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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2021-000379
Lower Court Case No. 2021CP4001599

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.

REPLY IN SUPPORT OF APPELLANTS' PETITION FOR A WRIT OF SUPERSEDEAS

Respondent Governor McMaster and Appellants agree that a public health emergency does "not give the Governor a blank check." McMaster Opp. at 26. The Governor's authority to act during an emergency is constrained to actions necessary to discharge his responsibility "for the safety, security, and welfare of the State." S.C. Code Ann. § 25-1-440(a). The provision of the Governor's Executive Order challenged here, which requires non-essential state employees to return to the office in person immediately during an ongoing pandemic ("Return in Person Order"), does not advance those goals. Crucially, despite multiple opportunities to do so, Respondents have never offered any defense of the Return in Person Order as necessary to protect the safety, security, and welfare of the people of South Carolina. This is not surprising,

because continuing remote work by non-essential state employees is not an emergency and does not threaten the safety, security, or welfare of the State.

Appellants only seek a writ of supersedeas to preserve the status quo prior to the issuance of the Return in Person Order, and to protect them against the profound risks and hardships posed by returning to the office in person while the COVID-19 global pandemic still rages. Because they present a justiciable controversy, because their Petition is procedurally proper, and because supersedeas is necessary to prevent irreparable harms and preserve their meritorious appeal, this Court should grant the writ without delay.

I. Appellants' Claims Are Justiciable.

Appellants maintain standing to pursue their claims. As to the individual Appellant, Deborah Mihal, at the time the Complaint in this case was filed and this Petition was filed, Mihal had not been offered any accommodation to continue working remotely—in fact, her repeated requests to work from home had been denied. Although within the past week such an accommodation was granted under a new telework policy, the policy prohibiting new remote work authorizations can be reinstated against Mihal at any time, as the temporary authorization that she was granted states that it can be modified or removed at any moment. This change in Mihal's specific circumstances, an option that arose only after this litigation began, is therefore not a basis for this Court to deny review of her claims. *See Abbeville Cty. Sch. Dist. v. State,* 410 S.C. 619, 630–31, 767 S.E.2d 157, 162–63 (2014) (holding case not moot where modifications were made to challenged program but the challenged policy "continues to disadvantage [plaintiffs] in the same fundamental way"), *amended,* 414 S.C. 166, 777 S.E.2d 547 (2015), *order superseded on other grounds,* 415 S.C. 19, 780 S.E.2d 609 (2015), *and amended,* 415 S.C. 19, 780 S.E.2d 609 (2015); *see also Porter v. Clarke*, 852 F.3d 358, 364

(4th Cir. 2017) (voluntary cessation of a challenged policy does not moot claims unless there is no chance it could be reinstated).[1]

Moreover, this case falls under the well-recognized exception to mootness for cases raising "questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Wachesaw Plantation E. Cmty. Servs. Ass'n, Inc. v. Alexander*, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015) (citation omitted). This case addresses the constitutional limits to the Governor's authority to act during a public health emergency. A decision on that question has far-reaching consequences both now and in the future, and accordingly, merits this Court's attention regardless of any single plaintiff's personal circumstances.

But even if the Court were to find that the accommodations offered to Mihal rendered her claims moot, the American Civil Liberties Union of South Carolina ("ACLU of SC") has standing to pursue its claims under the well-established doctrine of associational standing. "An organization has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the

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[1] Respondent argues that the Return in Person Order gives agencies "discretion to handle situations on a case-by-case basis," McMaster Opp. at 5, yet points to no language granting agencies such discretion. In fact, the Memorandum implementing the Return in Person Order states clearly and repeatedly that "[a]ll agencies and institutions are expected to return employees back to the workplace by Monday, March 15, 2021"; "it should be considered an essential job function for employees to be in the workplace," regardless of an employee's actual job duties; and "[a]ll employees are expected to return to the workplace fulltime," regardless of childcare availability. Memorandum re: "State Government Staffing - Return to Normal Operations" (Mar. 5, 2021) at 1–3 ("Memorandum"), https://admin.sc.gov/sites/default/files/3-5-2021%20MA%20Memorandum%20-%20State%20Government%20Staffing%20-%20Executive%20Order%202021-12.pdf. Although limited extensions were permitted as to when employees would return to in-person work, those extensions were in the process of expiring when this suit was filed, and agencies were not afforded any discretion to permit employees to continue working remotely. Accommodations that were permitted after the filing of this lawsuit do not counteract the unforgiving policy set by the Return in Person Order.

organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001); *see also Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 216–17, 845 S.E.2d 481, 490 (2020), *reh'g denied* (Aug. 7, 2020) (community organization with members with property in neighborhoods adjacent to proposed coastal cruise ship facility had associational standing to challenge facility's development).

The ACLU of SC is a nonpartisan, nonprofit organization dedicated to defending the principles embodied in our Constitution and our nation's civil rights laws. Compl. ¶ 10, attached hereto as Exhibit 1. The issues at stake in this case—the proper limits of the Governor's authority under the state Constitution, the scope of the emergency powers granted to him by the South Carolina Legislature, and the constraints imposed on that authority under the state's civil rights laws—lie at the heart of that mission. With respect to standing of its members, that was established through the declaration from the organization's legal director, attorney Susan Dunn, identifying several individual members impacted by the Return in Person Order and describing their specific circumstances.[2] This is sufficient to demonstrate the standing of ACLU of SC members. *See Pres. Soc'y of Charleston*, 430 S.C. at 216–17, 845 S.E.2d at 490; *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 866 (2006). Finally, because the relief sought in this case is injunctive in nature, and no individual damages are sought, participation by individual members is not necessary.

[2] As detailed in the Petition, the limited accommodation offered by the College of Charleston to Mihal does not apply to other state agencies or institutions, and none of the other ACLU of SC members whose circumstances are described in the Petition have been offered the opportunity to apply to continue working remotely since the Return in Person Order was issued.

