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,)	Civil Action No. 2021-CP-40-01599
Plaintiffs,)	**GOVERNOR MCMASTER'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**
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.)	

Defendant Governor Henry D. McMaster, in his official capacity ("Governor McMaster" or "Governor"), submits this Response in Opposition to Plaintiffs Deborah Mihal and the American Civil Liberties Union Foundation of South Carolina's ("ACLU") April 12, 2021 Motion to Reconsider the Court's April 9, 2021 Order Denying Plaintiffs' Motion for Temporary Restraining Order (TRO) and/or Preliminary Injunction. For the reasons that follow, the Court should deny Plaintiffs' Motion to Reconsider.

The Supreme Court of South Carolina has recognized "two basic situations in which a party should consider filing a Rule 59(e)[,SCRCP,] motion." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Under the rule, "[a] party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Id. But "[a] party must file such a motion when an issue or argument has been raised, but not ruled on, in order to

preserve it for appellate review." Id. As relevant here, "[a]n order granting or denying an injunction is reviewed for abuse of discretion." Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "Whether to grant a preliminary injunction is left to the sound discretion of the trial court and will not be overturned unless it is clearly erroneous." Compton v. S.C. Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). Viewed in this prism, Plaintiffs' Motion to Reconsider must fail because the Court acted well within its discretion for three reasons.

First, Plaintiffs' argument that a hearing was necessary is both legally and factually unsupported. See Pls.' Mot. to Recons. at ¶¶ 1–3, 5–7. Notably, nothing in Rule 65, SCRCP, requires this Court to hold a hearing for Plaintiffs. Instead, a hearing would only have been necessary to give Defendants an opportunity to respond if the Court had granted Plaintiffs' request for a TRO. See Rule 65(a)–(c), SCRCP. But that never happened. The Court denied Plaintiffs' Motion for TRO and/or Preliminary Injunction based upon the record before it. And Plaintiffs were the ones who styled the motion as requesting both forms of relief, and it was Plaintiffs who shouldered the extraordinary burden required for such relief and were obligated to present a record establishing it was warranted. Thus, the Court had an ample legal basis for deciding the question before it.

What is more, under the Supreme Court of South Carolina's Order governing trial court operations during COVID-19, the Court had wide discretion to decide the Motion in this manner:

> While the practice has been to conduct hearings on virtually all motions, this may not be possible during this emergency. If, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the

> motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers. If a hearing is held, the hearing shall be conducted in the manner specified by (c)(3) above. Consent motions should be decided without a hearing; in the event a party believes that the order issued exceeds the scope of the consent, the party must serve and file a motion raising that issue within ten (10) days of receiving written notice of entry of the order.

In re Operation of the Trial Courts During the Coronavirus Emergency, App. No. 2020-000447, Am. Order No. 2021-03-04-01, ¶ (c)(4) (Mar. 4, 2021).

In discussing the Court's comments about a potential hearing, see Pls.' Mot. to Recons. at ¶ 3, Plaintiffs omit that the Court also said it may decide not to hold a hearing in the matter at all. Here, Plaintiffs submitted an unverified Complaint, Motion for TRO and/or Preliminary Injunction, Affidavit of Ms. Mihal, unsworn Declaration of their counsel Susan Dunn, and a proposed order in support of their arguments. Defendants then submitted memoranda in opposition to Plaintiffs'. After thoroughly reviewing and considering the parties' extensive arguments in their respective filings, the Court decided a hearing was unnecessary. The Court was well within its "sound discretion," Compton, 392 S.C. at 366, 709 S.E.2d at 642, to decide Plaintiffs' interlocutory Motion on the record before it because Plaintiffs' arguments are "without merit," Am. Order No. 2021-03-04-01, ¶ (c)(4).

