entitlement to information regarding the State's execution protocols as a matter of the South Carolina Freedom of Information Act. (Ex. A, *Justice 360 v. South Carolina Department of Corrections*, Case No. 2020-CP-40-5306 (Richland County Comm. P.).) Four days later, in-house counsel for the Plaintiff made two filings with the South Carolina Supreme Court in which they raised constitutional challenges to this statute: a Petition for Original Jurisdiction and Declaratory Relief (Ex. B, *Moore v. Stirling* (S.C. Sup. Ct.); and a Petition for Writs of Certiorari and Mandamus (Ex. C, *Moore v. Stirling* (S.C. Sup. Ct.).)

On November 20, 2020, the South Carolina Supreme Court denied the latter of these requests. (Ex. D, Order in *Moore v. Stirling* (S.C. Sup. Ct.).) And on November 25, 2020, the circuit court denied the Plaintiff's request for a declaratory judgment, finding that disclosing the requested information "would clearly affect the security of the participants, process and facilities."

(Ex. E, Order in *Justice 360 v. South Carolina Department of Corrections*, Case No. 2020-CP-40-5306 (Richland County Comm. P.).)[2]

The duplicative state-level matters make it clear that abstention pursuant to Rule 12(b)(1), and dismissal pursuant to Rule 12(b)(6), are appropriate, as discussed below.

ARGUMENTS AND AUTHORITIES

I. Plaintiff's brief confirms that this case is designed to undo the state court's judgment, which is beyond a federal court's jurisdiction.

The state court's denial of Plaintiff's FOIA request is unimpeachable in this Court. The thesis of both Plaintiff's amended complaint and motion for TRO and preliminary injunctive relief is that the state court's decision is wrong and should be declared so by a federal court. However, this is exactly what the *Rooker-Feldman* doctrine prohibits. Accordingly, the Court should readily dismiss this case for lack of subject matter jurisdiction.

Both the United States Supreme Court and the Fourth Circuit have been clear that a federal trial court cannot serve as an appellate court for state-level judgments. *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 531–32 (2011) (explaining that the *Rooker-Feldman* doctrine bars federal courts from exercising jurisdiction over cases where "[t]he losing party filed suit in a U.S. District Court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking federal-court review and rejection of that judgment"); *Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 199 (4th Cir. 1997) (explaining that the *Rooker-Feldman* doctrine extends to claims that are "inextricably intertwined with a state court judgment").

[2] Though these materials are provided in support of dismissal pursuant to Rule 12(b)(1), the Court may likewise consider them in conjunction with a Rule 12(b)(6) motion, as they are matters of public record. *See Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) ("In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record.").

This is precisely what Plaintiff is asking the Court to do here. Both of Plaintiff's latest arguments seek the same information it requested in the state court. Under each, Plaintiff argues that this case should be permitted to proceed because, in its view, the underlying statute is unconstitutional despite failing to raise this issue before any state court and unsuccessfully seeking access to the information pursuant to FOIA at the state level. For example:

- Issue 1: "Justice 360 has a First Amendment Right to the Execution Protocols." (Dkt. No. 23-1, at 16.)
- Issue 2: "As-Applied to Justice 360, the Identity Statute is also an impermissible form of content discrimination and viewpoint discrimination." (*Id.* at 27.)

Virtually every filing from Plaintiff, or its affiliates, seeks access to information that the state courts have so far denied. Because the *Rooker-Feldman* doctrine specifically prohibits federal courts from considering the claims and arguments Plaintiff has presented, this Court should dismiss this case for lack of jurisdiction. Importantly, it is clear that success on this claim would effectively nullify the order of the state court. *See Alvarez v. Att'y Gen. for Fla.*, 679 F.3d 1257, 1264 (11th Cir. 2012) (finding no error in district court holding that *Rooker–Feldman* barred it from exercising subject matter jurisdiction, holding that "Alvarez's as-applied procedural due process challenge boils down to a claim that the state court judgment itself caused him constitutional injury by arbitrarily denying him access to the physical evidence he seeks under Florida's concededly constitutional procedures. It is abundantly clear that success on this claim would effectively nullify the state court's judgment and that the claim would succeed only to the extent that the state court wrongly decided the issues."); *McKithen v. Brown*, 626 F.3d 143, 154–55 (2d Cir. 2010) (holding that *Rooker–Feldman* barred the claim that "the state court incorrectly and unconstitutionally interpreted the [New York DNA] statute by not assuming exculpatory

results," and noting that '[t]he proper vehicle for McKithen to challenge the state court's interpretation of [the statute] was an appeal to the New York Appellate Division.").

