STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Deborah Mihal, and American Civil Liberties Union Foundation of South Carolina, Plaintiffs, v. Governor Henry McMaster, in his official capacity, and Marcia S. Adams, Executive Director of the South Carolina Department of Administration, in her official capacity, Defendants.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT C/A No.: 2021-CP-40-01599 **RESPONSE OF MARCIA S. ADAMS, IN HER OFFICIAL CAPACITY, TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

NOW COMES Defendant Marcia Adams, in her official Capacity as Executive Director of the South Carolina Department of Administration ("SCDOA"), by and through counsel, and responds in opposition to Plaintiffs' Motion for Temporary Restraining Order ("TRO") and/or Preliminary Injunction, as follows:

PLAINTIFFS' COMPLAINT AND MOTION

Plaintiffs filed a Complaint asking this Court to declare that the "Return in Person Order" contained in Executive Order 2021-12, as implemented by the South Carolina Department of Administration's guidance in its memorandum entitled "State Government Staffing – Return to Normal Operations," is "unenforceable" to the extent that it requires non-essential state employees to return to their workplaces in person "without reasonable accommodations for caregiving, health risk, and disability." They also request that the Court enjoin the Defendants from implementing the Return in Person Order. (Plaintiffs' Complaint, p. 19).

They base these demands on an allegation that the Executive Order "exceed[s] the scope of authority granted to the Governor and/or the Department of Administration and is *ultra vires*[.]" (Plaintiffs' Complaint, p. 19). At its essence, Plaintiffs' argument is based on the theory that the "Return in Person Order, as implemented by the Memorandum, creates requirements for non-essential state employees that are contrary to the safety, security, and welfare of the State. Both the Governor and the Department of Administration, therefore, have exceeded their statutory authority, usurped the legislative power of the General Assembly, and improperly imposed unlawful burdens on non-essential state employees in violation of Art. I, § 8 of the South Carolina Constitution." (Plaintiffs' Complaint, ¶ 53). Similarly, they also claim that the Governor exceeded his authority under S.C. Code Ann. § 25-1-440 (i.e., committed an *ultra vires* act) by issuing the Return in Person Order contained in EO-2021-12. (Plaintiffs' Complaint, ¶¶ 57-58).

These claims are baseless. For the reasons discussed below, Plaintiffs' motion should be denied.

LEGAL ARGUMENT

I. PLAINTIFFS CANNOT DEMONSTRATE A LIKELIHOOD OF SUCCESS AT THIS STAGE OF THE LITIGATION, WHERE THE GOVERNOR HAS AMPLE AUTHORITY TO AMEND OR RESCIND HIS PRIOR EXECUTIVE ORDERS DURING THE CURRENT COVID-19 EMERGENCY.

Plaintiffs argue that the Governor does not have the authority to amend or rescind his earlier order from March 19, 2020 (EO-2020-11) that directed non-essential personnel to cease reporting to work, physically or in-person, effective Friday, March 20, 2020. (Plaintiffs' Complaint, ¶ 19). Specifically, Plaintiffs appear to argue that the Governor lacks the authority to amend or rescind his earlier Executive Orders under current circumstances, or can only do so as Plaintiffs see fit.

At first glance, such an argument is contrary to the very language of the statute in which the General Assembly authorized the Governor to issue Executive Orders during a declared emergency, stated as follows:

> (a) The Governor, when an emergency has been declared,[1] 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:
>
> (1) **issue emergency proclamations and regulations and amend or rescind them**. These proclamations and regulations have the force and effect of law as long as the emergency exists;

S.C. Code Ann. § 25-1-440 (emphasis added).

In this case, the Governor has determined that it is "appropriate to modify, amend, or rescind certain emergency measures as part of the process of regularly reviewing such measures to account for new and distinct circumstances and the latest data related to the impact of COVID-19 and to ensure that any remaining restrictions are targeted and narrowly tailored to address and mitigate the current public health threats in the least restrictive manner possible…" (EO-2021-12, p. 4). As a part of this determination, the Governor ordered the following:

> I hereby direct all state agencies to immediately expedite the transition back to normal operations. **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 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.

[1] All parties appear to agree that an "emergency has been declared" and, to some degree, still exists. The General Assembly retains the power to terminate the declared emergency. S.C. Code Ann § 25-1-440(a)(2).

(EO-2021-12, p. 12).

It is apparent that the Plaintiffs disagree with the policy determinations of the Governor in ordering State Employees to return to the workplace on a full-time basis, as was the near-universal working condition of State employees prior to the initial promulgation of EO-2020-11 in March 2020. Plaintiffs have certainly set forth in their Complaint the policy disagreements they have with the Governor. They have failed utterly, however, to set forth a *legal* reason in law why the Governor cannot act to return State employees to work.

In South Carolina, "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).

There appears to be no dispute that the General Assembly specifically granted the Governor the power to issue, amend, or rescind emergency proclamations and regulations during the pending declared emergency. S.C. Code Ann. § 25-1-440.

