THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2021-000379
Lower Court No. 2021-CP-40-01599

Deborah Mihal and the American Civil Liberties Union Foundation of South Carolina,……...……Appellants,

v.

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,…….Respondents.

GOVERNOR MCMASTER'S RETURN IN OPPOSITION TO APPELLANTS' PETITION FOR A WRIT OF SUPERSEDEAS

Pursuant to Rule 240(e), SCACR, Respondent Governor Henry D. McMaster, in his official capacity ("Governor McMaster" or "Governor"), hereby submits this Return in Opposition to Appellants Deborah Mihal and the American Civil Liberties Union Foundation of South Carolina's ("ACLU") Petition for a Writ of Supersedeas. For the reasons that follow, the Court should deny the Petition.

BACKGROUND

On March 13, 2020, Governor McMaster first declared a State of Emergency based on a determination that the 2019 Novel Coronavirus ("COVID-19") posed an imminent public health emergency for the State of South Carolina. See Executive Order No. 2020-08 (Mar. 13, 2020).

Since then, 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 South Carolina. See S.C. Code Ann. § 25-1-440(a)(1) (authorizing the Governor to "issue emergency proclamations and regulations," which "have the force and effect of law," and to "amend or rescind them"). All told, the Governor has issued over fifty Executive Orders in connection with COVID-19 since first declaring a State of Emergency.[1]

Appellants do not dispute "whether the Governor can declare a public health emergency to respond to the threat of COVID-19," acknowledging that "[h]e unquestionably can." Pet. at 1. Rather, at issue here is 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 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. Section 5(D) modified 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,

[1] See Gov. McMaster's Resp. in Opp. to Pls.' Mot. for TRO & Prelim. Inj. at 6 n.3 (listing relevant Executive Orders issued in connection with COVID-19); see also generally OFFICE OF THE GOVERNOR, EXECUTIVE BRANCH, EXECUTIVE ORDERS, https://governor.sc.gov/executive-branch/executive-orders.

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 has issued memoranda to state agency heads and institutions of higher education containing guidance regarding staffing, operations, and plans for employees to return to the workplace.[2] Notably, the day before the Governor issued Executive Order No. 2021-12, the Supreme Court of South Carolina 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, App. No. 2020-000447, Am. Order No. 2021-03-04-01, ¶¶ (c)(1) & (c)(11)(A) (S.C. Sup. Ct. filed Mar. 4, 2021).

On April 6, 2021, however, Appellants filed an unverified Complaint for declaratory and injunctive relief in circuit court. In their Complaint, Appellants challenged the aforementioned provision of Executive Order No. 2021-12 modifying the Governor's prior directives and requiring state agencies under the Governor's authority to "expedite the transition back to normal operations." Executive Order No. 2021-12, § 5(D). Specifically, Appellants argued (1) the Governor's executive actions violated 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.

[2] See Exec. Dir. Adams Mem. to Agency Directors at 1–4 (Mar. 5, 2021), https://www.admin.sc.gov/sites/default/files/3-5-2021%20MA%20Memorandum%20-%20State%20Government%20Staffing%20-%20Executive%20Order%202021-12.pdf; Exec. Dir. Adams Mem. to Agency Directors at 1–5 (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.

Around the same time, Appellants filed a Motion for a TRO and/or Preliminary Injunction and submitted a memorandum, affidavit of Ms. Mihal, unsworn declaration from counsel, and proposed order in support. The circuit court held a status conference via WebEx with counsel for all parties on April 8, 2021. Both Respondents filed memoranda in opposition to Appellants' Motion shortly after the status conference. On April 9, 2021, Appellants filed a Reply in connection with their Motion. That same day, the circuit court issued an Order denying Appellants' Motion for TRO and/or Preliminary Injunction. By their account, Appellants filed a Motion to Reconsider, but the circuit court sat on it. Not so.

For starters, Appellants never gave the circuit court a deadline by which to rule before they intended to seek extraordinary writs in the appellate courts. Appellants only asked the circuit court for a "decision as quickly as possible and without delay." Apps.' Pet. at 75. Further, contrary to Appellants' representations, the procedural history did not end there. Both Defendants filed memoranda in opposition on April 12, 2021—the same day Appellants filed their Motion to Reconsider. What is more, Appellants left out that, on April 13, 2021, at the direction of the circuit court, the undersigned counsel prepared and submitted a proposed order denying Appellants' Motion to Reconsider. Yet Appellants moved forward with their appellate filings anyway. On the afternoon of April 13, 2021, Appellants filed a Notice of Appeal, Petition for Writ of Supersedeas, and Motion to Expedite in the Supreme Court of South Carolina.[3] That evening, the Clerk of the Supreme Court transferred the case to this Court pursuant to Rule 204(a), SCACR. On April 14, 2021, the circuit court entered an Order denying Appellants' Motion to Reconsider.