Respondent's conclusory statements to the contrary notwithstanding, the ACLU of SC is therefore an appropriate associational plaintiff. And these stories of the ACLU of SC members detailed in the Dunn Declaration are just the tip of the iceberg. Should the Court so desire, additional ACLU of SC members who have suffered the harmful effects of the Return in Person Order are willing to be named and/or submit affidavits.

For all these reasons the Court has jurisdiction to reach the merits of the Petition.

II. Appellants Qualify for Supersedeas Relief.

In attempting to dissuade this Court from granting the writ of supersedeas that Appellants request, Respondent tries to use the manufactured urgency of his Order to insulate it from this Court's review. He further tries to argue for dismissal of the Petition on procedural grounds that were already rejected by this Court, and ignores the exigencies of this situation and the harm it poses to state employees. Of course, parties are not forced to suffer irreparable harm simply because a policy is implemented so quickly after it was issued.

First, the Governor mischaracterizes the status quo to be preserved by supersedeas. Appellants seek to restore the status quo as it existed for nearly a year, since the Governor ordered non-essential employees to work remotely in March 2020. That status quo was disturbed by the Governor's Return in Person Order, which was issued and then implemented over a matter of weeks. "[I]t is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions . . . '[s]uch an injunction restores, rather than disturbs, the status quo ante.'" *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012) (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004)). Respondent ignores precedent permitting courts to block enforcement of a policy over a month after the policy was announced. *See, e.g.*, *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C.

450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005), *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). As in *Peek*, Appellants seek to preserve the status quo at the time they filed their motion for a preliminary injunction, after the Governor's Order was issued but before they suffered irreparable harm as a result.

Second, Respondent repeats the meritless assertion that Appellants' Petition was not first raised in the circuit court, and now claims that Appellants failed to attach the order denying their request for relief to their Petition. These arguments ignore several key provisions of Rule 241, SCACR. A supersedeas "preserve[s] the status quo pending the determination of the appeal," *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (citation omitted), and Appellants requested just that relief in the alternative as part of their Motion for Reconsideration, by seeking "an order preserving the status quo until an appellate court can review the constitutionality of Executive Order 2021-12 by immediately restraining enforcement of the return to in-person work provision pending appellate review." Mot. for Reconsideration at 4, attached hereto as Exhibit 2. Rule 241 does not require parties to use the word "supersedeas," it only requires parties to apply for that relief before the lower court, which Appellants did here.

Likewise, due to "the emergent circumstances and the need for immediate appellate review in order to prevent further irreparable harm," Appellants requested the court's decision on their request for a supersedeas "as quickly as practicable and without delay." Mot. for Reconsideration at 3. Rule 241 provides that parties may forgo first raising supersedeas in the lower court "where extraordinary circumstances make it impracticable" and states that "unnecessary delay by the lower court [] in ruling on this application shall constitute an extraordinary circumstance." Rule 241(d)(1), SCACR. The Rule further provides that a petition for supersedeas shall include "[a] certified copy of the lower court's [] ruling" or, alternatively,

the "petition shall state the extraordinary circumstances which made it impracticable to make such an application." Rule 241(d)(4)(C), SCACR. Appellants explained in their Petition that as of that morning "the court has not acted on Appellants' requests" and "[d]ue to the exigencies of this matter, . . . Appellants are proceeding with this Petition." Petition at 9. And though not required to attach any Order denying their Motion for Reconsideration due to the extraordinary circumstances at issue here, Appellants did attach to their Petition the court's Order denying their Motion for Temporary Restraining Order and/or Preliminary Injunction. Accordingly, Appellants fulfilled the procedural requirements of Rule 241, SCACR.

Although Respondent protests that the Petition was made in error and contains information outside of the Record on Appeal, McMaster Opp. at 15, Appellants observed the rules in requesting a supersedeas, including by filing a Petition for a Writ of Supersedeas that was verified by both Appellants, consistent with Rule 241(d)(3), SCACR. And they included as attachments the sworn affidavits previously submitted to the Circuit Court. These documents *are* the record for purposes of this Petition.

Respondent introduces a red herring by arguing that Appellants should have moved for an injunction pursuant to Rule 62(c), SCRCP, instead of requesting a writ of supersedeas. Respondent offers no explanation as to why Appellants were *obligated* to move under this rule as opposed to under Rule 241(c), SCACR. Indeed, Respondent completely ignores that this Court has granted a supersedeas in precisely this situation, after the circuit court below denied a preliminary injunction. *See, e.g.*, *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 598, 550 S.E.2d 287, 290 (2001) (explaining that this Court had previously granted a writ of supersedeas after the circuit court denied a preliminary injunction below); *S.C. High Sch. League v. Richland Cty. Sch. Dist. One*, S.C. Sup. Ct. Order dated Feb. 25, 2003

(same; Supreme Court reversed on other grounds). It is the exigencies of Appellants' circumstances and the harm that could befall them and other state employees that propel this Petition forward at this pace and in this manner. Respondent created these harms by issuing the Return in Person Order, which this Court must now enjoin to protect Appellants as their appeal advances.

Finally, under Rule 241(c)(3), SCACR, a court may—but is not required to—condition the granting of a supersedeas on the filing of a bond. Bond would not be appropriate here, as Respondent points to no monetary damages that would result from enjoining the Return in Person Order in this case. Respondent contends that "Appellants are asking the Court to place billions of dollars in emergency funds on the line," McMaster Opp. at 32, but fail to explain how temporarily enjoining the Return in Person Order would do that, as Appellants have not requested that the Governor declare the end to the state of emergency. If anything, the Return in Person Order may very well be more financially harmful to the State due to costly drops in productivity, mental health strain on supervisors and employees, and attrition of valued staff members due to the availability of remote positions in other states. Thus, bond would not be appropriate in this case.