II. The Court should abstain from addressing this constitutional challenge.

It is well-settled that federal courts have the discretion to abstain from adjudicating disputes that essentially involve matters of state law or state policy. As the Fourth Circuit has observed: "The Supreme Court has admonished the federal courts to respect the efforts of state governments to ensure uniform treatment of essentially local problems. Principles of federalism and comity require no less. Basic abstention doctrine requires federal courts to avoid interference with a state's administration of its own affairs." *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 719 (4th Cir. 1999) (internal citations omitted).

At least two separate grounds for abstention are present here. The first, *Younger* abstention, directs a federal court to abstain from adjudicating a matter when a related proceeding exists at the state level. The other, *Pullman* abstention, is appropriate where the federal court can avoid unnecessary constitutional rulings by allowing a state's courts to clarify the state's own law.

A. *Younger* abstention is applicable because there are pending state-level proceedings that involve important state interests.

Younger abstention, which is based on the Supreme Court's holding in *Younger v. Harris*, 401 U.S. 37 (1971), is applicable where a federal court's consideration of a matter would interfere with pending state-level proceedings. As the Fourth Circuit describes:

> The *Younger* doctrine expresses "a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." The doctrine recognizes that state courts are fully competent to decide issues of federal law, and has as a corollary the idea that all state and federal claims should be presented to the state courts.

Richmond, Fredericksburg & Potomac R.R. Co. v. Forst, 4 F.3d 244, 251 (4th Cir. 1993) (citations omitted). The Fourth Circuit further explains that *Younger* abstention "command[s] federal

restraint when the federal action is duplicative, casts aspersion on state proceedings, disrupts important state enforcement efforts, and is designed to annul a state proceeding." *Moore v. City of Asheville*, 396 F.3d 385, 394–95 (4th Cir. 2005); *see also Beam v. Tatum*, 299 F. App'x 243, 246 (4th Cir. 2008) (reminding that *Younger* abstention reflects a "[s]ensitiv[ity] to principles of equity, comity, and federalism").

In order for *Younger* to be applicable, there must be (1) an ongoing state proceeding (2) that implicates important state interests (3) in which there is an adequate opportunity to raise federal claims. *Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006). Here, all three factors are readily satisfied.

1. There is an ongoing proceeding before the Richland County Court of Common Pleas involving the same parties and subject matter presented here.

The Plaintiff's own conduct triggers *Younger*'s first element. Virtually concurrent with commencing this case, the Plaintiff filed a competing lawsuit in the Richland County Court of Common Pleas claiming an entitlement under the South Carolina Freedom of Information Act to the same execution protocols sought in this case. (Ex. A, *Justice 360 v. South Carolina Department of Corrections*, Case No. 2020-CP-40-5306 (Richland County Comm. P.).) Though the circuit court initially denied the Plaintiff its requested declaratory judgment, the deadlines for seeking reconsideration or appealing that ruling have not yet lapsed, and this ongoing proceeding presents South Carolina Code § 24-3-580 for review and potential construction by a state court.

2. South Carolina has significant interests in the administration of its penal code and identifying what information may be publicly available.

Younger's second prong is likewise met here. A state interest will justify federal abstention when it speaks to "[f]unctions which make our states self-governing sovereigns, rather than 'mere

political subdivisions' or 'regional offices'" of the United States government. *Harper v. PSC of W. Va.*, 396 F.3d 348, 352 (4th Cir. 2005).

The State's administration of its own criminal code is, of course, an essential part of South Carolina's sovereign operations; *Younger* itself arose out of a criminal proceeding. So, too, is its interest in deciding what information will be publicly available and what information must remain confidential. *See, e.g., S.C. Ass'n of Sch. Adm'rs v. Disabato*, 460 F. App'x 239, 243 (4th Cir. 2012) (affirming dismissal of case pursuant to *Younger* abstention and explaining that judicial review of the South Carolina Freedom of Information Act, which is the statute that establishes what information may be provided to the public, meets *Younger*'s second factor because such laws are "vital").

