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SC Court of Appeals

The State of South Carolina
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Honorable Alison Renee Lee, Circuit Court Judge
Appellate Case No. 2023-000104

Paul Roy Osmundson.. Appellant,

v.

School District 5 of Lexington and Richland Counties ....Respondent.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF INTEREST OF AMICUS 1

STATEMENT OF ISSUES ON APPEAL 2

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

ARGUMENT 3

I. Section 30-4-100, as interpreted by the trial court, contradicts FOIA's text, purpose, and history. 4

A. The text of Section 30-4-100(A) does not require dismissal when the ten-day hearing requirement is violated. 4

B. The purpose of FOIA demands that courts resolve questions of statutory interpretation in favor of access. 5

C. The legislative history of Section 30-4-100(A) indicates that the ten-day requirement was intended to expedite resolution, not erect a procedural barrier. 5

II. Section 30-4-100, as interpreted by the trial court, violates the guarantees of procedural due process in the United States and South Carolina Constitutions. 9

A. FOIA requesters have a protected property interest. 10

B. Section 30-4-100, if interpreted to permit dismissal based on the court's failure to set a hearing, fails to provide sufficient process. 12

III. Dismissing a FOIA suit based on the chief administrative judge's failure to comply with Section 30-4-100(A) violates Article I, Section 9 of South Carolina's Constitution. 14

A. The history of the Remedy Clause reveals its importance and purpose... 14

B. Cases interpreting the Remedy Clause suggest that administrative failures can deprive citizens of their right to a remedy. 17

C. Permitting dismissal based on judicial administrative failures would unconstitutionally deprive a FOIA requester of a remedy. 18

IV. Dismissal of Plaintiff's suit creates dangerous precedent that will restrict South Carolinians' access to justice. 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Armstrong v. Manzo, 380 U.S. 545 (1965) ... 13

Bd. of Pardons v. Allen, 482 U.S. 374 (1987) ... 10, 14

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) ... 10

Central Railroad & Banking Co. v. Ga. Constr. & Inv. Co., 32 S.C. 319, 11 S.E. 192 (1890) ... 17

Curtis v. State, 345 S.C. 557, 549 S.E.2d 591, (2001) ... 9

Davis v. Whitlock, 90 S.C. 233, 73 S.E. 171 (1911) ... 17

Doe v. Am. Nat'l Red Cross, 790 F. Supp. 590 (D.S.C. 1992) ... 17

In re Vora, 354 S.C. 590, 582 S.E.2d 413 (2003) ... 12, 14

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) ... passim

Mallette v. Arlington Cnty. Emps.' Supplemental Ret. Sys. II, 91 F.3d 630 (4th Cir. 1996) ... 9, 10

Maner v. Maner, 278 S.C. 377, 296 S.E.2d 535 (1982) ... 17, 18

Mathews v. Eldridge, 424 U.S. 319 (1976) ... 9, 12, 13

McIntyre v. Secs. Comm'r of S.C., 425 S.C. 439, 823 S.E.2d 193 (Ct. App. 2018) ... 9, 12

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) ... 12

Perry v. Sindermann, 408 U.S. 593 (1972) ... 10

Richardson on behalf of 15th Circuit Drug Enforcement Unit v. Twenty Thousand Sven Hundred Seventy-One and 00/1000 Dollars, 437 S.C. 290, 878 S.E.2d 868 (2022) ... 9

Ross v. Med. Univ. of S.C., 328 S.C. 51, 492 S.E.2d 62 (1997) ... 9

S. Judiciary Comm. Meeting, 122d Gen. Assemb., 1st Reg. Sess. (S.C. May 2, 2017), available at https://www.scstatehouse.gov/ video/archives.php ... 7

S.C. Pub. Int. Found. v. Calhoun Cnty. Council, 432 S.C. 492, 495, 854 S.E.2d 836, 838 (2021) ... 3