The Governor filed a Motion to Dismiss/Strike and Remand this Petition because it is both premature and procedurally improper. Appellants filed a Return in Opposition that took liberties

[3] Notwithstanding the applicable provisions of Rule 62, SCRCP, and Rule 241(d), SCACR, Appellants did not apply to the circuit court before petitioning the appellate courts for such extraordinary relief.

with the record, and Governor McMaster promptly filed a Reply to address their attempts to revise history. On April 15, 2021, the Court issued an Order denying the Governor's Motion and granting, in part, Appellants' motion to expedite consideration of their Petition for a Writ of Supersedeas. In the Order, the Court gave the Governor until 5:00 P.M. on Monday, April 19, 2021 to file a Return.

In the interim, Appellants gave notice that the College of Charleston, Ms. Mihal's employer, approved her request for a temporary telecommuting accommodation. Appellants, of course, ignore that the Governor has said from day one that the Executive Order gave agency heads discretion to handle situations on a case-by-case basis. As relevant here, however, they also sail past the mooting effect of the College of Charleston's actions on this quixotic and curious state employee grievance matter in which Ms. Mihal failed to even name her employer as a defendant. Appellants, undeterred, maintain they nevertheless have standing because the ACLU—in its opinion—believes it can raise these claims on behalf of anonymous state employees. Not so.

This matter therefore comes before the Court on Governor McMaster's opposition to Appellants' Petition for a Writ of Supersedeas.

STANDARD

"As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." Rule 241(a), SCACR. And the "automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court." Id. "After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule." Rule 241(c)(1), SCACR. When an exception applies, "any party may move for an order imposing a supersedeas of matters decided

in the order, judgment, decree or decision on appeal after service of the notice of appeal." Id. Under the rule, "[t]he effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal." Id.[4]

ARGUMENT

The Court should deny the Petition for a Writ of Supersedeas because Appellants failed to shoulder the heavy burden necessary to entitle them to such extraordinary relief.

I. The Petition is fatally flawed.

As a threshold matter, Appellants' Petition for a Writ of Supersedeas fails as a matter of both law and logic for three reasons.

First, Appellants have not and cannot make the requisite showing on a critical element for the Court to issue an order of supersedeas. It is well-settled that, "[e]xcept where extraordinary circumstances make it impracticable, an application for an order . . . for supersedeas must first be made to the lower court" that "entered the order or decision on appeal." Rule 241(d)(1), SCACR. In their Petition, Appellants contend that, "[o]n the morning of April 12, Appellants moved for the court to reconsider its denial of the Motion for Preliminary Injunction and applied for a supersedeas." Apps.' Pet. at 9 (emphasis added). That is not true. Appellants never asked the circuit court for a writ of supersedeas. Cf. Rule 241(d)(4)(C), SCACR (stating "[t]he petition shall contain . . . a showing that an application for this relief was made to the lower court . . . and was unjustifiably denied" (emphasis added)). Appellants, of course, bear the burden of showing it

[4] See also Graham v. Graham, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (citing with approval 4A C.J.S. Appeal & Error § 662 at 494–95 (1957) ("[T]he purpose . . . of a supersedeas . . . is to . . . stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal . . . , and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him."); id. at 497 ("As a rule, a supersedeas . . . does not reverse, annul, or undo what has already been done, or impair the force . . . of the judgment, order, or decision of the trial court . . . ."); 83 C.J.S. Supersedeas § 8, at 896 (1953) (a supersedeas suspends the judgment but does not annul the judgment itself).

would have been impracticable to first apply to the lower court for a writ of supersedeas. Rule 241(d)(1), SCACR. They did not shoulder that burden by misrepresenting to the Court that such an application was made. Because Appellants failed to otherwise explain why it was impractical to apply for supersedeas with the circuit court before rushing to the appellate courts, their Petition fails as a matter of law.[5]

Second, Appellants did not file a certified copy of the circuit court's Order denying their Motion for TRO and/or Preliminary Injunction or the Order denying their Motion to Reconsider. See Rule 241(d)(3), SCACR (stating "the moving party must contemporaneously file a certified copy of the order, judgment, decree or decision of the lower court"). Nothing in the Supreme Court's Orders governing trial court and appellate court operations suspended this elementary requirement. Cf. In re Operation of the Trial Courts During the Coronavirus Emergency, App. No. 2020-000447, Am. Order No. 2021-03-04-01 (S.C. Sup. Ct. filed Mar. 4, 2021); In re Operation of the Appellate Courts During the Coronavirus Emergency, App. No. 2020-000447, Am. Order No. 2020-05-29-02 (S.C. Sup. Ct. filed May 29, 2020).

