STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
DEBORAH MIHAL, and the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA, Plaintiffs, vs. GOVERNOR HENRY D. MCMASTER, in his official capacity; and MARCIA S. ADAMS, Executive Director of the South Carolina Department of Administration, in her official capacity, Defendants.	)	Civil Action No. 2020-CP-04-01083 **GOVERNOR MCMASTER'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER**

Defendant Governor Henry D. McMaster, in his official capacity ("Governor McMaster" or "Governor"), submits this memorandum in opposition to Plaintiffs Deborah Mihal and the American Civil Liberties Union Foundation of South Carolina's ("ACLU") Motion for Temporary Restraining Order ("TRO"). For the reasons that follow, the Court should deny Plaintiffs' Motion and decline their request for a TRO or any other extraordinary injunctive relief. As outlined in Governor McMaster's Motion to Dismiss, which is further supported by the present Memorandum, the Court should dismiss Plaintiffs' Complaint with prejudice.

I. BACKGROUND

Plaintiffs' lawsuit, while purportedly tied to weighty constitutional and statutory claims, boils down to a classic—albeit unexhausted, unripe, and speculative—state employee grievance. Look no further than the ACLU's letter to Governor McMaster that was the prologue to this

lawsuit.[1] It is chock full of employment law. Or consider Plaintiffs' charged arguments in the Complaint regarding alleged violations of the South Carolina Human Affairs Law and constructive discharge. Pls.' Compl. ¶¶ 2, 7, & 43. Yet Plaintiffs, apparently unhappy with the detailed remedies Congress and the South Carolina General Assembly have provided for employees, now seek to throw the baby out with the bathwater. Ms. Mihal, who helps administer disability programs and ensure that the College of Charleston's services are accessible to all students, Mihal Aff. ¶ 2, and the ACLU ask the Court to strike down and enjoin a provision in one of Governor McMaster's Executive Orders directing state government agencies under the Governor's authority "to immediately expedite the transition back to normal operations." Exec. Order No. 2021-12, § 5(D). In doing so, Plaintiffs vaguely and indirectly challenge certain aspects of the Governor's emergency authority, or at least the exercise of that power in a way they do not like or the modification or recission of prior directives at a particular time. To the extent Plaintiffs' Complaint challenges the Governor's emergency authority, whether intentionally or unintentionally, this undercuts their own arguments (since they claim to prefer prior directives over more recent modifications) and risks stripping the State of its ability to respond to and recover from COVID-19 in a collaborative and coordinated manner, expedite administration of allocated supplies of authorized and available vaccines, and obtain access to emergency federal resources and funding. All because she doesn't want to go back to work.

According to Plaintiffs, the Governor had the authority to issue an emergency executive order or proclamation directing non-essential employees to work remotely during the pandemic. However, Plaintiffs now argue he lacks the authority to modify or rescind that provision and force state employees to return to work in person, as their employers required prior to the Governor's

[1] Dunn Ltr. to Gov. McMaster, Am. Civil Liberties Union of S.C. (Mar. 30, 2021), https://www.aclusc.org/sites/default/files/field_documents/2021-03-30_ltr_to_governor_return_to_work.pdf

directive. Moreover, Plaintiffs claim that reinstating the previous default rules and requiring state employees to report to their workplace is somehow discriminatory. Aside from the quixotic nature of Plaintiffs' argument that requiring employees to go to work is discriminatory in any way—just as it was not discriminatory when they applied for and accepted the position and were previously obligated to work in person—Plaintiffs' theory of the case ignores the plain text of Section 5(D) of Executive Order No. 2021-12, as well as longstanding statutory provisions governing state human resources matters. Framing Plaintiffs' argument in a more familiar, or less unprecedented, context underscores the absurdity of their claims, as applied to the present public health emergency and any other extraordinary circumstance: Plaintiffs would have this Court believe the Governor has the authority to evacuate an area or close state offices in anticipation of a hurricane or snow storm, but he does not have the authority to modify or rescind his evacuation order when the threat evolves, the storm changes course (or until all snow melts), or the recovery begins. At bottom, Plaintiffs' claims fail as a matter of law and logic.

"Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring) (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)). "When [state] officials 'undertake[] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad'" and not "subject to second-guessing" from the judiciary, "which lacks the background, competence, and expertise to assess public health and is not accountable to the people." Id. at 1613–14 (second alteration in original) (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)). And "[t]hat is especially true where, as here, a party seeks emergency relief in an

interlocutory posture, while local officials are actively shaping their response to changing facts on the ground." Id. at 1614.

This action nevertheless arises out of Plaintiffs' personal disagreement with the Governor's lawful exercise of his executive discretion to shepherd the State through a global pandemic. Indeed, this is the latest example of the ACLU turning a letter into a lawsuit, manufacturing legal claims, and trying to micromanage the State's response to COVID-19. To date, the ACLU has yet to prevail, as courts continue to reject its baseless lawsuits. Respectfully, the Court should follow suit here, particularly with regard to Plaintiffs' request for a mandatory TRO, which would significantly alter the status quo.

COVID-19 Response

On March 13, 2020, Governor McMaster first declared a State of Emergency based on a determination that COVID-19 posed an imminent public health emergency for the State of South Carolina. See Executive Order No. 2020-08. That same day, the President of the United States declared the ongoing COVID-19 outbreak (1) was a pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia, pursuant to Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5207 ("Stafford Act"); and (2) constitutes a national emergency, pursuant to Sections 201 and 301 of the National Emergencies Act, 50 U.S.C. §§ 1601 et seq., and consistent with Section 1135 of the Social Security Act, 42 U.S.C. § 1320b-5, as amended, retroactive to March 1, 2020.

Less than two weeks later, the Governor asked the President to declare a major disaster exists in the State of South Carolina pursuant to Section 401 of the Stafford Act, and on March 27, 2020, the President granted the Governor's request, declared that a major disaster exists, and

ordered federal assistance to supplement state, tribal, and local recovery efforts in the areas affected by the COVID-19 pandemic, with an effective date retroactive to January 20, 2020, and continuing. Since initially declaring a State of Emergency, the Governor has issued various Executive Orders initiating, directing, and modifying specific narrowly tailored measures designed to address the significant public health, economic, and other impacts associated with COVID-19 and to mitigate the resulting burdens on healthcare providers, individuals, and businesses in the State of South Carolina.

The State, of course, has faced unprecedented challenges in the wake of this global pandemic. Recognizing the seriousness of COVID-19, all three branches of state government have taken, and continue to take, swift action to address this ever-evolving public health emergency. The South Carolina Supreme Court, for example, issued numerous orders modifying court operations during these unusual times. For its part, the General Assembly has overseen the expenditure of over $1.9 billion in emergency CARES Act[2] funds and temporarily changed the State's election laws to protect voters and ensure the integrity of our elections by allowing all qualified voters to vote by absentee ballot in connection with a State of Emergency. And the Governor, acting within the boundaries of his emergency powers, has declared states of emergency, worked closely with the federal government to obtain necessary aid on behalf of the State, and taken decisive and extraordinary measures to protect the health and safety of South Carolinians. E.g., S.C. Code Ann. §§ 1-3-410 through -460; § 25-1-440.

[2] Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) on March 27, 2020), and the President signed it into law the same day. See H.R. 748, Public Law No. 116–136, 134 Stat. 281 (Mar. 27, 2020).