III. Appellants' Appeal is Meritorious.

A. Appellants Will Be Irreparably Harmed by the Return in Person Order and Lack Adequate Remedy at Law.

Instead of acknowledging the sacrifices the Return in Person Order requires state workers to make, the Governor attempts to paint them as lazy and irresponsible. It is not that Appellants "simply do not want to go back to work." McMaster. Opp. 34. Rather, these state employees have already been working remotely full time to keep the government functioning during an

unprecedented emergency, while at the same time, balancing the extraordinary personal responsibilities that emergency has precipitated.

The harms Appellants have described from being forced arbitrarily to physically report to the office in the midst of the ongoing pandemic are anything but trivial. Appellants submitted evidence that members of the ACLU of SC have been unable to identify adequate, alternative care arrangements for their children, including one member whose work schedule would require her to leave her children unsupervised for several hours each day. Respondent does not dispute that this outcome may come to pass, or address the issue that, as described in the Petition, many schools are open for in-person instruction just 2 to 4 days a week and childcare slots have been sharply reduced during the pandemic, leaving significant gaps in which children would be unsupervised. The harms that could befall young children during unsupervised time at home are every parent's worst nightmare. To equate such harms to "pure economic loss," McMaster Opp. 19—or to suggest that they could be compensated after the fact through "the normal channels available to all state employees" in employment disputes, McMaster Opp. at 32—is beyond callous.

The health risks posed by the Return in Person Order are similarly impossible to remedy *post hoc*. For example, one ACLU of SC member who sought an exemption because she is breastfeeding her infant child has been ordered to return to the office in person. She now is being forced to choose between returning unvaccinated, despite the ongoing risk of contracting a deadly virus, and getting the vaccine, despite the lack of data and unknown risks of getting vaccinated while breastfeeding. A third member with a chronic health condition and a medically vulnerable wife has been forced to return in person despite not being fully vaccinated until early May. That the Governor would treat the risks faced by these individuals returning to the office

under these circumstances—risks to these employees' health and lives and those of their families—so cavalierly shows blatant disregard for the health and safety of South Carolinians.

Finally, the Department of Administration's Memorandum is simply not sufficient to protect state employees from the spread of COVID-19 in the workplace. The most Respondent can muster is that the Memorandum states that agencies "*should* still employ measures to reduce the likelihood of transmission in the workplace." McMaster Opp. at 17–18 (emphasis added). That is not a requirement that agencies employ such measures to protect employees, nor is it a benchmark setting a standard for agencies to meet before employees return to work. The Governor does not dispute, nor could he seriously do so, that rates of transmission remain dangerously high. Yet the Governor has failed to guarantee that agencies have been or will be able to institute adequate protective measures. In short, the Memorandum does nothing more than pay lip service to protecting these employees.

Appellants have further demonstrated irreparable harm by showing that they lack an adequate remedy at law. The operative question is not whether *any* other potential remedy exists. Rather, "[a]n 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) (quoting 27 *Am. Jur. 2d*, *Equity,* § 94 (1966)); *Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009), *aff'd as modified*, 399 S.C. 23, 731 S.E.2d 288 (2012) (same). A finding that available remedies at law are inadequate is appropriate in cases where redress would be uncertain or difficult to measure, or where "the available legal remedy in a given case reduces itself to a matter of words, rather than to a matter of efficacy, because of its

impracticability, or because the threatened acts may continue during the progress of an action at law." *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 16 (1939).

Those conditions are present here. Returning to their offices in person, as the Return in Person Order requires them to do, subjects the state employee members of the ACLU of SC to risks that simply cannot be recompensed after the fact. Those harms—risks to employees' health and the health of their families, risks to the wellbeing of their children or adults who rely on the state employees for care, and potential exposure to child neglect charges against state employees—are well within the scope of injuries that South Carolina courts have recognized cannot be recompensed through money damages after the fact. *See AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 52, 674 S.E.2d 505, 509 (Ct. App. 2009); *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 466–67, 626 S.E.2d 38, 42–43 (Ct. App. 2005), *holding modified by Poynter Invs., Inc.*, 387 S.C. 583; *Peek*, 367 S.C. at 457.

Respondent points to the requirement to exhaust administrative remedies that may lie against employers under other statutes, but that is irrelevant to this action. This is not an employment dispute, or a complaint regarding workplace safety conditions. Respondent cites no authority for the argument that Appellants must exhaust administrative remedies to advance their actual claims: that the Governor has exceeded his emergency powers. Appellants do assert that the Return in Person Order disproportionately injures women, caregivers, and people with disabilities, in contravention of state and federal antidiscrimination laws. But the hypothetical availability of one avenue of relief for some individuals against a different party—their employing agencies—*after* they suffer an actionable adverse employment action under those laws does not negate the irreparable injury Appellants seek to prevent in this suit. This case seeks prospective relief that would apply to all state agencies and institutions subject to the Order. The

impacted members of the ACLU of SC could not obtain that remedy from their individual employing agencies because those agencies are bound to comply with the Return in Person Order and lack statewide authority. Appellants' only *adequate* avenue of obtaining the immediate, forward-looking relief they seek is through this action.

B. Appellants Are Likely to Succeed on the Merits.

Appellants are likely to succeed on the merits of their claims because Respondents have never once defended the Return in Person Order as consistent with the Governor's responsibility to protect the "safety, security, and welfare of the State." S.C. Code Ann. § 25-1-440(a). Appellants do not argue that the legislature erred by vesting "unbridled, uncontrolled or arbitrary power" in the Governor during a state of emergency. *Gale v. State Bd. of Med. Examiners of S.C.*, 282 S.C. 474, 479–80, 320 S.E.2d 35, 38 (Ct. App. 1984). To the contrary, the legislature limited the Governor's authority. If, as Respondent contends, S.C. Code Ann. § 25-1-440(a) limits Respondents' discretion, then there are actions that exceed those limits and would not be permitted under the Governor's emergency powers. The executive branch "may exercise discretion in executing the laws, but only that discretion given by the legislature." *Hampton v. Haley*, 403 S.C. 395, 404, 743 S.E.2d 258, 262 (2013). Appellants thus challenge the *exercise* of the Governor's authority to act during a public health emergency, as the Governor cannot both locate his authority to act in his declaration of a public health emergency and then use that authority to subject non-essential state employees to the very dangers entailed by that emergency.