Third, respectfully, Appellants' application for supersedeas makes no sense. If this Court were to restore the status quo that existed prior to the circuit court's Order denying Appellants' Motion for TRO and/or Preliminary Injunction, that would be the Governor's Executive Order remaining in effect. Surely, that is not what Appellants want. Their request, however, only highlights the mandatory nature of the injunctive relief they sought in circuit court to upset the status quo in the first place. Cf. Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir. 1980) ("Mandatory preliminary injunctions do not preserve the status quo and normally should be granted only in

[5] Although the Court denied Governor McMaster's Motion to Dismiss/Strike and Remand, Appellants' inability to make the requisite showing is still a basis for the Court to deny the Petition on the merits, irrespective of Appellants' failure to follow the procedure outlined in the applicable rules.

those circumstances when the exigencies of the situation demand such relief.").[6] In any event, a supersedeas simply does not get Appellants across the finish line. As Appellants well know, they want a court—whether the circuit court, the Supreme Court, or this Court—to issue injunctive relief to enjoin further implementation and enforcement of an Executive Order that had been in effect for over a month by the time Appellants filed their unverified Complaint.

If Appellants want an injunction from this Court, they needed to first file a motion for injunction pending appeal with the circuit court. See Rule 62(a), SCRCP ("The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal."); Rule 62(c), SCRCP ("When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."); Rule 62(g), SCRCP ("The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered. An application for such relief should first be made to the trial court under Rule 62(c) or (d), but when such application is not practicable it may first be made to an appellate court or a judge or justice thereof.").

[6] Notably, the circuit court did not address this aspect of Appellants' Motion for TRO and/or Preliminary Injunction and did not apply the more "exacting standard" for mandatory injunctive relief. Pashby v. Delia, 709 F.3d 307, 320 (4th Cir. 2013) (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))). Instead, the circuit court found Appellants could not carry their burden even under normal scrutiny.

Yet Appellants moved forward with their appellate filings anyway and stripped the circuit court of its ability to address and rule on these arguments. Interestingly, in their haste to file a premature appeal, Appellants have now waived the right to present to this Court the arguments raised in their Motion to Reconsider. See Rule 203(d)(1)(B)(ii), SCACR; see also Pye v. Est. of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." (emphasis added)); Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (stating "[a] party must file" a Rule 59(e), SCRCP, motion "when an issue or argument has been raised, but not ruled on, . . . to preserve it for appellate review").

II. In any event, Appellants' Petition fails on the merits.

The circuit court correctly held that Appellants failed to shoulder the requisite burden of showing they are entitled to extraordinary injunctive relief. And this Court should follow suit.

Although Appellants style their request for relief as supersedeas, they are really seeking an injunction pending appeal. An appellate judge "has the power to make the order of injunction" on appeal, "but it ought not to be exercised unless the right of the appellant is very clear and beyond reasonable question." Silverthorne v. Barnwell Lumber Co., 96 S.C. 32, __, 79 S.E. 519, 519 (1913) (Fraser, J.); see also Hobby Lobby Stores, Inc. v. Sebelius, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers) (asserting that, "[u]nlike a stay," an applicant's "request for an injunction pending appeal 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts'" (quoting Respect Maine PAC v. McKee, 131 S. Ct. 445, 445 (2010) (mem.))); Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n, 479 U.S. 1312, 1312, (1986) (Scalia, J., in chambers) (recognizing an injunction pending appeal "demands a significantly higher justification" and "is to be used

'sparingly and only in the most critical and exigent circumstances'" (quoting Fishman v. Schaffer, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers))).

Here, where the circuit court determined that Appellants "failed to demonstrate sufficiently any of the three elements required for an injunction," Order Den. TRO & Prelim. Inj. at 3—including a likelihood of success on the merits—it is difficult to understand why Appellants believe they should now obtain relief that "demands a significantly higher justification." Ohio Citizens for Responsible Energy, Inc., 479 U.S. at 1312. Moreover, after the circuit court concluded that Appellants "offered no cogent legal argument to support their claims," Order Den. TRO & Prelim. Inj. at 5, it requires quite the legal "leap" for Appellants to contend that their asserted right to relief is "very clear and beyond reasonable question." Silverthorne, 96 S.C. at __, 79 S.E. at 519. Appellants' Petition does not bridge that significant gap. Nonetheless, they persist.

At bottom, Appellants are essentially seeking an expedited review of the circuit court's Order denying their Motion for TRO and/or Preliminary Injunction. "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). "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). For the Court to grant a preliminary injunction, whether prohibitory or mandatory in nature, 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). As explained below, the circuit court did not clearly abuse its discretion, and Appellants failed to meet their burden of proof and persuasion for any injunctive relief to issue.

A. At the outset, no hearing was required.

As an initial matter, Appellants' argument that a hearing was necessary—in addition to not being preserved, see Part I, supra—is manifestly without merit.