All told, the Governor has issued over fifty Executive Orders related to COVID-19 since first declaring a State of Emergency on March 13, 2020.[3] Although Plaintiffs apparently liked (and want reinstated) certain aspects of previous Orders, they now take issue with a single provision of Executive Order No. 2021-12, which "direct[ed] all state agencies to immediately expedite the transition back to normal operations." Executive Order No. 2021-12, § 5(D) (Mar. 5, 2021). This subsection further provided:

> All Agency Heads, or their designees, shall submit to the Department of Administration, for review and approval, a plan to expeditiously return all non-essential employees and staff to the workplace on a full-time basis. This Section shall apply to state government agencies, departments, and offices under the authority of the undersigned. I further direct the Department of Administration to continue to provide or issue any necessary and

[3] See Executive Order No. 2020-08 (Mar. 13, 2020); Executive Order No. 2020-09 (Mar. 15, 2020); Executive Order No. 2020-10 (Mar. 17, 2020); Executive Order No. 2020-11 (Mar. 19, 2020); Executive Order No. 2020-12 (Mar. 21, 2020); Executive Order No. 2020-13 (Mar. 23, 2020); Executive Order No. 2020-14 (Mar. 27, 2020); Executive Order No. 2020-15 (Mar. 28, 2020); Executive Order No. 2020-16 (Mar. 30, 2020); Executive Order No. 2020-17 (Mar. 31, 2020); Executive Order No. 2020-18 (Apr. 3, 2020); Executive Order No. 2020-19 (Apr. 3, 2020); Executive Order No. 2020-21 (Apr. 6, 2020); Executive Order No. 2020-22 (Apr. 7, 2020); Executive Order No. 2020-23 (Apr. 12, 2020); Executive Order No. 2020-25 (Apr. 16, 2020); Executive Order No. 2020-28 (Apr. 20, 2020); Executive Order No. 2020-29 (Apr. 27, 2020); Executive Order No. 2020-30 (May 1, 2020); Executive Order No. 2020-31 (May 3, 2020); Executive Order No. 2020-33 (May 8, 2020); Executive Order No. 2020-34 (May 8, 2020); Executive Order No. 2020-35 (May 12, 2020); Executive Order No. 2020-36 (May 15, 2020); Executive Order No. 2020-37 (May 21, 2020); Executive Order No. 2020-38 (May 27, 2020); Executive Order No. 2020-40 (June 11, 2020); Executive Order No. 2020-42 (June 26, 2020); Executive Order No. 2020-44 (July 11, 2020); Executive Order No. 2020-45 (July 11, 2020); Executive Order No. 2020-48 (July 26, 2020); Executive Order No. 2020-50 (Aug. 2, 2020); Executive Order No. 2020-53 (Aug. 10, 2020); Executive Order No. 2020-56 (Aug. 25, 2020); Executive Order No. 2020-59 (Sept. 9, 2020); Executive Order No. 2020-62 (Sept. 24, 2020); Executive Order No. 2020-63 (Oct. 2, 2020); Executive Order No. 2020-65 (Oct. 9, 2020); Executive Order No. 2020-67 (Oct. 24, 2020); Executive Order No. 2020-70 (Nov. 8, 2020); Executive Order No. 2020-72 (Nov. 23, 2020); Executive Order No. 2020-73 (Nov. 25, 2020); Executive Order No. 2020-75 (Dec. 8, 2020); Executive Order No. 2020-77 (Dec. 23, 2020); Executive Order No. 2021-03 (Jan. 7, 2021); Executive Order No. 2021-07 (Jan. 22, 2021); Executive Order No. 2021-08 (Feb. 6, 2021); Executive Order No. 2021-10 (Feb. 21, 2021); Executive Order No. 2021-11 (Mar. 1, 2021); Executive Order No. 2021-12 (Mar. 5, 2021); Executive Order No. 2021-13 (Mar. 8, 2021); Executive Order No. 2021-15 (Mar. 23, 2021); Executive Order No. 2021-18 (Apr. 7, 2021), available at https://governor.sc.gov/executive-branch/executive-orders. The Court can take judicial notice of the Governor's Executive Orders. See Rules 201(b) & (f), SCRE; Heyward v. Long, 178 S.C. 351, ___, 183 S.E. 145, 152 (1935); Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co., 440 F. Supp. 3d 520, 524 n.2 (D.S.C. 2020).

> appropriate additional or supplemental guidance, rules, or regulations regarding the application of this Section, or to otherwise provide clarification regarding the same, to such agencies, departments, and offices and to any additional agencies, departments, and offices so as to facilitate and expedite implementation of these initiatives.

Id.[4] Section 5(D) represented a modification to the previous directives that "all non-essential employees and staff of the State of South Carolina, as described below, shall not report to work, physically or in-person, until further notice." Executive Order No. 2021-11, § 8(A) (Mar. 1, 2021); see, e.g., Executive Order No. 2020-11, § 1(A) (Mar. 19, 2020) (containing initial directive).

Consistent with Section 5(D) of Executive Order No. 2021-12—as well as preexisting statutory authority, see S.C. Code Ann. § 8-11-230(6) ("The Department of Administration is authorized and directed to . . . develop policies and programs concerning leave with or without pay, hours of work, fringe benefits (except State retirement benefits), employee/management

[4] Section 8(A) of Executive Order No. 2021-11 further provided as follows:

> For purposes of this Section, essential employees and staff are those designated by, and in the sole discretion of, the corresponding Agency Head, or their designee, as essential or mission-critical to the State's preparation for and response to emergency conditions related to COVID-19 or otherwise necessary to serving the State of South Carolina by ensuring the continuity of critical operations of state government. Essential employees and staff may still be required to report to work as determined by, and in the sole discretion of, the corresponding Agency Head or their designee. Notwithstanding the foregoing or any previous event-specific employment classifications or designations, for purposes of this emergency, essential may be defined differently than it has been defined or applied in the context of hazardous weather events. In accordance with prior directives, as well as related guidance issued by the Department of Administration, state agencies and departments shall utilize, to the maximum extent possible, telecommuting or work-from-home options for non-essential employees and staff. This Section shall apply to state government agencies, departments, and offices under the authority of the undersigned. I further direct the Department of Administration to continue to provide any necessary and appropriate supplemental guidance to such agencies, departments, and offices and to any additional agencies, departments, and offices so as to facilitate and expedite implementation of these initiatives.

Executive Order No. 2021-11, § 8(A).

relations, performance appraisals, grievance procedures, employee awards, dual employment, disciplinary action, separations, reductions in force, and other conditions of employment as may be needed.")—the Department of Administration has issued memoranda to state agency directors and institutions of higher education containing guidance regarding staffing and operations and plans for employees to return to the workplace. Notably, the day before the Governor issued Executive Order No. 2021-12, the South Carolina Supreme Court issued an Order addressing similar operational issues pertaining to the Judicial Branch and the Unified Judicial System. See In re Operation of the Trial Courts During the Coronavirus Emergency, §§ (c)(1), (c)(11)(A), App. Case No. 2020-000447 (as amended March 4, 2021), available at https://www.sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2574.

To date, the South Carolina Department of Health and Environmental Control ("DHEC") and its public and private partners have conducted more than 6,900,000 tests for COVID-19 and have administered over 2,165,000 doses of vaccines for COVID-19. As a result, DHEC continues to document measured progress and downward or declining trends associated with the average rate of cases of COVID-19 per 100,000 individuals, the percentage of positive tests for COVID-19, and the number of new hospital admissions and deaths associated with or related to COVID-19. With numbers fluctuating week to week, the State's response to COVID-19 was and is far from static. And the Governor will continue to carefully monitor the situation to ensure the State responds appropriately to the ever-evolving public health threats. Plaintiffs, however, take issue with the Governor's measured approach.