The State's interests in protecting this information under Section 24-3-580 is particularly acute here in light of the vexatious conduct that can target those who participate in a state's execution process. *See generally In re Lombardi*, 741 F.3d 888, 894 (8th Cir.2014) (en banc) (referring to an October 2013 letter "from a compounding pharmacy . . . that demanded the Texas Department of Criminal Justice return a supply of compounded pentobarbital sold for use in executions, because of a 'firestorm,' including 'constant inquiries from the press, the hate mail and messages,' that resulted from publication of the pharmacy's identity").[3]

3. The Plaintiff can raise its claims in the state-level proceedings.

The final prong of the *Younger* analysis is also met, as the Plaintiff will have every opportunity to raise its constitutional claims in the pending state-level proceedings. To be sure,

[3] The State's interest in protecting this information is a real concern as evidenced by Plaintiff's own admission: "I also cannot fulfill Justice 360's mission of providing the public with information about the administration of the death penalty in South Carolina. One of the most frequently asked questions from the public is about the methods of execution used in South Carolina." (Vann. Decl. ¶ 19 (Dkt. No. 23-2).)

South Carolina's courts routinely adjudicate questions involving the First Amendment. *See, e.g.*, *In re Amir X.S.*, 371 S.C. 380, 391, 639 S.E.2d 144, 149–50 (2006) (rejecting an overbreadth challenge to a state law defining the offense of disturbing schools); *State v. Rothschild*, 351 S.C. 238, 242, 569 S.E.2d 346, 348 (2002) (rejecting a First Amendment challenge to a state criminal statute). Moreover, the State's Appellate Court Rules allow constitutional challenges to bypass the normal appellate procedure through the Court of Appeals and, instead, route them immediately from the trial court to the Supreme Court. Rule 203(d)(1)(A)(ii), SCACR.

It is straightforward, then, that the Plaintiff's constitutional claims can be adjudicated in the state—rather than federal—forum, and *Younger* abstention is therefore proper. *See Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 166 (4th Cir. 2008) (reiterating that a primary purpose of abstention is "to maintain comity between the state and federal courts.").

B. The Court should avoid making an unnecessary constitutional ruling pursuant to *Pullman* abstention.

A second abstention doctrine applicable here derives from *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and directs federal courts to defer exercising jurisdiction over a matter when a state law can be interpreted by a state court in such a manner as to avoid making a federal constitutional ruling. *Nivens*, 444 F.3d at 245. This basis for abstention is consistent with the Supreme Court's directive to avoid constitutional rulings when other avenues for relief are available. *See Slack v. McDaniel*, 529 U.S. 473, 485 (2000) (explaining that federal courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of" (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))).

Following this mandate, the Fourth Circuit has repeatedly relied on *Pullman* abstention to defer ruling on federal constitutional issues until after a state court has had an opportunity to

resolve unclear issues of state law. *See, e.g.*, *K. Hope, Inc. v. Onslow County*, No. 95-3126, 1997 U.S. App. LEXIS 3337, at *3–4 (4th Cir. Feb. 25, 1997) (per curiam) (vacating district court's ruling on constitutionality of state law pursuant to *Pullman* because a state court's resolution of the law "would avoid any need to address the constitutional questions presented"); *Meredith v. Talbot County*, 828 F.2d 228, 232 (4th Cir. 1987) (holding that *Pullman* abstention "is certainly appropriate" because possible constructions of state law would cause "the federal constitutional questions raised in the complaint [to] disappear"); *Ratcliff v. County of Buncombe*, 759 F.2d 1183, 1186–87 (4th Cir. 1985) (ruling that abstention was proper because resolution of a state law issue "could be dispositive of the federal constitutional issues").

Here, all of the claims for relief appear to hinge on a broad construction of South Carolina Code § 24-3-580. But that statute has never been conclusively addressed by any South Carolina court; it has only been the subject of an opinion from the Attorney General, and the Plaintiff disagrees with that opinion.

As such, to the extent that there is any remaining uncertainty or vagueness in regards to the secrecy statute, this issue should be addressed by South Carolina's courts so that they can construe the term in a manner to bring it within constitutional bounds (if necessary), ***not*** through a broad declaration by a federal court that South Carolina's secrecy statute is somehow unconstitutional.[4] Abstention pursuant to *Pullman* is therefore appropriate in order to provide South Carolina's courts with the opportunity to interpret the South Carolina law in a constitutional manner (again, if necessary).