In discussing the circuit court's comments about a potential hearing, see Pls.' Mot. to Recons. at ¶ 3, Appellants omitted that the circuit court also said it may decide not to hold a hearing in the matter at all. After all, Rule 65, SCRCP, did not require the circuit court to hold a hearing for Appellants. Instead, a hearing would only have become necessary to give Respondents an opportunity to respond if the circuit court had granted Appellants an ex parte TRO. See Rule 65(a)–(c), SCRCP; cf. S.C. Progressives Network Educ. Fund v. Andino, No. 3:20-cv-03503-MGL, 2020 WL 5995325, at *4 (D.S.C. Oct. 9, 2020) ("As a preliminary matter, 'Rule 65 does not require an evidentiary hearing[,]' so long as 'the party opposing the preliminary injunction [has] a fair opportunity to oppose the application and to prepare for such opposition.'" (quoting Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Loc. No. 70 of Alameda Cty., 415 U.S. 423, 432 (1974))). But that did not occur. After convening a status conference via WebEx, the circuit court denied Appellants' Motion for TRO and/or Preliminary Injunction.[7]

Under the Supreme Court's Order governing trial court operations during COVID-19, the circuit 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

[7] On that note, Appellants were the ones who styled the Motion as requesting either or both forms of extraordinary injunctive relief.

> 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) (S.C. Sup. Ct. filed Mar. 4, 2021). Even if Rule 65 required the circuit court to hold a hearing on Appellants' Motion prior to denying the requested relief (it did not), the Supreme Court's Order plainly states that "[i]n the event of a conflict between this order and the South Carolina Rules of Civil Procedure . . . , this order shall control." Id. at ¶ (a).

Here, Appellants submitted an unverified Complaint, Motion for TRO and/or Preliminary Injunction, affidavit of Ms. Mihal, unsworn declaration of their counsel,[8] a memorandum, and a proposed order in support of their arguments. Cf. Calcutt v. Calcutt, 282 S.C. 565, 572, 320 S.E.2d 55, 59 (Ct. App. 1984) (stating "the party seeking the injunction and restraining order must show such facts and circumstances entitling her thereto"). Both Respondents then submitted memoranda in opposition. Following the status conference, and after thoroughly reviewing and considering the evidence and the parties' arguments in their respective filings, the circuit court determined a hearing was unnecessary in this matter. In doing so, the circuit court exercised its "sound discretion," Compton, 392 S.C. at 366, 709 S.E.2d at 642, by denying Appellants' interlocutory motion on the record before it "without further input from the lawyers," Am. Order No. 2021-03-04-01, ¶ (c)(4). Accordingly, Appellants' assignment of error on this ground is a red herring.

[8] Contrary to the representations made in the Petition, see Apps.' Pet. at 8 n.6, Susan Dunn's declaration was not sworn. Indeed, the unsworn declaration failed to satisfy any legal requirements necessary for the circuit court to consider it as part of Appellants' request for injunctive relief. See Rule 65(b), SCRCP (containing affidavit or verification requirement); In re Operation of the Trial Courts During the Coronavirus Emergency, App. No. 2020-000447, Am. Order No. 2021-03-04-01, ¶ (c)(16) (S.C. Sup. Ct. filed Mar. 4, 2021) (allowing for certification, which was not employed here); cf. 28 U.S.C. § 1746 (outlining requirements for a declaration that were not followed here).

B. Appellants failed to show irreparable harm.

Turning to the merits, a review of Appellants' arguments regarding irreparable harm reveals their claims (1) fail to present a justiciable controversy to this Court and (2) are manifestly without merit.

1. The mootness of Ms. Mihal's claims and the ACLU's lack of standing present insurmountable hurdles.[9]

"[C]ourts resolve cases and controversies, not crusades." Timpson ex rel. Timpson v. McMaster, 437 F. Supp. 3d 469, 472 (D.S.C. 2020). Thus, before any action may be maintained, a justiciable controversy must exist. Byrd v. Irmo High Sch., 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical[,] or abstract character." Sloan v. Greenville Cty., 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003).

It is well settled that courts "will not pass on moot and academic questions or make an adjudication when there remains no actual controversy." Byrd, 321 S.C. at 431, 468 S.E.2d at 864. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy." Mathis v. S.C. State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). "Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief." Sloan v. Greenville Cty., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). Although courts have fashioned "three exceptions to the mootness doctrine," they have also emphasized that utilizing an exception "is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically invoked." Id.

[9] The Governor maintains Appellants' appeal—indeed the entire case—is now moot, and the ACLU lacks standing to bring claims on behalf of apparitions. But the nonjusticiability of Appellants' claims especially comes into focus in the context of their irreparable harm argument. It is through this lens that the Governor will therefore address this threshold issue.

Here, Appellants basically acknowledge their Petition for a Writ of Supersedeas is moot. Indeed, how could they not? But they argue the second exception to the mootness doctrine nevertheless breathes life into this quixotic, nonjusticiable challenge. See Sloan, 380 S.C. at 535, 670 S.E.2d at 667 (noting the second exception to the mootness doctrine provides that a "court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest" (emphasis added) (quoting Curtis v. State, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001))). It does not. Appellants' self-defeating arguments and their contrived policy dispute do not present a "questions of imperative and manifest urgency." As the Court saw only a few days ago, state agencies are handling these matters on a case-by-case basis. Further, respectfully, the public is not interested in Appellants' run-of-the-mill state employee grievances. Accordingly, the Court should decline Appellants' invitation to invoke its discretion to breathe life into this stale challenge.