Procedural History

On April 6, 2021, Plaintiffs filed a Complaint for declaratory and injunctive relief in this Court, challenging Governor McMaster's power and prerogative to modify his prior directives and

require state agencies under the Governor's authority to "expedite the transition back to normal operations." Plaintiffs argue (1) the Governor's executive actions violate the nondelegation doctrine in article III, section 1 of the South Carolina Constitution and the separation of powers doctrine enshrined in article I, section 8 of the South Carolina Constitution; and (2) requiring nonessential state employees to return to the workplace exceeded the Governor's authority and represented an *ultra vires* act. Around the same time, Plaintiffs moved for a TRO or preliminary injunction. The following day, on April 7, 2021, Governor McMaster promptly filed a Motion to Dismiss Plaintiffs' Complaint. This matter comes before the Court on Governor McMaster's opposition to Plaintiffs' Motion for TRO or other preliminary injunctive relief.[5]

II. STANDARD

"The remedy of an injunction is a drastic one and ought to be applied with caution." Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation." Allegro, Inc. v. Scully, 400 S.C. 33, 45, 733 S.E.2d 114, 121 (Ct. App. 2012). For the Court to grant a preliminary injunction, Plaintiffs must establish (1) they "would suffer irreparable harm if the injunction is not granted," (2) they "will likely succeed on the merits of the litigation," and (3) no adequate remedy at law exists. Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). "A preliminary injunction should issue only if necessary to preserve the status quo ante." Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010).

[5] From the face of their Complaint, Plaintiffs failed as a matter of law to state facts sufficient to constitute a cause of action under any theory of the case. Thus, Governor McMaster relies on documents outside the pleadings solely to oppose their request for a TRO and injunctive relief.

III. ARGUMENT

The Court should deny Plaintiffs' Motion for TRO because (1) Plaintiffs failed to shoulder their heavy burden of demonstrating irreparable harm, (2) they cannot succeed on the merits of this litigation, and (3) this action is foreclosed because adequate legal remedies are available, should they even be necessary. Because Plaintiffs failed as a matter of law to allege or prove they are entitled to declaratory or injunctive relief or that subject-matter jurisdiction is appropriate, the Court should further dismiss the Complaint with prejudice.

A. As a threshold matter, the Court should give deference to the Governor's policy decisions in the exercise of his emergency powers.

At the outset, it is necessary to set forth the lens through which the Court should judge the discretionary actions of a coequal branch of government, particularly in the context of a public health emergency.

> The people of this state, have, by the constitution assigned to the respective branches of the government, the several powers therein specified, according to the various provisions of that instrument, and in the exercise of those powers, each must necessarily be governed by its own judgment and discretion. The governor, in the discharge of his official duties, must follow what appears to him the most correct construction of the constitution, and wherever he has by official acts given a construction to any part of it which relates to his particular department, this court will not readily interfere to arrest the progress of his measures.

State v. Williams, 10 S.C.L. (1 Nott. & McC.) 26, 28 (1817). When "discretion is granted or presumed to be granted to the executive department of the government by legislative enactment, the court [will] not attempt to disturb the exercise of that discretion." Hall v. Richards, 159 S.C. 34, __, 156 S.E. 12, 14 (1930).

"Courts traditionally have recognized the [executive's] constitutional responsibilities and status as factors counseling judicial deference and restraint." Nixon v. Fitzgerald, 457 U.S. 731,

753 (1982). "The presumption is that the chief executive, in the exercise of the powers of his great office, acts with a view to the public interest, and therefore the courts should give effect to his acts to the utmost extent that they are authorized by law." McDowell v. Burnett, 92 S.C. 469, ___, 75 S.E. 873, 878 (1912). "[A] court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." Nixon, 457 U.S. at 754.

Indeed, "[t]he same degree of caution, which [a] court would use in declaring an act of the [General Assembly] unconstitutional, ought to be observed towards the acts of the executive." Williams, 10 S.C.L. at 28. It is well settled that "[a] legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." Westvaco Corp. v. S.C. Dep't of Revenue, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995). Courts are "reluctant to declare a statute unconstitutional" and "will make every presumption in favor of finding it constitutional." Bodman v. State, 403 S.C. 60, 66, 742 S.E.2d 363, 365 (2013). To that end, "[a] possible constitutional construction must prevail over an unconstitutional interpretation." Westvaco Corp., 321 S.C. at 62, 467 S.E.2d at 741. After all, "[t]he proper role of the judiciary" is "to apply, not amend, the work of the People's representatives." Henson v. Santander Consumer USA, Inc., 137 S. Ct. 1718, 1726 (2017).

The General Assembly has given the Governor certain emergency authority to meet various threats and challenges posed by a global pandemic. Although Plaintiffs cloak their Complaint with constitutional claims, they are merely asking this Court not only to inject itself into a premature state employee grievance but also to assume a public health function and to referee a policy debate over the propriety of the Governor's response to COVID-19. At bottom, Plaintiffs are asking the Court to interfere with another branch of government's discretion and decisions made during a

public health emergency based upon guidance from federal, state, and local experts. In doing so, they ask the Court to substitute its purported expert's opinion for the Governor's decisions. This should give the Court great pause.

Indeed, the Court lacks jurisdiction to review the discretionary acts of the Governor, particularly where, as here, affording the requested relief requested would violate the separation-of-powers clause of the South Carolina Constitution. E.g., McConnell v. Haley, 393 S.C. 136, 138, 711 S.E.2d 886, 887 (2011); Rose v. Beasley, 327 S.C. 197, 204, 489 S.E.2d 625, 628 (1997) (citing Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981); Bd. of Bank Control v. Thomason, 236 S.C. 158, 113 S.E.2d 544 (1960)); Fowler v. Beasley, 322 S.C. 463, 467, 468, 472 S.E.2d 630, 633 (1996) (citing Easler v. Maybank, 191 S.C. 511, 5 S.E.2d 288 (1939)); Blalock v. Johnston, 180 S.C. 288, 185 S.E. 51, 55 (1936) (quoting State ex rel. Whiteman v. Chase, 5 Ohio St. 528, 535 (1856)).

Deference is even more important and appropriate in the context of public health. "A law involving public health emergencies will only be struck down if it has 'no real or substantial relation to those objects, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" TJM 64, Inc. v. Harris, No. 220CV02498JPMTMP, 2020 WL 4352756, at *3 (W.D. Tenn. July 29, 2020) (quoting Jacobson, 197 U.S. at 31). Here, "[t]he role of the Court is not to second guess whether Defendants made the right decision." Id. at *4. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [a court] may think a political branch has acted." F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993) (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

Against this backdrop, the Court should proceed with caution and exercise the requisite restraint prior to wading into what is akin to a political question in the midst of a pandemic.

B. Plaintiffs are not entitled to a mandatory TRO.

The Court should deny Plaintiffs' Motion for TRO and reject any requests for other injunctive relief because they failed to shoulder the heavy burden of demonstrating an entitlement to such extraordinary relief in this case. See Scratch Golf Co., 361 S.C. at 121, 603 S.E.2d at 908 (asserting a plaintiff must establish (1) she "would suffer irreparable harm if the injunction is not granted," (2) she "will likely succeed on the merits of the litigation," and (3) no adequate remedy at law exists).

"A mandatory injunction, especially at the preliminary stage of proceedings, should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party." Gantt v. Clemson Agr. Coll. of S.C., 208 F. Supp. 416, 418 (W.D.S.C. 1962). "Mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in those circumstances where the exigencies of the situation demand such relief." Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980). The U.S. Court of Appeals for the Fourth Circuit "has defined the status quo as the 'last uncontested status between the parties which preceded the controversy.'" Pashby v. Delia, 709 F.3d 307, 320 (4th Cir. 2013) (quoting Aggarao v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355, 378 (4th Cir. 2012)).