Seago v. Horry Cnty., 378 S.C. 414, 663 S.E.2d 38 (2008) ... 11

State v. Neuman, 384 S.C. 395, 683 S.E.2d 268 (2009) ... 9

STATUTES

S.C. Code Ann. § 17-15-55 ... 19

S.C. Code Ann. § 17-24-40 ... 19

S.C. Code Ann. § 17-27-160 ... 19

S.C. Code Ann. § 30-4-100 ... 2, 4, 7, 8

S.C. Code Ann. § 30-4-15 .... 1, 5, 11
S.C. Code Ann. § 30-4-30 11
S.C. Code Ann. § 30-4-60 11
S.C. Code Ann. § 30-4-70 11
S.C. Code Ann. § 30-4-80 11
S.C. Code Ann. § 30-4-90 12
S.C. Code Ann. § 38-27-220 19
S.C. Code Ann. § 40-47-110 19
S.C. Code Ann. § 44-24-190 19
S.C. Code Ann. § 44-31-105 19
S.C. Code Ann. § 44-4-540 19
S.C. Code Ann. § 44-48-115 19
S.C. Code Ann. § 44-48-120 19
S.C. Code Ann. § 44-52-60 19
S.C. Code Ann. § 59-150-180 19
S.C. Code Ann. § 59-63-240 19
S.C. Code Ann. § 62-3-607 19
S.C. Code Ann. § 63-6-1650 19
S.C. Code Ann. § 63-7-1660 19
S.C. Code Ann. § 63-7-1930 19
S.C. Code Ann. § 63-7-40 18
S.C. Code Ann. § 63-7-690 18
S.C. Code Ann. § 63-7-700 18
S.C. Code Ann. § 63-7-710 18
S.C. Code Ann. § 8-13-320 19

OTHER AUTHORITIES

Cole Blease Graham, Jr., *The Evolving South Carolina Constitution*, 24 J. POL. SCIENCE 11 (1996) 15, 16

David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197 (1992) 15, 16

Michael J. DeBoer, *The Right to Remedy By Due Course of Law—A Historical Exploration & An Appeal for Reconsideration*, 6 FAULKNER L. REV. 135 (2014) 14

Thomas R. Phillips, *The Constitutional Right to a Remedy,* 78 N.Y.U. L. REV. 1309 (2003) 15, 17

LEGISLATIVE MATERIALS

1978 S.C. Act No. 593 5

1987 S.C. Act No. 118 6

H. Journal (Thurs., May 11, 2017), 122d Gen. Assemb., 1st Reg. Sess., at 44–45 (S.C.) 8

H.B. 3352, 122d Gen. Assemb., 1st Reg. Sess. (S.C. 2017) (Dec. 25, 2016 version) 7

H.R. Meeting, 122d Gen. Assemb., 1st Reg. Sess. (S.C. May 11, 2017), available at https://www.scstatehouse.gov/video/archives.php 8

S. Journal (Wed., May 10, 2017), 122d Gen. Assemb., 1st Reg. Sess. (S.C.) 8

CONSTITUTIONAL PROVISIONS

S.C. CONST., Art. I, § 15 (1868) 15

S.C. CONST., Art. I, § 15 (1895) 16

S.C. CONST., Art. I, § 9 .... 14, 16

INTRODUCTION

South Carolina's Freedom of Information Act (FOIA) serves a "vital" role in our "democratic society" by ensuring "that public business be performed in an open and public manner[.]" S.C. Code Ann. § 30-4-15. "Toward this end," the General Assembly has directed courts to construe FOIA "to make it possible for citizens . . . to learn and report fully the activities of their public officials[.]" *Id*. But that is not what happened here. In this case, Appellant sought to exercise his rights under the South Carolina Freedom of Information Act but was thwarted by forces wholly outside of his control. Although Appellant did everything required by statute, his case was dismissed because the chief administrative judge did not schedule a hearing within ten days of the filing of Appellant's suit. The circuit court erred in interpreting FOIA to permit dismissal of Appellant's case based on inaction of the chief administrative judge. The circuit court's error, if affirmed, will have far-reaching negative implications because it departs from FOIA's text, purpose, and history; creates multiple federal and state constitutional violations; and impedes South Carolinians' access to justice.

STATEMENT OF INTEREST OF AMICUS

The American Civil Liberties Union Foundation of South Carolina (ACLU-SC) is a nonpartisan nonprofit organization that advocates for civil rights and civil liberties in South Carolina. As part of that mission, ACLU-SC is committed to ensuring that state government is transparent and accessible to all people in South Carolina. ACLU-SC has an interest in this case because this Court's decision may have a profound impact on South Carolina residents' ability to access public government information through the Freedom of Information Act (FOIA) and, more broadly, to seek redress in state courts for violations of their rights. On both fronts, the ACLU-SC offers expertise on how different issues such as transparent

governance and access to the courts can interact to either open pathways or erect barriers to participatory democracy.

STATEMENT OF ISSUES ON APPEAL

I. Does the chief administrative judge's failure comply with Section 30-4-100—which instructs him to set a hearing within ten days of service of an action to enforce the provisions of FOIA—require dismissal of a plaintiff's case?[1]

STATEMENT OF THE CASE

In May of 2021, Appellant Paul Roy Osmundson, the Senior Editor for Local News at The State newspaper, submitted a Freedom of Information Act (FOIA) request to Respondent School District Five of Lexington and Richland Counties. Exhibit A to Plaintiff's Motion for Summary Judgment, filed February 11, 2022. On July 23, 2021, Appellant filed suit, alleging that Respondent failed to comply with the requirements of FOIA. *Id.*

FOIA requires that, "[u]pon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties." S.C. Code Ann. § 30-4-100(A). But in Appellant's case, the chief administrative judge did not schedule a hearing. *See* Form 4 (announcing the circuit court's decision).