Appellants' sole basis for moving forward, after all, stems from their argument that the ACLU somehow has standing to maintain this unusual lawsuit. Notwithstanding its continued efforts to flout the rules to push overstated, unsupported, and inflammatory assertions of irreparable harm, the ACLU lacks standing to bring these claims.

"Standing to sue is a fundamental requirement to instituting an action." Joytime Distribs. & Amusement Co., Inc. v. State, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). "Few exercises of the judicial power are more likely to undermine public confidence in the neutrality and integrity of the Judiciary than one which casts the Court in the role of a Council of Revision, conferring on itself the power to invalidate laws at the behest of anyone who disagrees with them." Bodman v. State, 403 S.C. 60, 68, 742 S.E.2d 363, 367 (2011) (quoting Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 145–46 (2011)). "To have standing, one must have a personal stake in the

subject matter of the lawsuit. In other words, one must be a real party in interest." Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." Charleston Cty. Sch. Dist. v. Charleston Cty. Election Comm'n, 336 S.C. 174, 181, 519 S.E.2d 567, 571 (1999) (quoting Anchor Point, Inc. v. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992)).

Governor McMaster objects to the ACLU's efforts on two grounds. First, it is elementary that "[t]he Record shall not . . . include matter which was not presented to the lower court." Rule 210(c), SCACR. Yet Appellants admittedly included new allegations in their Petition that were never raised to the circuit court. See Apps.' Pet. at 8 n.6.[10] Second, what is perhaps more offensive is that they continue to push self-serving assertions about anonymous members of the ACLU. Although Appellants go into a long diatribe about how Executive Order No. 2021-12 allegedly affects a host of different groups of people, that is speculative and unproven, for one, and does nothing to inform the inquiry of whether Ms. Mihal will suffer irreparable harm for another. Those members are not plaintiffs to this lawsuit, and the Court should reject this effort to backdoor in untestable allegations from purported state employees to make Appellants' case. This is not a class action. Cf. Rule 23, SCRCP.

Appellants have neither pled nor argued the requisite elements to establish associational standing, and the ACLU lacks standing to raise this challenge on behalf of anonymous purported members. See Beaufort Cty. v. Trask, 349 S.C. 522, 529 n.14, 563 S.E.2d 660, 664 n.14 (Ct. App. 2002) (stating the elements of standing "are not mere pleading requirements but rather an

[10] Again, as mentioned in note 3, supra, Appellants blithely contend this declaration was sworn. It was not.

indispensable part of the plaintiff's case; therefore, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation" (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992))); Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014) ("The three-part test for associational standing requires that an association's members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."). Indeed, if individual participation were not required and the ACLU could just proceed with utter anonymity, then Ms. Mihal would not have joined as a named plaintiff. Fortunately, that is not how it works.

Relatedly, the ACLU cannot assert irreparable harm on behalf of other unidentified alleged state employees for purposes of obtaining an injunction. 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)); cf. Evins v. Richland Cty. Historic Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (asserting "a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom"). Against this backdrop, the Court should reject Appellants' efforts to dump information not properly before the Court into the record about unnamed individuals, other state agencies, and unverifiable circumstances.

Even when putting aside this quixotic effort to manufacture standing, none of Appellants can demonstrate irreparable harm. Appellants' conclusory allegation that the Governor's action is purportedly unconstitutional or ultra vires, without more, is not good enough. Appellants' Petition

rehashes the same factual allegations and policy-based arguments on irreparable harm, but the circuit court—acting in its sound discretion—considered and rejected those assertions. Appellants' argument on irreparable harm fails on a more fundamental level because they have not and cannot identify a legal right to work remotely. Stated differently, Appellants have not raised "a fair question . . . as to the existence of such a right." Levine v. Spartanburg Reg'l Servs. Dist., Inc., 367 S.C. 458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005) (quoting Williams v. Jones, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912)), holding modified on other grounds by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010). The Department of Administration, of course, has the right to establish "conditions of employment." S.C. Code Ann. § 8-11-230(6). Neither Ms. Mihal nor her anonymous cohorts, on the other hand, has a right to demand their employment be exclusively remote.

Aside from the implicit concessions contained in the recent Notice regarding Ms. Mihal's accommodations, Appellants have not produced a single communication indicating they availed themselves of the accommodations process or received a decision. Nor have they introduced any evidence that termination is imminent. Further, they cannot show it would be dangerous to return to work. The guidance provided 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."[11]

[11] Dir. 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

Yet Appellants complain, without a shred of evidence, that state agency work environments will not be safe just because Governor McMaster rescinded a provision in a previous Executive Order that required face coverings in state government buildings. That is a bridge too far. 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. Moreover, the very Executive Order that Appellants challenge "encourage[s] all individuals within the State of South Carolina to wear a Face Covering" and authorizes the Department of Administration, in consultation with DHEC, "to promulgate guidelines regarding the use of face coverings in state government offices, buildings, and facilities." Executive Order No. 2021-12, § 2(A), (B). Further still, Executive Order No. 2021-12 expressly states that it does not "prohibit counties and municipalities of this State from enacting or implementing . . . emergency ordinances, orders, or other measures requiring individuals to wear a Face Covering . . . in public settings where they are, will be, or reasonably could be located in close proximity to others who are not members of the same household and where it is not feasible to maintain six (6) feet of separation from such individuals or to otherwise practice effective 'social distancing' in accordance with CDC and DHEC guidance." Id. § 2(G).