By asking the Court to alter the status quo, which is Section 5(D) of Executive Order No. 2021-12 remaining in place, Plaintiffs are seeking mandatory injunctive relief, which is met with even greater scrutiny from the Court. See id. (asserting that "'application of th[e] exacting standard of review [for preliminary injunctions] is even more searching when' the relief requested 'is mandatory rather than prohibitory in nature'" (alterations in original) (quoting Perry v. Judd, 471

F. App'x 219, 223–24 (4th Cir. 2012))). Viewed in this prism, Plaintiffs have failed as a matter of law to meet the heavy burden of demonstrating they are entitled to one of the most drastic forms of relief known under the law.

1. Plaintiffs failed to allege and cannot show irreparable harm.

First, Plaintiffs' request for a TRO fails as a matter of law because they cannot demonstrate any imminent irreparable harm stemming from enforcement of the Governor's Executive Order.

Plaintiffs' bare and conclusory allegation that the Governor's action is purportedly unconstitutional or ultra vires, without more, is not good enough. Although Plaintiffs go into a long diatribe about how Executive Order No. 2021-12 allegedly affects a host of different groups of people, that is wildly speculative, for one, and does nothing to inform the inquiry of whether Mihal will suffer irreparable harm. The ACLU, of course, cannot assert irreparable harm on behalf of other unidentified alleged state employees. See Denman v. City of Columbia, 387 S.C. 131, 140–41, 691 S.E.2d 465, 470 (2010) ("An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." (emphasis added) (quoting Scratch Golf Co., 361 S.C. at 121, 603 S.E.2d at 907)).

As for Ms. Mihal, she has not experienced any harm, and her claims of future harm are without merit. Although the College of Charleston's plan gave employees weeks to apply for and begin the interactive accommodations process for a number of issues, including disabilities and childcare, Ms. Mihal has not produced a single communication indicating she availed herself of that process or received a decision. She similarly has not introduced any evidence that termination is imminent. Nor can she show it would be dangerous to return to work. The guidance issued by the Department of Administration expressly states that "[a]gencies and institutions should still employ measures to reduce the likelihood of transmission in the workplace including, but not

limited to, requiring employees to wear masks in state government buildings, reminding employees to wash hands frequently, maintaining directional signs to manage the flow of people in the buildings, disinfecting high touch services and directing employees to stay home when they are not feeling well."[6] Yet Plaintiffs complain, without a shred of evidence, that state agency work environments will not be safe just because Governor McMaster lifted a provision in a previous Order that required masks in state government buildings. Like Director Adams, the Governor is confident in the ability of state agency heads to address the specific needs of their work environments—consistent with guidance from public health experts like the CDC and DHEC—without the Governor micromanaging each specific state building. Notably, Ms. Mihal does not even try to explain what measure the College of Charleston has taken to ensure a safe working environment. To do so would only undercut her arguments and the ACLU's claims that the "sky is falling" by having to report to work—something thousands of state employees can further counter.

The Department of Administration has the right to establish "conditions of employment." S.C. Code Ann. § 8-11-230(6). Neither Mihal nor her anonymous cohorts, on the other hand, has a right to demand their employment be exclusively remote. That is so regardless of the pages of conclusory purported expert testimony about the effects of COVID-19 on various groups. This case is about Mihal, not the myriad groups who experience greater risk to COVID-19. In other words, this is not a class action. Frankly, if Mihal has not found a vaccine at this point, then she obviously is not trying very hard. And if she does not want her child to return to in-person learning, that is her choice to make, even though it may be contrary to science and CDC and DHEC

[6] Adams Mem. to Agency Directors (Mar. 16, 2021), https://www.admin.sc.gov/sites/default/files/3-16-2021%20Additional%20FAQs%20-%20State%20Government%20Staffing-Return%20to%20Normal%20Operations%20Memorandum.pdf

guidance. But given the candid admissions in her own affidavit about how much time she spends caring for her child while working from home, which necessarily means she is not doing to business of the State for which she is paid a salary, the people of South Carolina should not continue footing the bill for this chosen arrangement. Businesses are requiring employees to return to work. So should state government. In any event, the Department of Administration's guidance specifically gives agencies the flexibility to give accommodations to address the unique nature of the pandemic and make necessary accommodations.

Further, it is worth noting that pure economic loss is generally insufficient to satisfy a showing of irreparable harm where an adequate remedy is available at law. See District of Columbia v. E. Trans–Waste of Md., Inc., 758 A.2d 1, 15 (D.C. 2000) (observing that "economic loss does not, in and of itself, constitute irreparable harm"). While the Governor is certainly sympathetic to parents' need to make childcare arrangements, that was and will remain a constant irrespective of the pandemic. Given that 94% of childcare facilities are open, and students have many options for returning to in-person learning at our schools, the Governor is confident Mihal can make appropriate arrangements. But our supreme court has long recognized that "the law will never, by any construction, advance a private interest to the destruction of a public interest." Richards v. City of Columbia, 227 S.C. 538, 547, 88 S.E.2d 683, 687 (1955). Instead, "it will advance the public interest, so far as it is possible, though it be to the prejudice of a private one." Id. Here, the people of South Carolina are ready for their government to get back to working for them full-time. Although Mihal may enjoy the current arrangement she secured during the pandemic, that cannot take precedence over the public's interest in her doing the job for which she was hired and receives a state salary.

Because Plaintiffs failed to allege and cannot demonstrate any irreparable harm stemming from having to comply with the Governor's Executive Orders, her request for injunctive relief fails as a matter of law. Regardless, a preliminary injunction "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff." Gantt v. Clemson Agr. Coll. of S.C., 208 F. Supp. 416, 417 (W.D.S.C. 1962). Plaintiffs still must show the remaining elements necessary to obtain a preliminary injunction. They cannot.

2. Plaintiffs cannot succeed on the merits because the Governor's Executive Order is lawful.

Although Plaintiffs have not carried their burden of satisfying the other necessary elements for injunctive relief, their case ultimately fails—and Governor McMaster's Motion to Dismiss prevails—because the Governor's Executive Order is lawful. In other words, Plaintiffs cannot succeed on the merits of this litigation.

In our system of government, "the powers of the General Assembly are plenary as to all matters of legislation unless limited by some provision of the Constitution." Clarke v. S.C. Pub. Serv. Auth., 177 S.C. 427, ___, 181 S.E. 481, 486 (1935). Stated differently, it is up to the General Assembly "to exercise discretion as to what the law will be." Hampton v. Haley, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013). As the supreme court explained in Hampton,

> The executive branch is constitutionally tasked with ensuring "that the laws be faithfully executed." Of course, the executive branch . . . may exercise discretion in executing the laws, but only that discretion given by the [General Assembly]. Thus, while non-legislative bodies may make policy determinations when properly delegated such power by the [General Assembly], absent such a delegation, policymaking is an intrusion upon the legislative power.

Id. at 404, 743 S.E.2d at 262 (quoting S.C. CONST. art. IV, § 15).

Here, the General Assembly has given the Governor broad powers during times of emergency. After all, "[t]he Governor, when an emergency has been declared, as the elected Chief

Executive of the State, is responsible for the safety, security, and welfare of the State."[7] S.C. Code Ann. § 25-1-440(a)(2). He is therefore "empowered with the . . . authority to adequately discharge this responsibility, which includes, among other things, to "declare a state of emergency for all or part of the State if he finds a disaster or a public health emergency, as defined in Section 44-4-130, has occurred, or that the threat thereof is imminent and extraordinary measures are considered necessary to cope with the existing or anticipated situation."[8] Id. The Governor naturally has the authority to modify, amend, or rescind such Orders. See S.C. Code Ann. § 25-1-440(a)(1).