The Governor attempts to recast these irreparable injuries as policy disagreements, but Appellants do not merely disagree with the Return in Person Order; rather, they aver that their "safety, security and welfare" will be actively harmed by it. Appellants do not rest their

arguments on their own opinions, but have cited publicly reported statistics as to rates of transmission of COVID-19, which are *higher* than when the state of emergency was first declared, along with the dire warnings of CDC officials, issued just days after the challenged Order, cautioning against easing restrictions prematurely. *See* Petition at 16. They have offered examples of numerous non-essential state employees whose health and wellbeing, and the safety of their families, are jeopardized by this arbitrary requirement to return to in-person work. And they have pointed to the disparate impact the Return in Person Order has on women, Black people and other racial minorities, people who are pregnant, and people with disabilities—harms that the Governor ignores entirely. On this basis, the Return in Person Order exceeds the Governor's emergency powers.

At most, Respondent argues that Appellants must carry out their duties in person rather than remotely because everyone in South Carolina is now eligible for a vaccine. McMaster Opp. at 29. Yet the Return in Person Order was issued weeks *before* everyone was eligible (not "in April" as Respondent's brief states, *see id.*), and eligibility for the vaccine does not ensure that people have access to the vaccine or time to become fully immune. And Respondent does not even attempt to argue that all state workers have actually received the vaccine, or that the availability of the vaccine ameliorates the harms detailed by Appellants, including lack of availability of alternative caregivers for employees' dependents and risks for people who cannot get the vaccine or are still at risk even after vaccination.

Respondent contends that "the power to impose naturally contemplates the power to rescind." McMaster Opp. at 28. Appellants do not dispute that the Governor has the power to "amend or rescind" emergency regulations. But when issuing new directives, those actions must be in service of his responsibility "for the safety, security, and welfare of the State." S.C. Code

Ann. § 25-1-440(a). Further, the Return in Person Order does not merely rescind the directive that all non-essential remote employees work remotely. If that were the case, agencies would have flexibility to establish or continue their own policies governing where and how non-essential state employees carry out their responsibilities. Instead, the Order cuts off state agencies' flexibility to allow employees to work remotely, and blocks even *pre*-pandemic agency accommodation policies that would have enabled agencies to approve pandemic-necessitated remote work agreements for some employees. Again, Respondent does not explain how categorically restricting agencies' flexibility to respond to employees' needs for work accommodations protects the safety, security, and welfare of the State. Appellants, by contrast, have demonstrated the serious ways in which the Order jeopardizes the safety and welfare of non-essential state employees, their families, and their communities.

The Governor points to limits on his authority as proof that the delegation of emergency powers to him is constitutional, yet he also argues that he must be able to exercise unchecked discretion. McMaster Opp. at 27. The Governor cannot have it both ways. In any event, Appellants do not challenge whether the delegation of such emergency authority was constitutional; it is the *exercise* of that authority under that limited power that Appellants challenge. Whether the Governor exceeded his limited authority is reviewable: "Any abuse of this decision-making power is subject to judicial review." *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 235, 246 S.E.2d 869, 877 (1978). Respondents have offered *no defense* of their decision to require non-essential state employees to return to work in person, meaning Appellants are likely to succeed in their argument that the Return in Person Order is contrary to his statutory authority and *ultra vires*.

IV. Conclusion.

For the reasons set forth above, this Court should grant the writ of supersedeas and enjoin the Return in Person Order.

Respectfully submitted,

By: /s/ Nancy Bloodgood
Nancy Bloodgood (SC Bar # 6459)
BLOODGOOD & SANDERS, LLC
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
Phone: 843-972-0313
Email: nbloodgood@bloodgoodsanders.com

/s/ Susan K. Dunn
Susan K. Dunn (SC Bar # 1798)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTH CAROLINA
P.O. Box 20998
Charleston, South Carolina 29413
Phone: 843-282-7953
Fax: 843-720-1428
Email: sdunn@aclusc.org

Lindsey Kaley*
Galen L. Sherwin*
Brian Dimmick*
Daniel Mach*
Alexandra Bornstein*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Phone: 212-519-7823
Email: lkaley@aclu.org
Email: gsherwin@aclu.org
Email: bdimmick@aclu.org
Email: dmach@aclu.org
Email: legal_ab@aclu.org

*Admission for *pro hac vice* granted by Circuit Court on April 20, 2021, pending in Court of Appeals

Attorneys for Appellants

Charleston, South Carolina
Date: April 21, 2021

EXHIBIT 1

ELECTRONICALLY FILED - 2021 Apr 06 9:43 AM - RICHLAND - COMMON PLEAS - CASE#2021CP4001599

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
DEBORAH MIHAL, and the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA, PLAINTIFFS, vs. GOVERNOR HENRY D. MCMASTER, in His Official Capacity; and MARCIA S. ADAMS, Executive Director of the South Carolina Department of Administration, in Her Official Capacity, DEFENDANTS.	))))))))))))))	Case No.: **SUMMONS AND COMPLAINT**

TO THE DEFENDANTS ABOVE NAMED:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the Complaint to the subscriber at **Bloodgood& Sanders, LLC, 242 Mathis Ferry Road, Suite 201, Mt. Pleasant, S.C. 29464**, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, the Plaintiffs will apply to the Court for the relief demanded in the Complaint and a judgment by default will be rendered against you.