Second, Plaintiffs either misunderstand or mischaracterize legal conclusions as factual findings and vice versa. See Pls.' Mot. to Recons. at ¶¶ 8–9. For starters, the Court never made a "finding that the [Executive] Order furthered the health, safety, and welfare of South Carolinians." Id. at ¶ 8. Although such a finding would have been correct, in the context of a preliminary injunction, the Court "examine[s] the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief." Compton, 392 S.C. at 367, 709 S.E.2d at 642. The Court merely found Plaintiffs failed to meet

their significant burden in light of the overwhelming authority that undercuts their unusual position and exercised its discretion in finding the Memorandum issued by Director Marcia Adams—of which it can take judicial notice—allowed for flexibility. See Rules 201(b) & (f), SCRE; Adams Mem. to Agency Directors (Mar. 16, 2021), available at https://www.admin.sc.gov/sites/default/files/3-16-2021%20Additional%20FAQs%20-%20State%20Government%20Staffing-Return%20to%20Normal%20Operations%20Memorandum.pdf. As for the adequate remedies at law, Plaintiffs have still yet to address why the myriad legal remedies identified in Defendants' briefs and the Court's Order are not adequate. Just because they say it does not make it so. Simply put, Plaintiffs failed to make the requisite prima facie showing on this critical element—and others—necessary for injunctive relief to issue. Finally, while they rehash the same conclusory factual arguments on irreparable harm, the Court already considered and rejected those.

Third, Plaintiffs' arguments on the merits are simply untenable. Plaintiffs' argument about irreparable harm, for example, continues to ignore their failure to identify any legal right to demand a remote employment arrangement. Plaintiffs have not even raised "a fair question . . . as to the existence of such a right." Williams v. Jones, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912). Nor can they. As for the Governor's emergency powers, Plaintiffs' arguments are self-defeating. In one breath, the concede that the Governor had the authority to issue an executive order requiring state employees to work from home during the pandemic. But in the next, they argue the Governor cannot modify or rescind that directive, in whole or in part, and require state employees to return to work because they claim that does not further the health, safety, and welfare of South Carolinians. See S.C. Code Ann. § 25-1-440(a)(1). According to whom? Plaintiffs seemingly ask the Court to substitute their preferences—or the self-serving opinions of their proffered expert—for the Governor's discretion and policy determinations.

Respectfully, that is not the standard. As the Court aptly noted in its Order, Plaintiffs merely "disagree with the policy determinations of the Governor in ordering State Employees to return to the workplace on a full-time basis." Order Den. TRO & Prelim. Inj. at 4. Further, Plaintiffs' argument whistles past the fact that subsection (a)(1) of section 25-1-440 expressly gives the Governor the authority to "issue emergency proclamations and regulations and amend or rescind them." Id. That is all he did here in issuing Executive Order No. 2021-12. Compare Executive Order No. 2020-11 (Mar. 19, 2020), with Executive Order No. 2021-12 (Mar. 5, 2021). When guiding the State of South Carolina through its response to a global pandemic, or any other State of Emergency for that matter, the power to impose naturally contemplates the power to rescind. And the authority to impose restrictions necessarily includes the power to remove them and restore, in whole or in part, the status quo that existed prior to the Governor's directives. Any other interpretation defies both law and logic. More to the point, it contravenes the intent of the General Assembly and leads to an absurd result.[1]

In sum, Plaintiffs have not articulated any legal basis for reconsideration. Plaintiffs' case is manifestly without merit, and they are not entitled to any extraordinary injunctive relief. The Court should therefore issue an Order denying Plaintiffs' Motion to Reconsider.

[1] See Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]."); Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994) ("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."); Florence Cty. Democratic Party v. Florence Cty. Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (per curiam) (stating the Court must "not construe the statute in a way which leads to an absurd result or renders it meaningless"); State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts 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."); Hodges, 341 S.C. at 91, 533 S.E.2d at 584 ("If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect." (quoting Ray Bell Constr. Co., Inc. v. Sch. Dist. of Greenville Cty., 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998))); State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009) ("A possible constitutional construction must prevail over an unconstitutional interpretation." (quoting Curtis v. State, 345 S.C. 557, 569–70, 549 S.E.2d 591, 597 (2001))).

Respectfully submitted,

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