As succinctly stated in a 1980 Attorney General's Opinion, "no one would seriously challenge that such an emergency power may be needed given the ever present potential of enemy attack, epidemic, natural disaster[,] or nuclear accident." S.C. Op. Att'y Gen. 80-93, 1980 WL 81975, at *2 (Sept. 5, 1980) (emphasis added). Yet, Plaintiffs nevertheless challenges this obvious need and well-established system on two logically and legally inconsistent grounds. First, they argue the General Assembly's statutory delegation of policymaking authority is unconstitutional and violates the separation-of-powers doctrine. Second, they argue the Executive Order runs afoul of the statutory authority given to the Governor. As explained below, each contention is meritless.

[7] An emergency, of course, is any "actual or threatened enemy attack, sabotage, conflagration, flood, storm, epidemic, earthquake, riot, or other public calamity." S.C. Code Ann. § 25-1-430(b); see S.C. Code Ann. § 1-3-420; S.C. Code Ann. § 44-4-130.

[8] A public health emergency is "the occurrence or imminent risk of a qualifying health condition." S.C. Code Ann. § 44-4-130(P); see also S.C. Code Ann. § 44-4-130(R)(2) (defining a "qualifying health condition," among other things, as "an illness or health condition that may be caused by terrorism, epidemic or pandemic disease, or a novel infectious agent or biological or chemical agent and that poses a substantial risk of a significant number of human fatalities, widespread illness, or serious economic impact to the agricultural sector, including food supply").

a. The General Assembly's statutory delegation of emergency powers is constitutional, and the Governor's actions do not violation the separation of powers doctrine.

Contrary to Plaintiffs' conclusory assertions, Governor McMaster's discretionary exercise of emergency authority does not intrude upon the legislative power.

"In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." S.C. CONST. art. I, § 8. "While case law within our state and across the nation involving separation of powers disputes is not a model of consistency, one theme reverberates throughout: the court's role in upholding the separation of powers doctrine is to maintain the three branches of government in positions of equality." Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control, 407 S.C. 583, 591, 757 S.E.2d 408, 412–13 (2014). That said, "[s]eparation of powers does not require that the branches of government be hermetically sealed." S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 649, 744 S.E.2d 521, 526 (2013) (quoting 16A AM. JUR. 2d Constitutional Law § 244).

Under our constitution, "the legislative power" is "vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'" S.C. CONST. art. III, § 1. "Although the legislature may delegate its authority to create rules and regulations to carry out a law, the legislature may not delegate its power to make the law." Joytime Distribs. & Amusement Co. v. State, 338 S.C. 634, 643, 528 S.E.2d 647, 652 (1999) (emphasis omitted).

In this instance, the General Assembly—in recognition that a unitary Executive is more nimble and able to quickly respond to the needs of the State in a public health emergency—gave

the Governor emergency powers. See S.C. Code Ann. § 25-1-440. After all, the Governor is the Commander-in-Chief of the organized militia of the state," S.C. CONST. art. IV, § 13, and "has the power to . . . preserve the common peace," 19 S.C. JUR. Constitutional Law § 24 (2020); see also S.C. CONST. art. XIII, § 3 ("The Governor shall have the power to call out the volunteer and militia forces, either or both, to execute the laws, repel invasions, suppress insurrections and preserve the public peace."). And "[t]he executive branch is constitutionally tasked with ensuring "that the laws be faithfully executed." Hampton, 403 S.C. at 404, 743 S.E.2d at 262 (quoting S.C. CONST. art. IV, § 15). He also has inherent authority as Commander-in-Chief, Chief Magistrate, and "the supreme executive authority of this State" to exercise prerogative powers in times of emergency. See S.C. CONST. art. IV, § 1; S.C. CONST. art. IV, § 13. "Of course, the executive branch . . . may exercise discretion in executing the laws, but only that discretion given by the [General Assembly]." Id. And "non-legislative bodies may make policy determinations when properly delegated such power by the [General Assembly]." Id.

Here, the Governor acted within the boundaries of the power bestowed upon him by the General Assembly in responding to this unique public health emergency. See S.C. Code Ann. § 25-1-440; see also S.C. Att'y Gen. Op., 1980 WL 81975, at *2 (Sept. 5, 1980) (observing that "[r]etained in the 1975 legislation and now found in Section 25-1-440 . . . was the express delegation of emergency powers to the Governor"). The Governor also acted in a context in which the General Assembly has not spoken because nobody could have foreseen the specific exigencies that arose—and continue to arise—at each step along the way in responding to COVID-19. What is more, no separation of powers concerns are present because the General Assembly, in giving the Governor this emergency authority, retained a check on his exercise of emergency powers. See S.C. Code Ann. § 25-1-440(a)(2); cf. State ex rel. McLeod v. Yonce, 274 S.C. 81, 84, 261

S.E.2d 303, 304 (1979) ("One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances.").

Indeed, Plaintiffs miss the mark on separation of powers in this case. Those concerns do not arise from the Governor exercising policymaking authority pursuant to a lawful delegation of authority from the General Assembly subject to its consent on the back end. To the contrary, separation-of-powers concerns reared their head the minute Plaintiffs asked this Court to second-guess the Governor's executive discretion. Cf. Newman v. Richland Cty. Historic Pres. Comm'n, 325 S.C. 79, 480 S.E.2d 72, 76 (1997) ("'Checks and balances' is not just an abstract phrase, but describes a set of concrete governmental arrangements allowing each branch of government to discharge its responsibilities without infringing on those of another branch. One of these arrangements is judicial review of certain executive and legislative actions. In determining when it is permissible to conduct such review, it is important to distinguish between matters of policy and matters of law. The courts are not in the business of reviewing the merits of legislative or executive policies; rather, our role is confined to determining whether a particular action is legal."). In other words, their separation-of-powers argument actually cuts the other way.

The nondelegation "doctrine is a component of the separation of powers doctrine and prohibits the delegation of one branch's authority to another branch." Hampton v. Haley, 403 S.C. 395, 407, 743 S.E.2d 258, 264 (2013). In South Carolina, the doctrine has typically arisen in the administrative agency context. It "prohibits the [General Assembly] from vesting unbridled, uncontrolled[,] or arbitrary power in an administrative agency." Gale v. State Bd. of Med. Examiners of S.C., 282 S.C. 474, 479, 320 S.E.2d 35, 38 (Ct. App. 1984). As our supreme court has recognized, without "limitations on the agency's authority," a court, "when presented with a

challenge of the agency's actions, would . . . be unable to judicially review its actions." Bauer v. S.C. State Hous. Auth., 271 S.C. 219, 233, 246 S.E.2d 869, 876 (1978). "In such a case, a citizen aggrieved by an agency action would be deprived of his due process rights under the State and Federal Constitutions."[9] Id.

Although the General Assembly "may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board 'to fill up the details' by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose." S.C. State Highway Dep't v. Harbin, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955). "In determining whether a statute violates the doctrine, we must consider the administrative actions the act affirmatively permits and examine the entire act in light of its surroundings and objectives to ascertain express or implied standards." Gale, 282 S.C. at 479–80, 320 S.E.2d at 38.

Indeed, a court is "not restricted to the ascertainment of standards in express terms if they may reasonably be implied from the entire act." Bauer, 271 S.C. at 233, 246 S.E.2d at 876.

> The [General Assembly] has the authority to confer upon boards and commissions the power to execute laws enacted by it. "However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration."

Terry v. Pratt, 258 S.C. 177, 184–85, 187 S.E.2d 884, 887–88 (1972) (quoting Atl. Coast Line Ry. Co. v. S. C. Pub. Ser. Comm'n, 245 S.C. 229, 234, 139 S.E.2d 911, 913 (1965), overruled on other grounds by Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998)).