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By: /s/ Nancy Bloodgood
Nancy Bloodgood (SC Bar # 6459)
BLOODGOOD & SANDERS, LLC
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
Phone: 843-972-0313
Email: nbloodgood@bloodgoodsanders.com

/s/ Susan K. Dunn
Susan K. Dunn (SC Bar # 1798)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTH CAROLINA
P.O. Box 20998
Charleston, South Carolina 29413
Phone: 843-282-7953
Fax: 843-720-1428
Email: sdunn@aclusc.org

Lindsey Kaley*
Galen L. Sherwin*
Brian Dimmick*
Daniel Mach*
Alexandra Bornstein*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Phone: 212-519-7823
Email: lkaley@aclu.org
Email: gsherwin@aclu.org
Email: bdimmick@aclu.org
Email: dmach@aclu.org
Email: legal_ab@aclu.org

**Pro hac vice* forthcoming

Attorneys for Plaintiffs

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
DEBORAH MIHAL, and the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA,	)	Case No..:
Plaintiffs,	)	**COMPLAINT**
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.	)	

COME NOW the Plaintiffs, Deborah Mihal, and the American Civil Liberties Union of South Carolina, by and through their undersigned counsel, and complaining of the above-named Defendants, would respectfully show unto this Honorable Court as follows:

INTRODUCTION & NATURE OF THE ACTION

1. On March 5, 2021, South Carolina Governor Henry McMaster ordered state agencies to "immediately expedite" the return of non-essential state employees to in-person work. This was a complete course reversal from the Governor's order that non-essential state employees work remotely, which they had been doing effectively for a year.

2. Crucially, the Governor's executive order, EO-2021-12, and the South Carolina Department of Administration's memorandum implementing it, require employees with disabilities and employees with caretaking responsibilities to return to work in person, regardless of their health or ability to find appropriate care coverage. As a result, EO-2021-12's provision requiring non-essential state employees to return to work in person will harm numerous state employees, their families, and their communities—including the approximately 24,000 state employees who have been working remotely during the pandemic. It also discriminates against employees based on sex and disability.

3. When Governor McMaster first declared a public health emergency on March 13, 2020, there were 21 recorded cases of COVID-19 in South Carolina total,[1] and a 7-day moving average of 2 cases per day.[2] And when Governor McMaster first ordered that non-essential state employees work remotely on March 19, 2020, there were 165 recorded cases of COVID-19 in South Carolina total,[3] and a 7-day moving average of 14 cases per day.[4]

4. By contrast, on March 5, 2021, when Governor McMaster ordered state agencies to return state non-essential employees to the office, there were 776 new cases on that day alone,[5] and a 7-day moving average of 1,244 cases per day.[6]

5. Requiring non-essential state employees to return to work contravenes the Occupational Safety and Health Administration's *Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, which includes limiting the number of people in one place at any given time, including by permitting telework and delivering services remotely.[7] The requirement even contravenes South Carolina's Department of Health and Environmental Control's own guidance for reopening businesses, which explicitly states that employers should "[c]ontinue to encourage telework when feasible with business operations."[8]

6. At the same time, EO 2021-12 also rescinded EO 2021-11, which had required individuals to wear face coverings in state government offices, buildings, and facilities, and instead merely "encourage[d]" individuals to

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[1] *SC Testing Data & Projections (COVID-19)*, S.C. Dep't of Health & Env't Control, https://scdhec.gov/covid19/sc-testing-data-projections-covid-19 (cumulative cases).

[2] *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (South Carolina).

[3] *SC Testing Data & Projections (COVID-19)*, S.C. Dep't of Health & Env't Control, https://scdhec.gov/covid19/sc-testing-data-projections-covid-19 (cumulative cases).

[4] *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (South Carolina).

[5] *SC Testing Data & Projections (COVID-19)*, S.C. Dep't of Health & Env't Control, https://scdhec.gov/covid19/sc-testing-data-projections-covid-19 (new cases per day).

[6] *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (South Carolina).

[7] *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, Occupational Safety & Health Admin., https://www.osha.gov/coronavirus/safework#implement-physical-distancing (last visited Apr. 5, 2021).

[8] *COVID-19 Reopening Guidance for Businesses*, S.C. Dep't of Health & Env't Control (July 27, 2020), https://scdhec.gov/sites/default/files/media/document/DHEC-Employer-Return-to-Work-Guidance_7.27.20.pdf.

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wear face coverings. Combined with the EO's rescission of the order that restaurants require employees and customers to wear face coverings, the EO is highly likely to contribute to increased rates of infection in South Carolina overall.[9]

7. Plaintiff Deborah Mihal is a state employee deemed non-essential and permitted to work remotely during the COVID-19 pandemic. Plaintiff ACLU of South Carolina has members who are non-essential state employees and were also permitted to work remotely during the COVID-19 pandemic. Plaintiffs seek declaratory and injunctive relief, both immediate and permanent, against Defendants for exceeding their emergency authority by *requiring* non-essential state employees return to the workplace in person. Without such relief, Plaintiffs and their members will be harmed, as EO-2021-12 leaves many employees with caregiving responsibilities and/or disabilities in an impossible predicament: They lack options for adequate, safe care for their children and adult dependents—jeopardizing the wellbeing of those they care for, and putting them at risk of prosecution for neglect. But not returning to work in person could result in employees losing their jobs. Further, returning to work in person means increased exposure to COVID-19, and can actually negatively impact employees' ability to fulfill their job responsibilities.

8. Time is of the essence. Non-essential state employees with caretaking responsibilities are required to return to the workplace on April 5, 2021, at many state agencies—regardless of whether they have secured adequate care. Unless the conduct herein alleged is immediately enjoined, employees will be subject to discriminatory policies that could result in loss of their jobs, unnecessary exposure to COVID-19, disruption to their children's education, and other dangers to their own safety and welfare and the safety and welfare of those they care for.

PARTIES, JURISDICTION & VENUE

9. Plaintiff Deborah Mihal ("Mihal") is a citizen of the United States and a resident of Charleston, South Carolina. Mihal is an employee at the College of Charleston. The College of Charleston is a public university operated by the state of South Carolina, and thus a state agency.

10. Plaintiff the ACLU of South Carolina ("ACLU of SC") is a nonpartisan, nonprofit organization dedicated to defending the principles embodied in our Constitution and our nation's civil rights laws. The ACLU of SC has over 8,000 members throughout the state, including many members who are employed by state agencies.