Notably, Appellants do not even try to explain what measures their employers have taken to ensure a safe working environment. To do so would only undercut their doomsday scenario. But businesses are requiring employees to return to work, and thousands of state employees have never had the remote option or arrangement Appellants now seek to convert into a legal right. To account for various employee-specific situations, though, the Department of Administration's guidance expressly gives state agencies the flexibility to make any necessary accommodations. If

an agency believes an employee fails to meet its criteria, then that is between the employees and their employers, none of which are parties to this action. And the process is obviously working. Look no further than Ms. Mihal's notice that she received a temporary accommodation. Yet the ACLU insists on moving forward with its baseless and boundless claims of irreparable harm.

Regardless, pure economic loss is generally insufficient to satisfy a showing of irreparable harm where an adequate remedy is available at law. See Dist. 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"). Courts have recognized irreparable harm in the form of the loss of an entire business or professional practice, but that is simply not the case here. Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 455, 626 S.E.2d 34, 37 (Ct. App. 2005), holding modified on other grounds by Poynter Invs., Inc., 387 S.C. 583, 694 S.E.2d 15. Appellants have not lost anything. They simply do not want to go back to work. 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 Appellants may prefer the arrangement they secured during the pandemic, that cannot take precedence over the public's interest in Appellants doing the jobs for which they were hired and receive a state salary.

Finally, it is worth noting that state agencies and institutions have long been authorized to "use alternate work locations, including telecommuting," provided that such arrangements "result in greater efficiency and cost savings." S.C. Code Ann. § 8-11-15(B). Moreover, state agencies and institutions "may use flexible scheduling of the minimum full-time workweek hours for an

employee . . . so long as the implementation of flex-time does not impair the ability of the agency or institution to meet its needs and service delivery requirements." S.C. Code Ann. § 8-11-17. Presumably, if Appellants' employers felt they could adequately and efficiently perform their jobs remotely or with flexible scheduling, the agencies would have made those arrangements—as authorized by law—prior to the pandemic.

Because Appellants failed to demonstrate any irreparable harm stemming from having to comply with the Governor's Executive Order, their request for injunctive relief fails. 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 Agric. Coll. of S.C., 208 F. Supp. 416, 417 (W.D.S.C. 1962). Appellants still must show the remaining elements necessary to obtain injunctive relief. They cannot.

C. Appellants cannot succeed on the merits.

As Director Adams noted, Appellants' theory of the case essentially boils down to one paragraph in their Complaint. See Dir. Adams Return at 4. At bottom, Appellants argue 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." Pls.' Compl. at ¶ 53. Appellants argue "[b]oth 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." Id. Similarly, they claim the Governor exceeded his authority under section 25-1-440 of the South Carolina Code of Laws—and, in their view, committed an ultra vires act—by issuing the Return in Person Order contained in Executive Order No. 2021-12. Id. at ¶¶ 57–58. Appellants simply cannot succeed on these specious claims.

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."[12] 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."[13] Id. The Governor

[12] 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. Cf. In re Operation of the Trial Courts During the Coronavirus Emergency, App. No. 2020-000447, Am. Order No. 2021-03-04-01, ¶ (a) (S.C. Sup. Ct. filed Mar. 4, 2021) (discussing "the current coronavirus (COVID-19) emergency," which "differs from . . . prior emergencies in many aspects").

[13] 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

naturally—and statutorily—has the authority to modify, amend, or rescind those Orders. See S.C. Code Ann. § 25-1-440(a)(1).

Appellants do not challenge the Governor's emergency authority or his ability to rescind or amend his prior Orders and directives. Pls.' Reply 1, 2. Instead, they argue his directive that state agencies submit plans "to expeditiously return all non-essential employees and staff to the workplace on a full-time basis," Executive Order No. 2021-12, § 5(D), was incorrect—and, ergo, illegal—on two grounds. First, they argue the Executive Order violated the separation-of-powers and nondelegation doctrines. Second, they argue the Executive Order was ultra vires. The Governor will address each in turn.

1. Appellants' latent and conclusory constitutional arguments fall flat.

"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 & Env't 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. Int. 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).

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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").

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—expressly gave the Governor certain 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). "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. The Governor 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.

Here, the Governor acted within the boundaries of his constitutional authority and 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.").[14]

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, 403 S.C. at 407, 743 S.E.2d at 264. 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," the Court "must

[14] See also Newman v. Richland Cty. Hist. 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.").