[9] Plaintiffs, of course, have not raised any due process challenges to the Executive Orders or the statutes pursuant to which they were issued.

"All reasonable doubt must be resolved in favor of the constitutionality of a statute." Gale, 282 S.C. at 480, 320 S.E.2d at 38.

> The degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. There are many instances where it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to enable the administrative officers to carry out the legislative will; especially may such a contingency arise when the discretion conferred relates to police regulations."

Harbin, 226 S.C. at 594–95, 86 S.E.2d at 470.

The U.S. Supreme Court has only twice struck down legislation as violative of the nondelegation doctrine in the history of our Republic. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); ALA Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). "By contrast," the Court has "over and over upheld even very broad delegations."[10] Gundy v. United States, 139 S. Ct. 2116, 2129 (2019) (plurality); id. at 2130–31 (Alito, J. concurring) (noting "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards," and "it would be freakish to single out the provision at issue here for special treatment"). Parties have had mixed success in South Carolina.

The Governor, of course, recognizes that "the issue is to be decided not on the assumption that the officer will use sound judgment in exercising the unregulated discretion with which the

[10] E.g., Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001); Mistretta v. United States, 488 U.S. 361, 379 (1989); United States v. Mazurie, 419 U.S. 544, 556–57 (1975); United States v. Sharpnack, 355 U.S. 286, 296–97 (1958); Am. Power & Light Co. v. Securities & Exch. Comm'n, 329 U.S. 90, 104–06 (1946); Yakus v. United States, 321 U.S. 414, 425–26 (1944); Mulford v. Smith, 307 U.S. 38, 47–49 (1939); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409–11 (1928); United States v. Grimaud, 220 U.S. 506, 516–17 (1911); Marshall Field & Co. v. Clark, 143 U.S. 649, 693–94 (1892); Wayman v. Southard, 23 U.S. (10 Wheat) 1 (1825).

statute has invested him, but upon consideration of what things the statute affirmatively permits him to do." Terry, 258 S.C. at 182–83, 187 S.E.2d at 886. Our nation is one of laws, not of men. But it is equally true that "[t]he degree of authority that may lawfully be delegated to an administrative agency must in large measure depend upon circumstances of the particular case at hand, including legislative policy as declared in the statute, objective to be accomplished[,] and nature of agency's field of operation." Id. at 183, 187 S.E.2d at 886–87.

Here, we are not in a vacuum—we are in the midst of a global pandemic that, by definition, constitutes a public health emergency. See S.C. Code Ann. § 1-3-420 ("The Governor, when in his opinion the facts warrant, shall, by proclamation, declare that, because of . . . a public health emergency, as defined in Section 44-4-130, a danger exists to the person or property of any citizen and that the peace and tranquility of the State, or any political subdivision thereof, or any particular area of the State designated by him, is threatened, and because thereof an emergency, with reference to such threats and danger, exists."); S.C. Code Ann. § 44-4-130(P) (defining public health emergency as "the occurrence or imminent risk of a qualifying health condition"); S.C. Code Ann. § 44-4-130(R)(2) (defining a qualifying health condition, in relevant part, as an "epidemic or pandemic disease . . . that poses a substantial risk of a significant number of human fatalities, widespread illness, or serious economic impact to the agricultural sector, including food supply"); S.C. Code Ann. § 25-1-430(b) (defining emergency as an "actual or threatened enemy attack, sabotage, conflagration, flood, storm, epidemic, earthquake, riot, or other public calamity"); S.C. Code Ann. § 25-1-440(a)(2) (stating "[t]he Governor, when an emergency has been declared, as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State and is empowered with the following additional authority to adequately discharge this responsibility . . . [to] declare a state of emergency for all or part of the State if he finds a disaster

or a public health emergency, as defined in Section 44-4-130, has occurred, or that the threat thereof is imminent and extraordinary measures are considered necessary to cope with the existing or anticipated situation"). Those are the "circumstances of the particular case at hand." Terry, 258 S.C. at 183, 187 S.E.2d at 887.

As for "legislative policy as declared in the statute," id., the General Assembly did not hide the ball in enacting the Emergency Health Powers Act.[11] Indeed, in recognition that "new and emerging dangers, including emergent and resurgent infectious diseases and incidents of civilian mass casualties, pose serious and immediate threats," the General Assembly found that "the government must do more to protect the health, safety, and general well being of our citizens," and the Act was thus "necessary to protect the health and safety of the citizens of this State." S.C. Code Ann. §§ 44-4-110(1)–(2) & (10). More to the point, the General Assembly concluded "this State must have the ability to respond, rapidly and effectively, to potential or actual public health emergencies." Id. § 44-4-110(5). Nevertheless, it found that "emergency health powers must be grounded in a thorough scientific understanding of public health threats and disease transmission." Id. § 44-4-110(7). "[G]uided by principles of justice, it is the duty of this State to act with fairness and tolerance toward individuals and groups," and "the rights of people to liberty, bodily integrity, and privacy must be respected to the fullest extent possible consistent with the overriding importance of the public's health and security." Id. §§ 44-4-110(8)–(9).

[11] S.C. Code Ann. §§ 44-4-100 through -570. Subsections 1-3-420 and 25-1-440(a)(2) cross-reference the Emergency Health Powers Act for the definition of "public health emergency" and, therefore, we must read them all in concert with one another. See Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) ("It is well settled that statutes dealing with the same subject matter are in para materia and must be construed together, if possible, to produce a single, harmonious result."); S.C. Code Ann. § 25-1-440(e) ("In addition to the powers and duties provided in this article and in Article 7, Chapter 3 of Title 1, the declaration of a state of public health emergency authorizes implementation of the provisions of Chapter 4 of Title 44, the Emergency Health Powers Act.").

And the "objective to be accomplished," Terry, 258 S.C. at 183, 187 S.E.2d at 887, is clear. The General Assembly said the purpose of the Act, among other things, is "to grant state officials the authority to provide care and treatment to persons who are ill or who have been exposed to infection, and to separate affected individuals from the population at large for the purpose of interrupting the transmission of infectious disease." S.C. Code Ann. § 44-4-120(4). Another purpose is "to ensure that the needs of infected or exposed persons will be addressed to the fullest extent possible, given the primary goal of controlling serious health threats." Id. § 44-4-120(5). In light of these purposes, the Act "provide[s] state officials with the ability to prevent, detect, manage, and contain emergency health threats without unduly interfering with civil rights and liberties." Id. § 44-4-120(6). After all, the State must develop "a comprehensive plan to provide for a coordinated, appropriate response in the event of a public health emergency." Id. § 44-4-120(7).

Last, the "nature" of the "field of operation," Terry, 258 S.C. at 183, 187 S.E.2d at 887, is ensuring public health and safety during a public health emergency. As noted above, "this State must have the ability to respond, rapidly and effectively, to potential or actual public health emergencies." S.C. Code Ann. § 44-4-110(5). Recognizing the need for swift action, the General Assembly gave these emergency powers to the Governor. But it certainly did not give the Governor a blank check. Rather, the General Assembly—through the relevant provisions in Title 1, Title 25, and Title 44—carefully circumscribed the authority the Governor may exercise in shepherding the State of South Carolina through a public health emergency precisely like the COVID-19 pandemic with "a coordinated, appropriate response." S.C. Code Ann. § 44-4-120(7).