[9] Gery P. Guy Jr. et al., *Association of State-Issued Mask Mandates and Allowing On-Premises Restaurant Dining with County-Level COVID-19 Case and Death Growth Rates — United States, March 1–December 31, 2020*, MMWR 2021 (Mar. 12, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7010e3-H.pdf.

11. Defendant the Honorable Henry D. McMaster ("McMaster") is the Governor of South Carolina. As Governor, the South Carolina Constitution vests in him the "supreme executive authority" of the State. S.C. Const. Art. IV, § 1.

12. Defendant Marcia S. Adams ("Adams") is the Executive Director of the South Carolina Department of Administration and is sued in her official capacity. The Department of Administration was directed to review and approve agencies' plans for non-essential employees to return to the workplace in-person, as well as to provide additional guidance and clarification regarding that provision of EO-2021-12.

13. This Court is vested with subject matter jurisdiction with regard to the matters raised in this pleading by virtue of Article V, § 11, of the South Carolina Constitution, as enabled by South Carolina Code § 14-5-350.

14. This Court has personal jurisdiction with regard to each Defendant.

15. Venue is proper in the Court of Common Pleas of Richland County, South Carolina, by virtue of South Carolina Code § 15-7-20.

FACTS

Background on Executive Actions

16. On March 13, 2020, Governor McMaster first declared a public health emergency due to the 2019 novel coronavirus ("COVID-19"). In his Executive Order ("EO") 2020-08, issued on that date, Governor McMaster explained that he had "determined that it is necessary and prudent to declare that an emergency exists, or that the threat thereof is imminent, due to the evolving nature and scope of the public health threat or other risks posed by COVID-19 and the actual and anticipated impacts associated with the same." Accordingly, pursuant to S.C. Code Ann. § 1-3-420 and § 25-1-440, the Governor declared a public health emergency as "COVID-19 poses an actual or imminent public health emergency for the State of South Carolina."

17. When an emergency is declared, the Governor "is responsible for the safety, security, and welfare of the State," and "empowered" with additional authority—but only so far as it is needed to "adequately discharge this responsibility." S.C. Code Ann. § 25-1-440(a).

18. This additional authority includes, among other provisions, the ability to "issue emergency proclamations and regulations and amend or rescind them." S.C. Code Ann. § 25-1-440(a)(1).

19. Within a week of declaring a public health emergency, Governor McMaster issued EO 2020-11 on March 19, 2020, directing all non-essential state employees not to report to work in person. The order "direct[ed] that

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all non-essential employees and staff of the State of South Carolina . . . shall not report to work, physically or in-person, effective Friday, March 20, 2020, and until further notice," and mandated that state agencies and departments "utilize, to the maximum extent possible, telecommuting or work-from-home options for nonessential employees and staff." EO 2020-11 (Mar. 19, 2020). The order was intended "[t]o ensure the proper function and continuity of state government operations and the uninterrupted performance and provision of emergency, essential, or otherwise mission-critical state government services, while simultaneously undertaking additional proactive measures to safeguard the health and safety of state employees, pursuant to the cited authorities and other applicable law." *Id.*

20. Prior to issuing the EO at issue in this litigation, Governor McMaster issued a new declaration that a state of emergency exists in South Carolina on February 21, 2021. EO 2021-10 (Feb. 21, 2021). The order noted that "as part of the ongoing process of facilitating economic recovery and revitalization in a safe, strategic, and incremental manner, the State of South Carolina must also continue to encourage effective 'social distancing' practices and implement additional targeted and narrowly tailored emergency measures to combat and control the spread of COVID-19." *Id.*

21. Notwithstanding these previous directives, on March 5, 2021, the Governor issued EO 2021-12, which directed state agencies to "immediately expedite" the return of non-essential state employees to their offices in person. EO 2021-12 required agencies to "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." EO 2021-12 at 12 ("Return In Person Order"). The Return In Person Order also directed the Department to continue to provide supplemental guidance as needed to the agencies. *Id.*

22. The Return In Person Order did not merely rescind EO 2020-11's provision directing non-essential employees and staff to work remotely—it created an affirmative requirement that non-essential state employees return to work in-person, full time.

23. On March 5, 2021, the same day the Governor issued EO 2021-12, the South Carolina Department of Administration issued a memorandum to Agency Directors of all state agencies and institutions of higher education entitled "State Government Staffing – Return to Normal Operations." (The "Memorandum"). The Memorandum required state agencies to submit their return-to-the-office plans to the Department of Administration by March 10 at noon, and provided that if an agency or institution does not have an approved plan by the close of business on March 12, the agency or institution is required to return *all staff* to the workplace on March 15.

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24. The Memorandum offered guidance to state agencies and institutions in the form of "Frequently Asked Questions." The Memorandum set the expectation that *all* agencies and institutions would return *all* employees to the workplace by March 15, permitting only "a limited amount of time" for agencies to modify their workplace to mitigate the risk of exposure to COVID-19. The example given by the Memorandum of a plan likely to be approved is one in which an agency would have 60% of its workforce in the workplace on March 15, 75% on March 22, and the remainder in early April—including employees "who work in close environments such as cubicles or shared offices."

25. The Memorandum states that "only those employees who were working from home before the COVID-19 health emergency for unrelated Covid-19 reasons are to remain teleworking." Some state agencies and institutions have interpreted that to mean that, even where they have policies in place to allow employees to request to work remotely, no new requests can be approved—regardless of the reasons for the request, whether the individual request would merit approval, or the disruption caused to the employee's health or productivity by being required to return to work in person.

26. The Memorandum goes on to explain that even employees with disabilities and employees with caretaking responsibilities must return to work in person, regardless of their health or ability to find appropriate care coverage.

27. The Memorandum provides that, even if a child care center or school for an employee's child is not available for in-person attendance, employees with caretaking responsibilities must report to the workplace in person. Agencies are permitted to request additional time for employees with caretaking responsibilities to return to work. However, the Memorandum is clear that this is a "short time," and that a plan that would require such employees to return fulltime to the workplace by April 5 is likely to be approved.