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 v. State Bd. of Med. Exam'rs of S.C., 282 S.C. 474, 479–80, 320 S.E.2d 35, 38 (Ct. App. 1984).

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 v. S.C. State Hous. Auth., 271 S.C. 219, 233, 246 S.E.2d 869, 876 (1978).

> 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. "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.

Of course, "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 statute has invested him, but upon consideration of what things the statute affirmatively permits him to do." Terry v. Pratt, 258 S.C. 177, 182–83, 187 S.E.2d 884, 886 (1972). To be sure, 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, the State is not in a vacuum; rather, it is in the midst of responding to and recovering from a global pandemic that, by definition, constitutes a state of emergency and a public health

emergency. See S.C. Code Ann. § 1-3-420; S.C. Code Ann. § 44-4-130(P); S.C. Code Ann. § 44-4-130(R)(2); S.C. Code Ann. § 25-1-430(b); S.C. Code Ann. § 25-1-440(a)(2). 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.[15] Indeed, the General Assembly concluded "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). 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).

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 give the State the ability to develop "a comprehensive plan to provide for a coordinated, appropriate response in the event of a public health emergency." S.C. Code Ann. § 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.

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.

[15] S.C. Code Ann. §§ 44-4-100 through -570.

at 594–95, 86 S.E.2d at 470. This is precisely one of those instances. The contingency was a public health emergency, and the General Assembly provided "intelligible principles" through which the Governor could help the State combat and recover from a pandemic.

The General Assembly was not required to 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, to include the regular operations of state government. See S.C. Code Ann. § 25-1-440(a)(1). Importantly, Appellants have not identified a statute or any legislative power Respondents have usurped. Instead, they simply contend—in ipse dixit fashion—that the Governor violated the nondelegation and separation-of-powers doctrines. That much does not follow. To the contrary, Respondents have identified statutes that give them the precise authority exercised in this situation. See id.; S.C. Code Ann. § 8-11-230(6). And "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.

Accordingly, the circuit court correctly found Appellants failed to show they are likely to succeed on the merits of their claims under the separation-of-powers and nondelegation doctrines.

2. Respondents' actions were not ultra vires.

With that question settled, Appellants are left only with their policy-driven argument that Executive Order No. 2021-12 does not further "the safety, security, and welfare of the State." S.C. Code Ann. § 25-1-440(a)(2).

As to the Governor's emergency powers, Appellants' arguments are self-defeating. In one breath, they acknowledge the Governor had the authority to issue an emergency executive order authorizing or directing certain nonessential state employees to work remotely 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 the workplace because—in their opinion—it does not further the health, safety, and welfare of South Carolinians. According to whom? In raising this argument, Appellants seemingly ask the Court to substitute their preferences—or the self-serving opinions of their proffered expert—for the Governor's discretionary decisions and policy determinations. Respectfully, that is not the standard. As the circuit court aptly noted in its Order, Appellants simply "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.

What is more, Appellants' argument is incongruous with subsection (a)(1) of section 25-1-440 of the South Carolina Code of Laws, which gives the Governor the authority to "issue emergency proclamations and regulations and amend or rescind them." Executive Order No. 2021-12 rescinded the previous directives and ordered agencies to expedite the transition back to normal operations. Compare Executive Order No. 2020-11, § 1(A) (Mar. 19, 2020), with Executive Order No. 2021-11, § 8(A) (Mar. 1, 2021), and Executive Order No. 2021-12, § 5(D) (Mar. 5, 2021). In other words, the Governor directed agencies to transition back to the pre-pandemic status quo. When guiding the State of South Carolina through its response to a global pandemic, or any other State of Emergency, the power to impose naturally contemplates the power to rescind. Any other interpretation would contravene the intent of the General Assembly and lead to an absurd result.[16]

[16] 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]."); 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.,

Indeed, Appellants' argument regarding mootness only highlights the weakness of their claims. Appellants do not contest the Governor's authority to issue emergency executive orders under section 25-1-440. Instead, they just disagree—from a policy standpoint—with one provision of a single Executive Order. According to Appellants, even though everyone 16 years of age or older in the State of South Carolina is eligible to receive a vaccine, it is too early for state employees to return to work. Rather than issuing Executive Order No. 2021-12 in April, Appellants believe the Governor should wait a couple months. For that reason alone, Appellants contend the Governor exceeded his emergency authority.

Here, "[t]he role of the Court is not to second guess whether Defendants made the right decision." TJM 64, Inc. v. Harris, No. 220CV02498JPMTMP, 2020 WL 4352756, at *4 (W.D. Tenn. July 29, 2020). "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)).

> 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.

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))).

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). "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). 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." Neuman, 384 S.C. at 402, 683 S.E.2d at 271.

Viewed in this prism, Appellants simply cannot prevail on their constitutional and ultra vires claims. The Court should therefore deny the Petition for a Writ of Supersedeas.

D. Appellants have adequate legal remedies available.

To date, Appellants still have not addressed why the myriad legal remedies identified in Respondents' briefs and the circuit court's Order are neither readily available nor adequate.