In February of 2022, Appellant filed a Motion for Summary Judgment. Plaintiff's Motion for Summary Judgment (Feb. 11, 2022). Shortly thereafter, Respondent filed a Motion to Dismiss, arguing that dismissal was required because no hearing was held within ten days after Appellant filed his action. Defendant's Memo in Support of Motion to Dismiss, filed March 16, 2023, p. 2–3.

[1] The Parties' briefs also address whether the circuit court erred in denying Plaintiff's Motion to Reconsider, but ACLU-SC's brief focuses solely on the issue listed here.

The trial court granted Defendant's Motion to Dismiss. Form 4. The court's reasoning, in its entirety, was explained as follows:

> After reading all the documents and motions, Defendant's Motion to Dismiss is dispositive according to S.C. Code Ann. § 30-4-100(A). According to Section 30-4-100(A) a hearing must be held within ten days of the service on all parties and a scheduling order to conclude the action must be held within six months. *In this current matter, no hearing was held within the allotted timeframe. Therefore, the Motion to Dismiss is dispositive* and the court need not determine the merits of the Summary Judgment claims.

Id. (emphasis added). The court's reasoning turned entirely on the meaning of Section 30-4-100(A)'s ten-day hearing requirement. Under the trial court's reasoning, if no hearing is held within the allotted timeframe, Section 30-4-100 requires dismissal of the action.[2]

STANDARD OF REVIEW

Because the question presented involves statutory interpretation, this Court reviews the lower court's decision *de novo*. *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 838 (2021).

ARGUMENT

The circuit court's interpretation of Section 30-4-100 contradicts the basic tenets of FOIA, violates both federal and state constitutional guarantees, and undermines citizens' access to justice. For those reasons, this Court should reverse the circuit court's ruling.

[2] The trial court later denied Plaintiff's Motion to Reconsider. Although the Parties brief this issue, ACLU-SC's brief is limited to the trial court's interpretation of Section 30-4-100.

I. Section 30-4-100, as interpreted by the trial court, contradicts FOIA's text, purpose, and history.

FOIA's text, purpose, and history are clear: the Freedom of Information Act is meant to facilitate, not hamper, access to government information. Close examination of Section 30-4-100(A)'s text and history supports the same conclusion. The circuit court's interpretation of Section 30-4-100(A) to mandate dismissal—based on events entirely outside of the requester's control—contradicts that principle.

A. <u>The text of Section 30-4-100(A) does not require dismissal when the ten-day hearing requirement is violated.</u>

The plain text of Section 30-4-100(A) requires a hearing within ten days but does not mandate dismissal when that requirement is not met. It reads, in relevant part, "Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, *the chief administrative judge of the circuit court must schedule an initial hearing within ten days* of the service on all parties." S.C. Code Ann. § 30-4-100(A) (emphasis added).

The provision's requirement contains a triggering event (when the requirement applies), an actor (to whom the requirement applies), and a mandate (what the requirement demands). The triggering event is "the filing of the request for declaratory judgment or relief related to the provisions of this chapter"; the actor is "the chief administrative judge of the circuit court"; and the mandate demands that the chief administrative judge "*must* schedule an initial hearing within ten days of the service on all parties." *Id.* (emphasis added). The mandate—and therefore any consequence for failing to comply—applies to one actor: the chief administrative judge. The plain text of Section 30-4-100(A) does not permit imposing a consequence on the plaintiff, who could exert no control over the chief administrative judge.

B. The purpose of FOIA demands that courts resolve questions of statutory interpretation in favor of access.

The "[f]indings and purpose" of FOIA dictate "that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy." S.C. Code Ann. § 30-4-15. "Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings." *Id*. The circuit court construed Section 30-4-100(A) to prevent an attempt to enforce FOIA. That interpretation is directly contrary to the General Assembly's stated purpose in enacting FOIA: "to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials[.]"

C. The legislative history of Section 30-4-100(A) indicates that the ten-day requirement was intended to expedite resolution, not erect a procedural barrier.

The legislative history of FOIA's ten-day requirement indicates that the provision was intended to benefit requesters by expediting the judicial review process. The General Assembly enacted South Carolina's Freedom of Information Act in 1978. 1978 S.C. Act No. 593. The initial legislation established that

> [a]ny citizen of the State may apply to the circuit court for injunctive relief to enforce the provisions of this act in appropriate cases provided such application is made no later than sixty days following the date which the alleged violation occurs or sixty days after ratification of such act in public session, whichever comes later. The court may order equitable relief as it sees fit.

Id. at § 11.