[4] By arguing for *Pullman* abstention here, Director Stirling does not concede that the statute at issue is unclear, vague, or somehow constitutionally impaired. Nevertheless, in the event that the South Carolina's secrecy statute needs to be construed against the background of a constitutional challenge, Director Stirling respectfully submits that such an analysis should be done by South Carolina, rather than federal, courts.

C. Dismissal with prejudice is appropriate.

If the Court agrees that abstention is the proper course in this case, it should dismiss, rather than stay, this case pursuant to Rule 12(b)(1). The Fourth Circuit has held that a necessary component of *Younger* abstention is dismissing a complaint with prejudice. As the court reasoned: "Because *Younger* is in part based on the idea that a state court is equally competent in deciding federal constitutional issues when faced with a pending prosecution, *Younger* does not contemplate those issues returning to federal court." *Nivens*, 444 F.3d at 246. And because *Younger* abstention involves a federal court rejecting subject matter jurisdiction in favor of resolution at the state level, dismissal with prejudice is the proper resolution. *See id.* at 247 ("Thus, when a district court abstains from a case based on *Younger*, it should typically dismiss the case with prejudice; not on the merits, but instead because the court is denied the equitable discretion ever to reach the merits.") (internal citations omitted).

Similarly, while *Pullman* abstention usually results in a stay of federal proceedings while a state court clarifies state law, the Fourth Circuit has been clear that dismissal is appropriate when both *Pullman* abstention and another abstention doctrine are jointly applicable. *See, e.g.*, *Meredith*, 828 F.2d at 232 (affirming a district court's dismissal of a complaint pursuant to both *Burford* abstention and *Pullman* abstention because "retention of jurisdiction does not comport with the underlying principles and purpose of *Burford* abstention"). Because *Younger* abstention accompanies *Pullman* abstention here, dismissal with prejudice is proper.

III. The Plaintiff has not alleged facts that, if true, would give rise to a plausible constitutional claim.

A. South Carolina Code § 24-3-580 regulates access to information within the government's control and there is no First Amendment right to such information.

Although *Younger* and *Pullman* instruct the Court to abstain from addressing the merits of Plaintiff's claims, the Plaintiff nevertheless fails to show that it has alleged facts sufficient to state a claim upon which relief can be granted. As such, should the Court find that abstention is not warranted, it should still dismiss the Plaintiff's claim pursuant to Rule 12(b)(6).

At its core, the Plaintiff alleges that South Carolina Code § 24-3-580 impairs its ability to advise its clients. (*See, e.g.*, Am. Compl. ¶ 15 (Dkt. No. 21) (alleging that the Plaintiff has standing to bring this case because this statute impairs the Plaintiff's "right to counsel and advise its clients").) But this argument assumes that such a right to access information about the State's execution protocols exists in the first place. Courts agree that it does not.

For one, the statute only restricts actions of persons with information, not actions of those without. As such, there is no colorable argument that the statute infringes the Plaintiff's rights because it does not prohibit any of the Plaintiff's actions. At most, the Plaintiff alleges that access to this information may allow it to advise its clients more efficiently, but that is not enough to establish a claim the secrecy statute was applied in a manner that violated Plaintiff's constitutional rights. The First Amendment does not mandate an unqualified "right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion). To be sure, courts have generally held that the decision to make government information available is typically a "question of policy" for the "political branches." *See id*. at 12, 16; *see also Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1167–

71 (3d Cir. 1986) (surveying precedent and history and concluding that decision to disclose government information belongs to political branches).

This limitation on access to information within the government's control—and the absence of any constitutional right to access the same—extends to the source and manufacturer of lethal injection drugs and the qualifications of those who will administer them, precisely what the Plaintiff seeks here. *See, e.g.*, *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1264–67 (11th Cir. 2014) (per curiam) (denying myriad constitutional claims asserted by an inmate aimed at seeking access to information regarding the source and manufacturer of lethal injection drugs or "the qualifications of the person or persons who will manufacture the drugs, and who will place the catheters," and collecting numerous cases rejecting similar claims and arguments); *Owens v. Hill*, 758 S.E.2d 794, 805 (Ga. 2014) ("To the extent that Hill seeks to turn the First Amendment into an Open Records Act for information relating to executions, his claim clearly fails.").