Notwithstanding their silence on the subject, the South Carolina Grievance Procedure Act, the South Carolina Human Affairs Law, the Americans with Disabilities Act, the Family Medical

Leave Act, Title VII of the Civil Rights Act of 1964, the South Carolina Occupational Safety and Health Law, and the South Carolina Workers' Compensation Act give Appellants ample legal recourse to pursue any claims. See Dir. Adams' Return in Opp. to Pet. for Writ of Supersedeas at 9–10. And many of these are exclusive remedies. See S.C. CONST. art. V, § 11 (providing South Carolina circuit courts with "original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts"); Dema v. Tenet Phys. Servs.-Hilton Head, Inc., 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009) (stating to determine "whether the [General Assembly] has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute").

But the Court need not decide which of these remedies are exclusive at this juncture. Rather, the Court can simply recognize that Appellants—both named and anonymous—failed to exhaust the many administrative remedies outlined above that remain readily available. 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"). Where, as here, Ms. Mihal failed to even name her employer, College of Charleston, as a defendant, it would be particularly inappropriate to wade into her employment claims. 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).

Nor have Appellants alleged or "demonstrate[d] 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). Appellants have not

shown the College of Charleston, or other alleged state employers, have taken "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)). To the contrary, the Department of Administration has given agencies and institutions of higher education flexibility in formulating and implementing return-to-work plans. In any event, Appellants did not allege they have been fired or otherwise adversely affected to date. If they are, they can proceed through the normal channels available to all state employees.

E. Appellants whistle past the issue of a bond.

As they did below, Appellants failed to address altogether what bond would be appropriate in the event this Court were to enter a writ of supersedeas and/or injunction pending appeal.

"The granting of supersedeas . . . may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate." Rule 241(c)(3), SCACR; see also Headdon v. State Highway 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).

Appellants 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, in doing so, Appellants are asking the Court to place billions of dollars in emergency funds on the line—as they are contingent upon South Carolina being in a declared State of Emergency—just because Appellants have manufactured a lawsuit based upon their desire to not go back to

work. The question, then, becomes what amount is sufficient for the payment of such costs and damages as Respondents 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 component of a coequal branch of government—on what bond would be sufficient, in the interests of justice, for Appellants to post before any order granting injunctive relief would become effective.

* * * *

In short, neither a supersedeas nor an injunction is necessary to preserve the status quo. The status quo is keeping Governor McMaster's Executive Order—which was in effect for over a month before Appellants filed this lawsuit—in effect until a final ruling is obtained. When put to their burden of proof and persuasion, Appellants could not make a prima facie showing that they were entitled to the extraordinary relief they now seek on an expedited, interlocutory posture in this Court. But no final judgment is at stake here. Appellants are thus free to move forward with their case in circuit court and request an expedited hearing and final ruling on the merits. See Poynter Invs., Inc., 387 S.C. at 589, 694 S.E.2d at 18. Instead, they seek to expedite an appeal from an interlocutory order governed by an abuse of discretion standard. The circuit court already found Appellants failed to meet their burdens of proof and persuasion based upon the same or similar record before this Court. If Appellants have actual admissible proof to support their claims, then they should relish the opportunity to present it in a final hearing on the merits. That

Appellants wish to pursue this matter on an incomplete record full of untested allegations, conclusory assertions, and self-serving opinions of their proffered expert is telling.

Contrary to Appellants' representations to the Court, the "evidence" they presented is not "uncontroverted." Apps.' Pet. at 19. The day after Appellants filed this lawsuit, the Governor filed a Motion to Dismiss the Complaint and, in the alternative, a Motion to Strike the very allegations they claim are "uncontroverted" on appeal. Included within that Motion was the argument that the unsworn Dunn Declaration was insufficient to put the allegations of anonymous purported state employees before the Court for purposes of establishing associational standing. Notwithstanding the new alleged facts Appellants seek to inappropriately inject in the record, nothing has changed, other than the College of Charleston apparently granting Ms. Mihal's request for an accommodation. And overstated, conclusory, and evolving claims of irreparable harm—for both named and unnamed Appellants—are not grounds for flouting the rules. The circuit court got it right, and this Court should reject Appellants' ever-evolving crusade.

CONCLUSION

In sum, Appellants simply do not want to go back to work. Appellants, however, have not alleged any legal right to work remotely or any cognizable irreparable harm. Nor are they in danger of suffering irreparable harm. To breathe life into Appellants' 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—and not name the county—for requiring court operations to resume. Appellants simply cannot succeed on the merits of this litigation because the Governor's Executive Order was constitutional and well within his power. And Appellants have known adequate remedies at law that foreclose this action in circuit court. The Court should therefore deny Appellants' Petition for a Writ of Supersedeas. The circuit court exercised its sound discretion in denying Appellants'

Motion for TRO and/or Preliminary Injunction, and Appellants have offered no basis for upsetting the status quo while their moot and meritless lawsuit makes its way through the appellate courts.

Respectfully submitted,

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