Almost a decade later, in 1987, the General Assembly amended the legislation in three ways: it extended the time for filing suit from sixty days to one year; provided for declaratory as well as injunctive relief; and stated that violations constitute irreparable injury:

> Any citizen of the State may apply to the circuit court for either or both a declaratory judgment and injunctive relief to enforce the provisions of this chapter in appropriate cases as long as such application is made no later than one year following the date on which the alleged violation occurs or one year after a public vote in public session, whichever comes later. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

1987 S.C. Act No. 118, § 8 (emphasis added).

In 2017, the General Assembly further amended Section 30-4-100(A) by adding time-sensitive procedural requirements:

> A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later. Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extend this time period upon a showing of good cause. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists.

S.C. Code Ann. § 30-4-100(A) (emphasis added). The 2017 additions attempted to expedite FOIA suits in two ways: by requiring a hearing within ten days of filing and by setting a time limit for ultimate resolution of a case.

Prior to its ultimate enactment, the 2017 legislation (introduced as House Bill 3352) underwent significant revisions, which are particularly relevant to the proper interpretation of Section 30-4-100(A)'s ten-day requirement. When it was introduced, H.B. 3352 was an identical version of legislation that had been introduced the year before. *S. Judiciary Comm. Meeting*, 122d Gen. Assemb., 1st Reg. Sess. (S.C. May 2, 2017), available at https://www.scstatehouse.gov/video/archives.php, at 01:53:00 [hereinafter Subcommittee Meeting]. The bill originally created an administrative enforcement procedure and did not impose a ten-day hearing requirement for cases brought in circuit court. H.B. 3352, 122d Gen. Assemb., 1st Reg. Sess. (S.C. 2017) (Dec. 25, 2016 version).

When the bill arrived in the Senate Judiciary Committee, Senator Margie Bright Matthews expressed concerns about the draft, including its failure to expedite the judicial enforcement process. *Subcommittee Meeting* at 01:54:50. Specifically, Senator Bright Matthews explained that she had been on the Conference Committee examining the same bill in 2016. *Id.* The 2016 Conference Committee planned to amend the proposed bill to remove the administrative law process and to add the ten-day hearing requirement, but the legislative session had ended. *Id.* Regarding the ten-day requirement, Senator Bright Matthews said, "there was a concern about some constituents saying that their motions were not heard timely. Then, [the Conference Committee was] going to consider . . . creat[ing] an avenue of filing FOIA requests like a temporary motion so that it would have fast-tracked within ten days." *Id*. Ultimately, the Senate Judiciary Committee determined it would submit a favorable report on the bill and that Senator Bright Matthews would propose an amendment before the entire Senate. *Id*. at 02:06:40.

When the full Senate took up H. 3352, Senators Bright Matthews and Malloy offered the amendments discussed in Committee, including the ten-day hearing requirement. S. Journal (Wed., May 10, 2017), 122d Gen. Assemb., 1st Reg. Sess., at 36–39 (S.C.). Senator Bright Matthews explained the amendments, and they were adopted without any opposition. *Id.* When H. 3352 returned to the house, Representative Newton, one of the bill's sponsors, praised the resulting bill, saying, "This is progress. This is fulfilling the commitment of transparency as part of the Speaker's Task Force [of 2014], and we urge your concurrence." *H.R. Meeting*, 122d Gen. Assemb., 1st Reg. Sess. (S.C. May 11, 2017), available at https://www.scstatehouse.gov/video/archives.php, at 01:05:18. The House unanimously concurred in the Senate's amendments. H. Journal (Thurs., May 11, 2017), 122d Gen. Assemb., 1st Reg. Sess., at 44–45 (S.C.). Ultimately, the General Assembly enacted FOIA's expedited hearing requirement as part of Act 67, which took effect on May 19, 2017. S.C. Code Ann. § 30-4-100 (History).

The legislative history of FOIA shows that, at every turn, the General Assembly has expanded requesters' rights. The same is true for the ten-day requirement in Section 30-4-100(A), which was intended to work *in favor of*, not against, requesters. Interpreting Section 30-4-100(A) to mandate dismissal for the court's failure to hold a hearing flies in the face of the text, purpose, and history of FOIA.