It necessarily follows, then, that if an inmate has no constitutional right to access this information, then the inmate's attorney cannot have a greater right of access than his or her own client. Giving an inmate "access by proxy" through counsel would run contrary to the long-settled precedent that the State has no obligation to enable a prisoner to discover potential grievances and then litigate them. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 354–56 (1996); *In re Lombardi*, 741 F.3d 888, 895–96 (8th Cir. 2014) (en banc) (holding that an inmate's inability to discover potential claims he or she may bring does not violate due process); *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013) (rejecting Fourteenth Amendment, Supremacy Clause, and access-to-the-courts claims challenging state's failure to disclosure information regarding the method of execution in a timely manner absent a plausible Eighth Amendment claim).

B. South Carolina Code § 24-3-580 does not sanction Plaintiff's conduct.

One requirement of Article III standing is that the plaintiff suffer an "injury in fact." *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The record contains no evidence to support this prerequisite to federal jurisdiction. Plaintiff has not been charged with violating the secrecy statute. This lack of prosecution makes sense considering, as stated above, the statute regulates information within the government's control. *See Younger*, 401 U.S. at 42 (concluding that, absent threats of prosecution, a "genuine controversy" could not arise simply because the plaintiffs might feel inhibited by fears that are "imaginary or speculative"). Furthermore, under Plaintiff's theory, any statute that restricts access to information would potentially violate an attorney's professional speech.

The absence of the constitutional rights alleged by the Plaintiff renders its claim facially defective. Accordingly, if the Court does not abstain here, it should dismiss this case for failing to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

IV. Because the Court should dismiss this case, it should also deny the Plaintiff's requested injunction.

The Court should dismiss this case for the reasons discussed above. But the Plaintiff has also sought temporary injunctive relief, which should also be denied.

The standards for issuing a temporary injunction are well established. "The substantive standards for granting a request for a temporary restraining order and entering a preliminary injunction are the same." *S.C. Progressive Network Educ. Fund v. Andino*, No. CV 3:20-03503-MGL, 2020 WL 5995325, at *2 (D.S.C. Oct. 9, 2020). Both "are intended to meet exigent circumstances[.]" *Ideal Toy Corp. v. Plawner Toy Mfg. Corp.*, 685 F.2d 78, 84 (3d Cir. 1982). It "is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "[T]he party seeking the injunction must prove his own case and adduce the

requisite proof, by a preponderance of the evidence, of the conditions and circumstances upon which he bases the right to and necessity for injunctive relief." *Citizens Concerned for Separation of Church & State v. City of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980).

A temporary restraining order or a preliminary injunction should issue only when the plaintiff can "[1] establish that [it is] likely to succeed on the merits, [2] that [it is] likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that [injunctive relief] is in the public interest." *Winter*, 555 U.S. at 20. The burden is on the party seeking injunctive relief to show it is entitled to the relief, not the burden of the other party to show the movant is not entitled. *Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 443 (1974).

"[A]ll four requirements must be satisfied." *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009). Thus, even a strong showing of likely success on the merits cannot compensate for failure to show likely injury. *Winter*, 555 U.S. at 21–22. And, irreparable injury alone is insufficient to support equitable relief. *See id*. at 23 (holding irreparable injury was likely to occur, but holding injunctive relief was improper because of the burden on the government and impact on public interest). In sum, "[a temporary restraining order or a] preliminary injunction shall be granted only if the moving party clearly establishes entitlement." *Di Biase v. SPX Corp*., 872 F.3d 224, 230 (4th Cir. 2017).

Plaintiff's injunctive requests "may be characterized as being either prohibitory or mandatory." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014). "Whereas mandatory [temporary restraining orders and preliminary] injunctions alter the status quo [generally by requiring the non-movant to do something], prohibitory [ones] aim to maintain the status quo and prevent irreparable harm while a lawsuit remains pending." *Id*. at 236

(citation omitted) (internal quotation marks omitted). The Fourth Circuit has "defined the status quo for this purpose to be the last uncontested status between the parties which preceded the controversy." *Id*. (citation omitted) (internal quotation marks omitted).

"Mandatory . . . injunctive relief in any circumstance is disfavored, and warranted only in the most extraordinary circumstances." *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994) (citation omitted). Or, in other words, "[i]t is fundamental that mandatory injunctive relief should be granted only under compelling circumstances inasmuch as it is a harsh remedial process not favored by the courts." *Citizens Concerned for Separation of Church & State*, 628 F.2d at 1299.