28. For employees with disabilities that the Centers for Disease Control and Prevention ("CDC") has identified as placing them at higher risk for severe illness from COVID-19, the Memorandum allows only a "temporary reasonable accommodation to work remotely until the individual has had an opportunity to be vaccinated." The Memorandum does not take into account that the vaccine may be contraindicated for some employees because of their disabilities, or that others may be at higher risk from COVID-19 because of disabilities that are not specifically identified by the CDC.

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29. The Memorandum does caution that agencies are still expected to follow the Americans with Disabilities Act and the Family and Medical Leave Act ("FMLA"), and instructs agencies to handle requests for accommodations on a case-by-case basis. However, it also states that "it should be considered an essential job function for employees to be in the workplace"—even though the determination of what constitutes an essential job function is actually a case-by-case, fact-specific inquiry. That statement is completely contrary to the fact that non-essential state employees had been fulfilling many of their job functions remotely. Despite that, the Memorandum does not permit agencies to grant accommodations that would allow employees to work remotely, instead instructing state agencies to "identify accommodations that would enable the employee to report to the workplace."

30. Publicly available plans for state agencies and institutions to return their employees to the workplace generally follow the guidelines outlined by the Memorandum, with variations. The University of South Carolina, College of Charleston, and Clemson University all require employees who are primary caregivers to return to work on April 5, even if they have pre-school or school-age children whose daycare or school is not operating on a full-time schedule, or are unable to find other coverage for their caretaking responsibilities. The University of South Carolina and Clemson University require employees at high risk of serious illness due to contracting COVID-19 to return to the workplace on April 17 and April 26 respectively, and require employees to be actively pursuing vaccination. All three schools suspended the approval of new requests for remote work agreements in accordance with EO-2021-12. Other state agencies have comparable plans for employees to return to the workplace.

Harms from the Return In Person Order

31. Numerous non-essential state employees are now scrambling to make accommodations for their caretaking responsibilities, and to determine if any workplace accommodations due to disabilities will be provided to allow them to return to the workplace safely.

32. Plaintiff Deborah Mihal is the Director of Disability Services for the College of Charleston, and has been working remotely successfully with her team for the past year. She has been able to hold student meetings via video conferencing, as well as participating in her various committee responsibilities and holding weekly staff meetings. There are even some of her job responsibilities, like reviewing student requests for accommodations, that have become more streamlined by going remote. Mihal has been able to fulfill her responsibilities while acting as primary caretaker for her nine-year-old son, who is enrolled in remote schooling.

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33. The order that she return to the workplace by April 5 has left Mihal without options for childcare or workable accommodations. Her husband works full-time out of the house five days a week, except for Friday afternoons. She had to commit her son to virtual schooling for the full semester in January 2021, and has gotten no response from her outreach to the principal to see if she can switch him to in-person learning. Even if she is able to enroll him in-person, that would mean additional disruptions for his education and entail yet another new teacher—his fifth this school year—along with a new cohort of classmates. Mihal was also told there is no availability to enroll her son in his school's afterschool programs. She cannot afford a nanny, and her older son has his own remote school responsibilities as well as a part-time job.

34. Additionally, both returning to the workplace and all of her available childcare options would increase her and her family's exposure to COVID-19. Mihal scheduled her vaccination as soon as she could, and though she has an appointment, she will not be fully vaccinated before she is required to return to the workplace.

35. Meanwhile, the College of Charleston has not provided her with any solutions. The college has suspended approval of new telecommuting agreements. One flexible schedule offered to her would move her hours to 8 am to 4 pm, five days a week, which represents only a small schedule adjustment and would not solve her childcare dilemma. If she tries to rely on leave, she will use it up before the school year is over. Her supervisor suggested that she could come to the office evenings, say, 3 pm to 7 pm on weekdays, and on weekends to cover her 37.5 hours in the office. But that will still leave time each day before her husband returns from work to care for their son, and will not allow her to do many aspects of her job that require her to be available during business hours, such as meeting with students, hiring a new employee, holding weekly staff meetings, participating in regularly-scheduled committee meetings, and numerous other job responsibilities.

36. Mihal fears what will happen to her son if he does not have adequate care; she also fears that she will lose her job if she does not comply with the requirement that she return to work in-person.

37. The challenges Mihal is facing—the risk to her job, her difficulty securing safe childcare, the disruptions to her son's schooling, and the increased exposure to COVID-19 infection—all are caused by the Governor's Return in Person Order contained in EO-2021-12 and the implementing Memorandum. Without the order, she would likely continue to be able to work remotely as she has been doing for the past year, or could seek reasonable accommodations from her employer if she was required to return to the workplace. Mihal would like to continue

working remotely, at least until the end of the current school year, but will be required to return to the workplace on April 5.

38. Mihal is not alone in struggling to find childcare. About 20% of public schools in South Carolina are still on a "hybrid" schedule for all students, only open for in-person instruction 2 to 4 days a week, leaving parents or other caretakers to supervise the education of school-age children on the remaining school days. In addition, child care availability in South Carolina, already scarce before the pandemic, decreased even further after the pandemic began. By late June 2020, only about 60% of the roughly 2,400 regulated child care centers in the state remained open. Inadequate child care options can lead to a variety of harms, including job loss for the caregiver and the risk of prosecution for child neglect should the caregiver have to leave her child unsupervised to continue working. In South Carolina, child neglect is a felony that carries a sentence of up to 10 years in prison if convicted. Children, too, may be developmentally harmed.

39. Additionally, several members of the ACLU of SC are also unable to find adequate childcare on such short notice. Two members are being forced to return to the office without alternative childcare arrangements. One member serves as the primary caregiver for her school-age daughter, since her husband is an essential worker who works outside the home. Her daughter goes to remote school, and will not be able to return to in-person school this year. The only even temporary alternative care option she has found so far is an hour's drive away from her home and does not have adequate internet for her daughter's virtual school. Another member has two school-age children that she will be able to transition to in-person school, but has not found afterschool care for them. She will have no care for them over the summer and will likely have to take leave or FMLA.