II. Section 30-4-100, as interpreted by the trial court, violates the guarantees of procedural due process in the United States and South Carolina Constitutions.[3]

Dismissing a FOIA case because the court failed to hold a hearing within ten days violates the guarantees of due process.[4] "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). To determine whether adequate process was provided, a court asks two questions: (1) whether plaintiff asserts a protected life, liberty or property interest and (2) whether plaintiff received "the minimum measure of procedural protection warranted under the circumstances." *Mallette v. Arlington Cnty. Emps.' Supplemental Ret. Sys. II*, 91 F.3d 630, 634 (4th Cir. 1996). FOIA requesters have a

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[3] Amicus ACLU-SC's constitutional arguments under the Due Process and Remedy Clauses, *see infra* Part III, bear on the legality of the circuit court's decision and therefore address the "issues on appeal as presented by the parties." Rule 213, SCACR; *see also* Appellant's Initial Brief at 1 (stating the issue as "[w]hether the circuit court erred in granting Respondent's Motion to Dismiss based on the fact that a hearing on Appellant's claim for injunctive relief was not held within ten days of service on all parties"); Respondent's Initial Brief at 1 (stating the issue as whether "Judge Lee properly dismissed Osmundson's lawsuit because he seeks injunctive relief but did not file a motion to request a hearing as required by Code Section 30-4-100(A)"). ACLU-SC's constitutional arguments are also relevant to the interpretation of Section 30-4-100(A) because "[a] possible constitutional construction must prevail over an unconstitutional interpretation." *State v. Neuman*, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) (quoting *Curtis v. State*, 345 S.C. 557, 569–70, 549 S.E.2d 591, 597 (2001)).

[4] South Carolina's Due Process Clause, Article I, Section 3, employs the same analysis as its federal counterpart. *See Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 66, 492 S.E.2d 62, 70 (1997) (finding a property interest); *Richardson on behalf of 15th Circuit Drug Enforcement Unit v. Twenty Thousand Sven Hundred Seventy-One and 00/1000 Dollars*, 437 S.C. 290, 300, 878 S.E.2d 868, 873 (2022) ("[W]e agree with the circuit court that the *Mathews* test applies[.]"); *see also McIntyre v. Secs. Comm'r of S.C.*, 425 S.C. 439, 449, 823 S.E.2d 193, 198 (Ct. App. 2018) (applying *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

protected property interest, and dismissal for the court's failure to comply with the ten-day rule deprives requesters of adequate process.

A. FOIA requesters have a protected property interest.

Access to government information pursuant to South Carolina's FOIA is a property interest protected by the Fourteenth Amendment's guarantee of due process. "[T]o decide whether [the plaintiff] has a property interest protected by the Fourteenth Amendment, we must look for an independent source of a 'claim of entitlement.'" *Mallette*, 91 F.3d at 634–35; *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). "The hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (citations omitted).[5] "Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'" *Id.*; *see also Roth*, 408 U.S. at 576, 571–72 (explaining that protected property interests "may take many forms" and "extend well beyond actual ownership of real estate, chattels, or money").

Several factors indicate whether state law creates a protected property interest. When a benefit is "created and defined by statutory terms," *Roth*, 408 U.S. at at 578, and is granted when "certain particularized eligibility criteria" are met, that benefit receives protection under the Due Process Clause, *Mallette*, 91 F.3d at 635. Often, mandatory language, such as a statute's use of 'shall,' indicates a statutory entitlement. *Bd. of Pardons v. Allen*, 482 U.S. 374, 376–77 (1987); *see also Mallette*, 91 F.3d at 635–36 (collecting cases).

[5] That Appellant was attempting to secure the benefit (and not having the benefit taken away) is of no consequence. *Mallette*, 91 F.3d at 640 *("*Eligible applicants are no less entitled to that expectation than are eligible recipients[.]"*).*

FOIA creates just such "an individual entitlement grounded in state law," *Logan*, 455 U.S. at 601, because it establishes "rules . . . that secure certain benefits and that support claims of entitlement to those benefits," *Roth*, 408 U.S. at 577. To start, FOIA explicitly creates "a *right* to inspect, copy, or receive . . . any public record of a public body," subject to certain exceptions. S.C. Code Ann. § 30-4-30 (emphasis added); *see also Seago v. Horry Cnty.*, 378 S.C. 414, 423, 663 S.E.2d 38, 42 (2008) ("FOIA grants the public an *immutable right* to access public records.") (emphasis added). Additionally, the statute contains mandatory language throughout:

- S.C. Code Ann. § 30-4-15 ("The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens *shall* be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy.") (emphasis added)

- S.C. Code Ann. § 30-4-30(C) ("If the request [for public records] is granted, the record *must* be furnished or made available for inspection or copying" within prescribed time periods.) (emphasis added)

- S.C. Code Ann. § 30-4-60 ("Every meeting of all public bodies *shall* be open to the public unless closed pursuant to § 30-4-70 of this chapter.") (emphasis added)

- S.C. Code Ann. § 30-4-70(b) (requiring that, prior to closing a meeting to the public, "the public agency *shall* vote in public on the question [of whether to hold a closed meeting] and when the vote is favorable, the presiding officer *shall* announce the specific purpose of the executive session") (emphasis added)

- S.C. Code Ann. § 30-4-80(A) ("All public bodies, except as provided in subsections (B) and (C) of this section, *must* give written public notice of their regular meetings at the beginning of each calendar year.") (emphasis added)