Here, the Plaintiff's request fails on every element.

A. The Plaintiff's claims fail on their face, rendering it unlikely to succeed on the merits or to suffer an irreparable harm in the absence of an injunction.

As explained above, Plaintiff cannot demonstrate a likelihood of success on the merits of its constitutional claims because there is no First Amendment right to obtain the information it seeks. Simply put, this claim lacks any chance of success because there is no affirmative constitutional duty that requires the government to disclose information. Furthermore, courts have uniformly rejected similar claims, whether couched as claims under the First Amendment or other constitutional provisions. Specifically, the Eighth Circuit has held that the inability to discover claims does not constitute a due process violation. *See Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011). This is consistent with the general principle that the First Amendment does not afford the right to information in the government's possession. *See Houchins*, 438 U.S. at 15 ("The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."); *see also LAPD v. United Reporting*, 528 U.S. 32, 40 (1999) ("[W]hat we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment.").

For example, even in a criminal prosecution, there is no general federal constitutional right to discover information. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Nor has the First Amendment ever "been interpreted . . . as requiring a government official who is an 'unwilling speaker' to impart information." *Kline v. Republic of El Salvador*, 603 F. Supp. 1313, 1319 (D. D.C. 1985); *see also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker.").

At bottom, the right to receive information cannot be stretched to the point of creating a First Amendment right to compel disclosure of all government-held information.[5] Because Plaintiff has not raised a plausible claim that its First Amendment rights have been violated, Justice 360 is not likely to suffer irreparable harm. For both of those reasons, the request for TRO and the preliminary injunction should be denied.

B. The balance of equities favors Defendants.

It is not in the public interest to grant an injunction in this case. A stay is an equitable remedy and, as such, "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 384 (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). Similarly, the uncertainties and expense that come from the delay, as well as the impact of such delay upon the families of victims and their communities, will only be compounded by an injunction.

[5] Because Plaintiff cannot demonstrate a likelihood of success on the merits, it is unnecessary for the Court to determine which type of preliminary injunction Plaintiff requests. Nonetheless, although Plaintiff fails to mention it, as it relates to this motion, a prohibitory injunction would prohibit Defendants from carrying out executions. However, Plaintiff ultimately seeks a mandatory injunction to mandate Defendants disclose information.

C. An injunction is not in the public interest.

Because Plaintiff has failed to present any plausible violations of the First Amendment, there has been no showing that Plaintiff will suffer an unconstitutional harm, and the equities tip in favor of Defendants; an injunction is not in the public interest. To be sure, the South Carolina Supreme Court declined Justice 360's client's petition for the same relief pursuant to Rule 245(a), SCACR, which provides that review in the South Carolina Supreme Court's original jurisdiction is warranted only when "the public interest is involved, or if special grounds of emergency or other good reason exist." For the reasons stated above, the request for injunctive relief should be denied, and this case should be dismissed.

CONCLUSION

As a matter of federal–state comity, the Court should dismiss this case—to the extent it is not moot—pursuant to the *Rooker-Feldman* doctrine, *Younger* abstention, and *Pullman* abstention, and allow the state courts to address the issues of statutory interpretation presented by this case. If it does reach the merits, the Court should still dismiss this case, as the Plaintiff cannot legitimately claim a right to access information as counsel that courts nationally agree the Plaintiff's own clients have no right to access. Accordingly, the Court should dismiss this matter pursuant to Rules 12(b)(1) and 12(b)(6) and deny the Plaintiff's requested injunctive relief.

Signature Page Attached

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
Federal Bar No. 9742
todd.carroll@wbd-us.com
Kevin A. Hall
Federal Bar No. 5375
kevin.hall@wbd-us.com
Bryant S. Caldwell
Federal Bar No. 13125
bryant.caldwell@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
803-454-6504

Counsel for Director Stirling and the South Carolina Department of Corrections

ALAN WILSON
Attorney General
Federal Bar No. 10457

ROBERT D. COOK
Solicitor General
Federal Bar No. 285
RCook@scag.gov

By: /s/ J. Emory Smith, Jr.
J. EMORY SMITH, JR.
Deputy Solicitor General
Federal Bar No. 3908
ESmith@scag.gov

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803-734-3680

Counsel for Director Stirling and the South Carolina Department of Corrections

November 30, 2020