Our supreme court has emphasized that "[t]here are many instances where it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to

enable the administrative officers to carry out the legislative will; especially may such a contingency arise when the discretion conferred relates to police regulations." Harbin, 226 S.C. at 594–95, 86 S.E.2d at 470. This is precisely one of those instances. The contingency was a pandemic, and the General Assembly provided "intelligible principles" through which the Governor could take action to protect the State from such public health threats.

The General Assembly was not required to read a crystal ball or contemplate, much less memorialize, every then-conceivable extraordinary scenario when it granted the Governor emergency authority. And the power to declare a state of emergency necessarily includes the power to dial back restrictions imposed due to the same to facilitate a return to normalcy. That is all that happened here. Importantly, Plaintiffs have not identified a single statute or legislative power the Governor has usurped. Instead, they simply contend—in ipse dixit fashion—that he has violated the nondelegation and separation-of-powers clauses just because they say so. That much does not follow. Contrary to their conclusory assertions, the current delegation of emergency authority to the Governor was and is constitutional, appropriately limited, and properly exercised. The Governor is not permitted to act arbitrarily, and "[a]ny abuse of this decision-making power is subject to judicial review." Bauer, 271 S.C. at 235, 246 S.E.2d at 877. Accordingly, Plaintiffs' nondelegation doctrine arguments are without merit. The General Assembly appropriately circumscribed the emergency powers given to the Governor, and Governor McMaster acted well within the confines of those powers here.

In sum, "allowing some degree of overlap between the branches has been a feature of our government since the founding of the Republic." S.C. Pub. Interest Found., 403 S.C. at 649, 744 S.E.2d at 526. Plaintiffs' hard-and-fast position ignores our supreme court's carveout to the

general rule that allows the Executive to engage in policymaking "when properly delegated such power by the General Assembly." Hampton, at 404, 743 S.E.2d at 262.

b. The Executive Orders are consistent with section 1-3-420 and comply with subsection 25-1-440(a)(2).

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994). But the Court must "not construe the statute in a way which leads to an absurd result or renders it meaningless." Florence Cty. Democratic Party v. Florence Cty. Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (per curiam).

Indeed, "[c]ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the [General Assembly] or would defeat the plain legislative intention." State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010). "If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect." Hodges, 341 S.C. at 91, 533 S.E.2d at 584 (quoting Ray Bell Constr. Co., Inc. v. Sch. Dist. of Greenville Cty., 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998)). It is well settled that "[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)).

In the very first title of the South Carolina Code of Laws, the General Assembly set forth a specific article delineating the Governor's powers to maintain peace and order. See S.C. Code Ann. § 1-3-410 ("The Governor may take such measures and do all and every act and thing which

he may deem necessary . . . to maintain peace, tranquility and good order in the State, and in any political subdivision thereof, and in any particular area of the State designated by him." (emphasis added)). As part of that power,

> The Governor, when in his opinion the facts warrant, shall, by proclamation, declare that, because of . . . a public health emergency, as defined in Section 44-4-130, a danger exists to the person or property of any citizen and that the peace and tranquility of the State, or any political subdivision thereof, or any particular area of the State designated by him, is threatened, and because thereof an emergency, with reference to such threats and danger, exists.

S.C. Code Ann. § 1-3-420. When the Governor issues "a proclamation as provided for in this section, [he] must immediately file the proclamation in the Office of the Secretary of State, which proclamation is effective upon issuance and remain in full force and effect until revoked by the Governor." Id.

Governor McMaster has followed the procedures set forth in section 1-3-420 since first declaring a public health emergency because of COVID-19 on March 13, 2020. The Governor has also followed the provisions set forth in section 25-1-440 of the South Carolina Code of Laws. Notably, the powers given to the Governor in section 1-3-420 contain no temporal limitation. The power to declare a state of emergency in section 25-1-440, on the other hand, does contain a limitation of fifteen days. In an attempt to harmonize the two statutes, the Governor has thus limited the temporal scope of his narrowly tailored emergency measures to fifteen-day periods to avoid any conceivable conflict between the two statutory provisions and to preempt any potential argument that he has exceeded his authority. Cf. Hodges, 341 S.C. at 91, 533 S.E.2d at 584 ("The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd.").

COVID-19, of course, is an evolving emergency that continues to present different and additional public health, economic, and other threats. Thus, preparing for and responding to COVID-19 and its wide-ranging impacts is not a static scenario or one-time event. Neither the pandemic nor the State's response can be deemed a single factual occasion. And a review of the Governor's Executive Orders confirms as much.

Further, as the Attorney General noted, "[n]othing in the statute [] prohibits the Governor, the end of a fifteen day period, from the declaration of a 'new' emergency." S.C. Att'y Gen Op., 2020 WL 2044376, at *3 (Apr. 13, 2020). Indeed, in the context of the current COVID-19 pandemic, "a declaration of emergency cannot 'foresee' what will occur at the end of the fifteen day period." Id. No one can. The Attorney General thus succinctly concluded that "[t]he General Assembly has delegated broad emergency powers to the Governor, pursuant to [section] 25-1-440 to manage the State's response to a declared emergency." Id. at *4 (emphasis added); see also Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) ("The Court must presume the [General Assembly] did not intend a futile act, but rather intended its statutes to accomplish something."). After all, the State of South Carolina would have been at risk of losing the opportunity to receive these and other federal emergency funds if the Governor had not continued to declare separate and distinct States of Emergency. In other words, our ability to receive critical funds from the federal government is inextricably tied to South Carolina being in a declared State of Emergency. See 42 U.S.C. §§ 5170 & 5131.

Here, Plaintiffs simply argue the Governor's actions were ultra vires because they disagree with them. In their Complaint, Plaintiffs summarily state that the Governor and Department of Administration "usurped the legislative power" and "improperly imposed unlawful burdens on

non-essential state employees." Pls. Compl. ¶¶ 53 & 58. This triggers two pretty obvious follow up questions: (1) what legislative power and (2) what unlawful burdens?

When taken together, a review of sections 1-3-420 and 25-1-440 reveals the Governor acted within the bounds of the statutorily prescribed authority the General Assembly gave him to shepherd the State through what the General Assembly itself has acknowledged constitutes a public health emergency.[12] That includes the power to help the State of South Carolina both combat and recover from COVID-19. Any other reading would lead to an absurd result that plainly was not intended by the General Assembly.

* * * *

In sum, Plaintiffs cannot succeed on the merits of this litigation because the Governor's Executive Orders are constitutional and within the bounds of the lawful delegation of emergency authority bestowed upon him by statute. The Court should therefore join its sister courts and deny Plaintiffs' motion for preliminary injunction and dismiss the complaint with prejudice.

3. Plaintiffs have an adequate remedy at law.

Aside from conclusory allegations in the complaint, Plaintiffs failed to show they lack an adequate remedy at law. Just because he says it does not make it so.

In South Carolina, circuit courts have "original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts." S.C. CONST. art. V, § 11. To determine "whether the [General Assembly] has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." Dema v. Tenet Phys. Servs.-Hilton Head, Inc., 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009). "The cardinal rule of statutory

[12] E.g., Act No. 133 of 2020 (R-138, S. 635); Act No. 135 of 2020 (R-140, H. 3411); Act No. 142 of 2020 (R-148, H. 5202); Act No. 143 of 2020 (R-149, H. 5305); Act No. 154 of 2020 (R-170, H. 3210).

construction is to ascertain and effectuate the intent of the [General Assembly]." Rainey v. Haley, 404 S.C. 320, 323, 745 S.E.2d 81, 82 (2013).