- S.C. Code Ann. § 30-4-90(a) ("All public bodies *shall* keep written minutes of all of their public meetings.") (emphasis added)
- S.C. Code Ann. § 30-4-90(b) ("The minutes *shall* be public records and *shall* be available within a reasonable time after the meeting except where such disclosures would be inconsistent with § 30-4-70 of this chapter.") (emphasis added)

The extensive use of mandatory language reinforces the statutory guarantee of a citizen's right to access government information. Moreover, the cause of action established by Section 30-4-100 is itself a protected property interest. *Logan*, 455 U.S. at 428–29 ("[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.") (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

B. <u>Section 30-4-100, if interpreted to permit dismissal based on the court's failure to set a hearing, fails to provide sufficient process.</u>

Because FOIA requesters have a protected property interest, "fair procedures" are required. *Mallette*, 91 F.3d at 636. The circuit court's interpretation of Section 30-4-100 does not allow for sufficiently fair procedures.

Procedural due process analysis employs a multi-factorial test to evaluate the sufficiency of process, *McIntyre*, 425 S.C. at 449, 823 S.E.2d at 198 (citing *Mathews*, 424 U.S. at 334–35), but "[t]he United States Supreme Court has held . . . that at a minimum certain elements must be present. These include (1) adequate notice; (2) *adequate opportunity for a hearing*; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003) (emphasis added); *see also Mallette*, 91 F.3d at 640 ("At a minimum, the Constitution requires notice and some opportunity to be heard."). In essence, "[t]he fundamental requirement of due process is the opportunity to be

heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982), is particularly instructive here. In *Logan*, the plaintiff was hired by the defendants and fired shortly thereafter, allegedly because of his disability. 455 U.S. at 426. He filed a charge with the Illinois Fair Employment Practices Commission, which was required by statute to hold a meeting "designed to obtain evidence, ascertain the positions of the parties, and explore the possibility of a negotiated settlement" within 120 days. *Id*. at 426, 424. The Commission did not hold a hearing within the 120-day period, and the defendants argued that his charge should be dismissed. *Id*. at 426. Although the plaintiff "argued that terminating his claim because of the Commission's failure to convene a timely conference—a matter beyond [the plaintiff's], or indeed the company's, control—would violate his federal rights to due process and equal protection," the Illinois Supreme Court "found th[e] legislative language to be mandatory, and accordingly it held that failure to comply deprived the Commission of jurisdiction[.]" *Id*. at 436–37.

The Supreme Court ultimately held that the plaintiff had not received sufficient process. *Id*. at 434. The Court reasoned, "[h]ere, . . . it is the state system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference—whether the Commission's action is taken through negligence, maliciousness, or otherwise." *Id*. at 436. In short, it was "the 'established state procedure' that destroys [the plaintiff's] entitlement without according him proper safeguards." *Id*.

Here, solely because of the chief administrative judge's failure to comply with Section 30-4-100(A), Appellant was denied a hearing. Interpreting Section 30-4-100(A) to permit a wholesale dismissal under those circumstances eschews the requirement that there be "adequate opportunity for a hearing." *In re Vora*, 354 S.C.

at 595. Just like the procedure in *Logan*, “the state system itself . . . destroy[ed] a complainant’s property interest, by operation of law[.]” 455 U.S. at 436. Under Supreme Court precedent, that is simply not permissible. In short, once South Carolina established FOIA, which created protected property rights, both the state and federal constitutions demanded adequate protections. *Allen*, 482 U.S. at 377 n.8. Those protections were not provided here.

III. Dismissing a FOIA suit based on the chief administrative judge’s failure to comply with Section 30-4-100(A) violates Article I, Section 9 of South Carolina’s Constitution.

The circuit court’s interpretation of Section 30-4-100, and the resulting dismissal of plaintiff’s action, violated Article I, Section 9 of the South Carolina Constitution, which provides, “All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.” S.C. CONST., Art. I, § 9.

A. The history of the Remedy Clause reveals its importance and purpose.

The history of South Carolina’s Remedy Clause highlights the provision’s purpose and reveals information about the contours of the right.

The majority of state constitutions, including South Carolina’s, contain a Remedy Clause, which recognizes an individual’s right to obtain a remedy by the due course of law. Michael J. DeBoer, *The Right to Remedy By Due Course of Law—A Historical Exploration & An Appeal for Reconsideration*, 6 FAULKNER L. REV. 135, 137–38 (2014). The right “has a distinguished history that extends from current state constitutional provisions, back to state constitutions in the early American republic and Sir William Blackstone's Commentaries on the Laws of England, and then further back to Sir Edward Coke's Second Part of the Institutes of the Laws of England and Magna Carta.” *Id.* at 137. “Many framers of the original state constitutions in colonial America . . . recogniz[ed the Remedy Clause] as a constraint on both judicial and legislative power.” Thomas R. Phillips, *The*

Constitutional Right to a Remedy, 78 N.Y.U. L. REV. 1309, 1309 (2003). Despite its prevalence in state law, this right has no federal counterpart. David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1199–2000 (1992); *see also* Phillips at 1309 ("Of all the rights guaranteed by state constitutions but absent from the federal Bill of Rights, the right to a remedy through open access to the courts may be the most important.").