The only apparent effort made by Plaintiffs to support the argument that the Governor exceeded his statutory authority, or "usurped the legislative power of the General Assembly," or engaged in an *ultra vires* act, is to voice their policy disagreements with him. Specifically, they

argue that the "Return in Person Order" does not – in their view – adequately protect the "safety, security, and welfare of the State." (Plaintiffs' Memorandum of Law, p. 12).

While Plaintiffs may certainly prefer one set of policies over another, and may certainly believe that their preferred policies would better secure the "safety, security, and welfare of the State" than the Governor's would, they have offered no cogent *legal* argument to support their claims. They have, instead, given voice to their beliefs and/or fears that (1) the Executive Order exposes State employees to increased health risks, or (2) that State employees can do work from home as well as they can at the worksite, or (3) that returning to work may have a disparate impact on some State employees on the basis of sex and disability. (Plaintiffs' Memorandum of Law, pp. 13-19).

This showing is absolutely inadequate to support Plaintiffs' argument or demonstrate a likelihood of success. Most unavailing is their reliance on *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (1935), in which the Court declared that then-Governor Johnston exceeded his authority when he instituted martial law (!) and directed the state militia to occupy state highway commission offices to suppress an alleged "insurrection." The Court wryly observed that there was:

> no particle of evidence, nor even suggestion, that there existed a state of war, or anything approaching disorder. It is common knowledge that in the area where a state of insurrection was said to exist, the militia was called out and martial law declared, all was as calm, quiet, and peaceful as a May morn; and the courts were open and functioning. Under the Governor's proclamation, the defendants, by force and arms, have taken over the offices, the physical offices, books, properties, and all things pertaining to the state highway department and the state highway commission.

183 S.E. at 21. It is difficult to follow how the bizarre facts referenced in *Hearon* have any bearing on the current case before the Court. Indeed, in the current case, the Governor is actually *easing*

emergency restrictions set forth earlier in the COVID-19 crisis, as the Governor has determined that conditions in South Carolina are better than they were in March 2020.

In any event, Plaintiffs have made no showing of any likelihood of success in this matter, and for that reason alone, their motion must be dismissed.

II. IN ANY EVENT, PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY HAVE NO ADEQUATE REMEDY AT LAW.

Especially curious – and specious – is Plaintiffs' argument that they have no adequate remedy at law (other than attempting to beguile the Court into committing its own violation of the separation of powers) for the parade of horribles that they believe will befall State employees who return to their physical worksites.

On the contrary, it appears that such a State employee would have any number of statutory remedies if he believed that his employing agency (1) did not sufficiently accommodate a qualified disability under the S.C Human Affairs Law ("SCHAL") or Americans with Disabilities Act ("ADA"), or (2) improperly denied him leave under the Family Medical Leave Act ("FMLA"), or (3) subjected him to an adverse action that is grievable under the South Carolina Grievance Procedure Act, S.C. Code Ann. § 8-17-310, *et seq*., or (4) subjected him to race, gender, or disability discrimination under the SCHAL, ADA, or Title VII of the Civil Rights Act of 1964, as amended, or (5) subjected him to conditions that cause a workplace injury or illness as defined by the South Carolina Occupational Safety and Heath ("SCOSH") law or the South Carolina Worker's Compensation Act.

It appears, therefore, that legal remedies abound if a State employee believes that he may be injured by returning to his job site.

For these reasons alone, Plaintiff's motion should be denied.

III. EVEN IN THE ABSENCE OF ANY GOVERNING EXECUTIVE ORDER, THE DEPARTMENT OF ADMINISTRATION HAS THE STATUTORY AUTHORITY TO DEVELOP POLICIES AND PROGRAMS THAT ADDRESS CONDITIONS OF EMPLOYMENT FOR STATE EMPLOYEES.

The Executive Order at issue gave the following directive:

> I further direct the Department of Administration to continue to provide or issue any necessary and 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.

(EO-2021-12, p. 12). Plaintiffs' vitriol reserved for the Memorandum produced pursuant to this directive is especially hard to comprehend. The Memorandum addresses any number of situations as the COVID-19 crisis evolves, and the Department's guidance to other state agencies offered significant flexibility to allow them to meet the Governor's reasonable expectations.

In any event, even in the absence of an Executive Order, the General Assembly has already authorized the Department, in coordination with agencies served, to "develop policies and programs concerning…other conditions of employment as may be needed." S.C. Code Ann. § 8-11-230(6).

In this case, the Department has done exactly that. It developed guidance for state agencies and their employees that will help stakeholders implement a return-to-work program that is as safe and productive as possible.

CONCLUSION

For the reasons stated above, Marcia Adams respectfully requests that the Court deny Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction, and grant Marcia Adams any other such relief as the Court may deem just and proper.

Dated this the 8th day of April, 2021.

Respectfully submitted,

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