Here, the General Assembly has expressed its intent regarding employee grievances. See S.C. Code Ann. § 8-17-310 (finding "that harmonious relations between public employers and public employees are a necessary and most important factor in the effective and efficient operation of government, and that a proper forum for the understanding and resolution of employee grievances will contribute to the establishment and maintenance of harmony, good faith, and the quality of public service"; stating "state agencies are encouraged to use methods of alternative dispute resolution to avoid a grievance hearing and further litigation"; and acknowledging "[i]t is for the protection and in the interests of both the employee and the agency via a neutral method of dispute resolution and fair administrative review, that . . . the "State Employee Grievance Procedure Act," is enacted").

The same is true for complaints of employment discrimination. See S.C. Code Ann. § 1-13-90 ("Any person shall complain in writing under oath or affirmation to the Commission within one hundred eighty days after the alleged discriminatory practice occurred. The Commissioner, his employees or agents, shall assist complainants in reducing verbal complaints to writing and shall assist in setting forth such information as may be required by the Commission. The Commission shall serve a copy of the complaint upon the respondent within ten days after the complaint is received by the Commission, except that if the Commission determines for good cause that such service will impede its investigation of the complaint, it shall serve notice of the complaint, including the date, place, and circumstances of the alleged unlawful employment practice upon the respondent within ten days after the complaint is received by the Commission." (emphasis added)).

Thus, if Mihal has a problem with the College of Charleston's decision, she can follow the grievance procedures in the event an adverse action is taken, S.C. Code Ann. § 8-17-330, or file a complaint with the Human Affairs Commission, S.C. Code Ann. § 1-13-90. But nothing gives her the right to skip these well-defined processes and demand an injunction from this Court. That is especially the case where, as here, Mihal failed to even name her employer as a defendant. Indeed, if the Court were to entertain this claim, it could be exposed to countless employment grievance or discrimination claims. To breathe life into Plaintiffs' absurd claims here would be no different than allowing a member of a county clerk of court's office to sue the Chief Justice of South Carolina—but not the county—for requiring the resumption of in-person court operations. The General Assembly did not intend to give plaintiffs any such end-run around the statutory process.

Our courts have "rather consistently applied the doctrine of exhaustion of administrative remedies to avoid interference with the orderly performance of administrative functions." Andrews Bearing Corp. v. Brady, 261 S.C. 533, 536, 201 S.E.2d 241, 243 (1973). Despite their considerable but curious efforts at creative pleading, Plaintiffs—both known and unknown, named and anonymous—failed to exhaust the exclusive administrative remedies of which they are aware prior to filing this action in circuit court. See S.C. Code Ann. §§ 8-17-310 through -380; S.C. Code Ann. §§ 1-13-10 through -110. While a review of the statutes reveals these remedies are exclusive, the Court should at the very least reject Plaintiffs' request for injunctive relief under the more discretionary doctrine because they failed to exhaust and, thus, the case is premature and not ripe for review. See, e.g., Moore v. Sumter Cty. Council, 300 S.C. 270, 273–74, 387 S.E.2d 455, 457–58 (1990) (finding the record demonstrated "two administrative remedies" that were "readily available" to plaintiffs and, therefore, holding the action was "premature" because the plaintiffs were required to "exhaust their administrative remedies before seeking judicial relief").

Nor can they demonstrate any recognized exceptions to the exhaustion requirement. "[A] generally recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of them would be a vain or futile act." Ward v. State, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000). But a party must demonstrate futility "by a showing comparable to the administrative agency taking a 'hard and fast position that makes an adverse ruling a certainty.'" Brown v. James, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010) (quoting Law v. S.C. Dep't of Corr., 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2000)). Plaintiffs have not and cannot allege that the College of Charleston or the Department of Administration have taken a hard and fast position on her particular situation.

To that end, the attached email from Karen Wingo, Executive Director of the Division of Human Resources for the South Carolina Department of Administration, shows that College of Charleston still has discretion to make accommodations. And Mihal has failed to present any evidence to this Court of the College taking a single adverse action as to her that would even trigger statutory remedies. No communications were produced. Instead, she just vaguely says she has not received an answer. Respectfully, that is not good enough. Mihal does not have any liberty or property interest in demanding that her job be solely by remote means. No state or federal law provides for such a right. If it did, Plaintiffs would have brought due process claims, not this unusual challenge. That they did not is quite telling.

In any event, Plaintiffs have not even been fired or otherwise adversely affected yet. If they are, then they can proceed through the normal channels like every other state employee.

4. The Court must require a bond.

Notwithstanding the foregoing, if the Court is inclined to grant an injunction, the plain language of Rule 65(c), SCRCP, requires the imposition of a bond:

> Except in divorce, child custody, and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State or of an officer or agency thereof.

Rule 65(c), SCRCP. Our appellate courts have held for centuries that the failure to require a bond constitutes reversible error. See, e.g., Headdon v. State Hwy. Dep't, 197 S.C. 118, ___, 14 S.E.2d 586, 588 (1941) (holding the failure to require a bond prior to issuing an order that effectively continued a temporary restraining order constituted error); Hunt v. Smith, 18 S.C. Eq. 277, 280 (1 Rich. Eq.) (1845) (reversing and holding the lower court should have refused to issue an injunction because the applicant failed to comply with the law by not giving bond with sufficient security).

Here, Plaintiffs are asking this Court to enjoin the Governor of South Carolina from implementing and enforcing executive orders addressing the COVID-19 pandemic. More to the point, Plaintiffs are asking the Court to place billions of dollars in emergency funds on the line just because Mihal has manufactured a lawsuit based upon her desire to not go back to work. To the extent Plaintiffs believe only a "nominal bond" is necessary, our supreme court has previously held that a "circuit court's order requiring only a nominal security bond does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper." Atwood Agency v. Black, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007). Simply put, a bond is required, and it cannot be merely nominal.

With that issue settled, the question becomes what amount is sufficient for the payment of such costs and damages as Defendants may incur. Included in these costs are attorneys' fees, which are recoverable under South Carolina law in an action seeking to overturn an injunction.

See Chambers v. Long, 132 S.C. 179, ___, 128 S.E. 853, 854 (1925) ("That an attorney's fee for the dissolution of an injunction may be recovered as damages, under the bond, is settled by the cases of Livingston v. Exum, 19 S. C. 229; Hill v. Thomas, 19 S. C. 230; Britt v. McCormick, 117 S. C. 8, 108 S. E. 179; 14 R. C. L. 486."). The Governor respectfully defers to the Court—as a coequal branch of government—on what bond would be sufficient, in the interests of justice, for Plaintiffs to post before any order granting injunctive relief would become effective.

IV. CONCLUSION

In sum, Plaintiffs simply do not want to go back to work. Plaintiffs, however, have not alleged any cognizable irreparable harm. Nor are they in danger of suffering irreparable harm. To breathe life into Plaintiffs' absurd claims would be no different than allowing a member of a county clerk of court's office to sue the Chief Justice of South Carolina for requiring court operations to resume. Plaintiffs simply cannot succeed on the merits of this litigation because the Governor's Executive Order requiring state employees to return to work was constitutional and well within his power. And Plaintiffs have known adequate remedies at law that foreclose this action in circuit court. The Court should therefore deny Plaintiffs' request for a TRO and dismiss the Complaint with prejudice.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,

/s/Thomas A. Limehouse, Jr.
Thomas A. Limehouse, Jr. (SC Bar 101289)
Chief Legal Counsel
Anita (Mardi) S. Fair (SC Bar 75115)
Deputy Legal Counsel
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, South Carolina 29201
(803) 734-2100
tlimehouse@governor.sc.gov
mfair@governor.sc.gov

/s/Vordman Carlisle Traywick, III
Vordman Carlisle Traywick, III (SC Bar 102123)
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
ltraywick@robinsongray.com

Counsel for Defendant Governor Henry McMaster

April 8, 2021
Columbia, South Carolina