South Carolina's Remedy Clause was ratified as part of the 1868 Constitution,[6] S.C. CONST., Art. I, § 15 (1868), which came about when the federal government, "[a]ggravated by South Carolina's insistence on electing former Confederate heroes to the Congress and its passage of the Black Codes to regulate former slaves, . . . directed establishment of a new state government[.]" Graham at 19. The 1868 Constitution "embodied many principles of democratic government" in addition to the Remedy Clause, including a popularly elected governor, the abolition of a property ownership requirement to hold office, and public education. *Id*. At that time, the Remedy Clause read, "All Courts shall be public, and every person, for any injury that he may receive in his lands, goods, person or reputation, shall have remedy by due course of law, and justice administered without unnecessary delay." S.C. CONST., Art. I, § 15 (1868).

The next revision came in 1895. The 1895 Constitution "was adopted by a convention with the specific aim of excluding African Americans from politics," but "[d]espite the preoccupation with race, many of the typical and therefore more reform-oriented features of the 1868 Constitution were retained." Graham at 21, 22. At that time, the Remedy Clause was revised to its current language: "All courts

[6] South Carolina has had seven different constitutions, ratified in 1776 (at the time of the Revolution), 1778, 1790 (after entering the federal union), 1861 (at secession), 1865 (after losing the Civil War), 1868 (forced by the federal government), and 1895 (post-Reconstruction). Cole Blease Graham, Jr., *The Evolving South Carolina Constitution*, 24 J. POL. SCIENCE 11, 15 (1996).

shall be public, and every person shall have speedy remedy therein for wrongs sustained. S.C. CONST., Art. I, § 15 (1895). Even as other rights contracted in South Carolina's 1895 post-Reconstruction Constitution, the Remedy Clause was simplified and expanded: the revision broadened the qualifying injury from an individual's "lands, goods, person or reputation" to any "wrong[] sustained." At that time, South Carolina's Remedy Clause became a "general entitlement to a remedy for . . . 'wrongs sustained' without limitation," unlike some other states, which limit the right to a remedy to certain types of injuries. Schuman at 1202.

The next major reconsideration of the South Carolina Constitution came in the late 1960's and early 1970's, when the importance of the Remedy Clause was reaffirmed by the Committee to Make a Study of the South Carolina Constitution. The General Assembly had appointed the Committee to study the 1895 Constitution and report on potential revisions. Graham at 22–23. The Committee "focused on each section of the 1895 document, painstakingly reviewed it, and made a specific evaluation to carry over or delete a section. If carried over, the report recommended needed revisions." *Id.* at 23. The Committee largely retained the "fundamental freedoms and liberties," *id.* at 23, and ultimately, the Remedy Clause language remained the same (but was moved from Section 15 to Section 9 in Article I), S.C. CONST., Art. I, § 9. Article I, still containing the Remedy Clause, was ratified in 1971. *Graham* at 23.

The evolution of the Remedy Clause reveals its purpose: to check legislative and judicial power by ensuring that citizens could obtain recourse for injuries. After the right's introduction in 1868, which occurred during a time of progress and reform, it has never been constricted. Even in the post-Reconstruction 1895 Constitution, which was a bald attempt to oppress Black South Carolinians, the Remedy Clause expanded its reach. Then, in 1971, its importance was reaffirmed with its inclusion in the newly ratified Article I. Thus, the Remedy Clause remains

a fundamental guarantee that all South Carolinians have a right to a remedy for wrongs.

B. Cases interpreting the Remedy Clause suggest that administrative failures can deprive citizens of their right to a remedy.

Despite its long-standing provenance, few cases interpret the Remedy Clause. Generally speaking, Remedy Clause cases in other states "challenge procedural impediments to judicial access or to block substantive modifications to established causes of action or remedies." Phillips at 1311. Existing South Carolina case law suggests that administrative failures creating "procedural impediments to judicial access," *id*., can give rise to violations of the Remedy Clause.

Early cases articulated "the object of" the Remedy Clause: "to secure to the inhabitants of the state, for which the constitution was made, access to the courts for redress of any injury which they may have received." *Central Railroad & Banking Co. v. Ga. Constr. & Inv. Co.*, 32 S.C. 319, 11 S.E. 192, 203 (1890) (discussing Article I, § 15, prior to the 1895 revision); *see also Davis v. Whitlock*, 90 S.C. 233, 73 S.E. 171, 173 (1911) (discussing "the right of the citizen to invoke the judicial power"). More recent cases reaffirm that conclusion. *See Doe v. Am. Nat'l Red Cross*, 790 F. Supp. 590, 594 (D.S.C. 1992) (conceptualizing the Remedy Clause as a "constitutional right of access to the courts of South Carolina for [an] alleged wrong").

The South Carolina Supreme Court applied this principle in *Maner v. Maner*, 278 S.C. 377, 296 S.E.2d 535 (1982). In *Maner*, the litigants asserted that a "tremendous backlog of cases awaiting final disposition" violated their right to a remedy under Article I, Section 9 of the South Carolina Constitution. *Id*. at 380, 535. The Supreme Court held that the Remedy Clause entitles litigants to a speedy appeal. *Id*. In so holding, the Court explained, "[if] this Court has within its grasp the means by which it can dispose of these cases in a speedier fashion, and thus

relieve the Court of its backlog of appeals, then we must conclude the movants have been denied their right to a speedy appeal." *Id*. In other words, if the Court, through administrative failings, burdened a litigant's access to a remedy, it would violate the Remedy Clause. Although the Court in *Maner* held that it did not "ha[ve] within its grasp the means" to alleviate the problem (and, therefore, no violation occurred), the Court's decision contemplated the possibility that court administrative action—or inaction— that restricts litigants' access to remedies can give rise to a deprivation under Article I, Section 9 of the Constitution.

C. Permitting dismissal based on judicial administrative failures would unconstitutionally deprive a FOIA requester of a remedy.

Construing Section 30-4-100(A) to permit outright dismissal of FOIA suits based on administrative inaction would violate of the Remedy Clause. It would create exactly the situation envisioned in *Maner*, where "the means" of facilitating access to a remedy—by scheduling a hearing within the ten-day limit—is entirely "within [the] grasp" of the chief administrative judge. 278 S.C. at 380. When the chief administrative judge does not employ "th[ose] means," the deprivation of a remedy would amount to a constitutional violation.

IV. Dismissal of Plaintiff's suit creates dangerous precedent that will restrict South Carolinians' access to justice.

Because requirements to hold a hearing within a certain amount of time appear in numerous places throughout the South Carolina Code, this Court's decision will have far-reaching implications. If a court's failure to schedule a hearing warrants dismissal in the FOIA context, the same will be true for the many other analogous provisions, and what happened to Appellant may befall many other litigants.

Analogous provisions appear in South Carolina Code provisions regarding child welfare (S.C. Code Ann. §§ 63-7-40(E)(2), 63-7-690, 63-7-700(C), 63-7-710(A),

63-6-1650(C), 63-7-1660(D), 63-7-1930(A)); student expulsion (S.C. Code Ann. § 59-63-240); mandatory quarantine (S.C. Code Ann. §§ 44-4-540(C)(4), 44-31-105(D)); involuntary commitment of individuals (S.C. Code Ann. §§ 17-24-40(C)(1), 44-24-190(C), 44-48-115(I), 44-48-120(B), 44-52-60(E)); bond for criminal defendants (S.C. Code Ann. §§ 17-15-55(B)(1), 17-15-55(C)(1), 17-15-55(E)); post-conviction relief procedures (S.C. Code Ann. § 17-27-160(C)); the State Ethics Commission (S.C. Code Ann. § 8-13-320(9)(b)(1)); seizure of non-compliant insurance companies by the South Carolina Department of Insurance (S.C. Code Ann. § 38-27-220(e)); probate administration (S.C. Code Ann. § 62-3-607(b)); and restriction of healthcare-related professional licenses (S.C. Code Ann. § 40-47-110(E)).[7]

Each of these provisions requires that a hearing be set within a certain timeframe. Under the circuit court's interpretation of these provisions, the party seeking a remedy is at the administrative mercy of the court. If a hearing is not scheduled within the required timeframe—whether because of inadvertence or any other reason and regardless of the importance of the case—the remedy sought will be unavailable, significantly diminishing meaningful access to the judicial system.

CONCLUSION

Dismissal of Appellant's case was incorrect as a matter of statutory interpretation, unconstitutional under both the state and federal constitutions, and fundamentally unfair. And if the circuit court's reasoning is upheld, Appellant's case is only a harbinger of things to come. The ACLU of South Carolina urges this Court to reject the circuit court's interpretation.

[7] These provisions require a hearing within a certain timeframe in a traditional court of law. There are even more provisions requiring a hearing within a set time in the administrative context. *See, e.g.*, S.C. Code Ann. § 59-150-180.

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