40. Other members of the ACLU of SC are put at risk by the Return In Person Order because they are breastfeeding or have chronic health conditions. One member is breastfeeding her son who was born in late January, and does not want to get the vaccine, given the unknown risks to her and her infant. Although she was told she could request an accommodation to continue working remotely, and submitted all the necessary documentation, her request was denied and she is expected to return to the office today. She used her leave as part of her maternity leave, and the only other option she has been given is FMLA. Her husband is a disabled Veteran who cannot work, so she cannot afford to not make an income. She will have to return to the office, unvaccinated, at great risk to her, her husband, and her infant.

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41. Another member has a chronic health condition and a wife who is also medically vulnerable. The member is nonetheless being required to return to the office today, well before he will be fully vaccinated in early May. No accommodations have been offered to him, and FMLA has not even been suggested as an option. Dunn Decl. ¶ 7.

42. And finally, one member of the ACLU of SC supervises state employees that will be affected by the Governor's order. This member is worried that the requirement to return to the office will negatively affect the productivity and mental health of supervisors and employees, and risks good employees choosing to take other positions that allow them to continue to work remotely.

EO-2021-12's Return in Person Order Has a Disparate Impact on Women, Pregnant and Breastfeeding/Lactating People, People of Color, and People with Disabilities, Contravening the South Carolina Human Affairs Law

43. The Return in Person Order contravenes the South Carolina Human Affairs Law, which makes it unlawful for an employer to "discharge from employment, or otherwise discriminate against an individual with respect to the individual's compensation or terms, conditions, or privileges of employment because of the individual's . . . race, . . . color, sex, . . . national origin, or disability." S.C. Code Ann. § 1-13-80. The harms described in the preceding paragraphs will not be felt equally among all non-essential state employees. Rather, the impacts of EO-2021-12 will disproportionately burden women, people who are pregnant, people of color, and people with disabilities.

44. The Return in Person Order will cause harm to caregivers of school-age children and adult dependents who are now required to return to work, regardless of their ability to find safe and adequate coverage for care. Caregiving responsibilities fall disproportionately on women. During the pandemic, "most mothers report that they are doing all, much more, or somewhat more child care than others."[10] The result of that imbalance is not surprising: losing full-time child care and remote schooling were associated with a higher likelihood that mothers leave the workforce. Requiring caregivers to return to the workplace without care options in place has a disparate impact on women, who are the ones struggling to find alternative arrangements, paying for costly care, risking placing their children or adult dependents in unsafe conditions, and potentially losing their jobs if they cannot make alternative care arrangements.

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[10] Lauren Bauer et al., *Ten economic facts on how mothers spend their time*, Brookings Inst. (Mar. 30, 2021), https://www.brookings.edu/research/ten-economic-facts-on-how-mothers-spend-their-time/.

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45. The Return In Person Order will cause harm to people who are pregnant or breastfeeding/lactating. Although the CDC identifies pregnancy as creating a higher risk for severe illness resulting from COVID-19, the CDC has also made clear that the decision whether to receive vaccination is a personal choice for those who are pregnant, given the "limited data on the safety of COVID-19 vaccines in pregnant people."[11] Yet under the Return In Person Order, state agencies may allow pregnant people to continue to work remotely only if they are taking steps to be vaccinated. The same is true for those who are breastfeeding/lactating: "Because the vaccines have not been studied on lactating people, there are no data available on: [t]he safety of COVID-19 vaccines in lactating people[, the] effects of vaccination on the breastfed infant[, or the] effects on milk production or excretion."[12] By not allowing those who are pregnant or breastfeeding/lactating to continue to work remotely based on evidence (such as a letter from a doctor) that they have been advised or have chosen not to get the vaccine, EO 2021-12 fails to address the uncertainty in this area of research, forcing those who are pregnant or breastfeeding/lactating to get vaccinated or risk losing their jobs or their income.

46. Employees with disabilities are also harmed by the Return In Person Order. For individuals with conditions the CDC deems high-risk, state agencies may grant these individuals a temporary accommodation to continue to work remotely, but only until they have the opportunity to be vaccinated. However, there are some individuals with these conditions for whom the vaccine may be contraindicated for medical reasons. These employees, who will continue to face elevated risk from COVID-19, will not be protected by the limited accommodation authorized by EO 2021-12. Individuals who do not have medical conditions that meet the CDC's specific criteria may still be at elevated risk of serious consequences from COVID-19 because they have multiple medical conditions that combine to increase their risk, or because their specific conditions and circumstances place them in this higher risk category. EO 2021-12 does not allow for agencies to provide the reasonable accommodation of allowing these individuals to continue to work remotely, even temporarily, and even if these individuals can present evidence (such as a letter from a doctor) of their elevated risk. EO 2021-12 also directs agencies to make the determination that all jobs require being physically present at the workplace as an essential function, even though what job functions are essential is fact specific, depends on the characteristics of each job, and a number of different types of evidence may

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[11] *Information about COVID-19 Vaccines for People who Are Pregnant or Breastfeeding*, Ctrs. for Disease Control & Prevention (updated Mar. 18, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html.

[12] *Id.*

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be relevant to the determination for each particular job. There is no support in the law for issuing a blanket declaration that all jobs within the state government have any particular essential functions.

47. Finally, the Return In Person Order will have a disparate impact based on race and will exacerbate existing disparities in rates of COVID-19 infection, hospitalization, and death. Black people comprise 26% of the South Carolina population, yet they have accounted for 26% of COVID cases, 36% of COVID hospitalizations and 33% of COVID deaths.[13] At the same time, Black people represent only 15-17% of those vaccinated, compared to 23% who were white. These disparities in access to the vaccine mean that people of color will be of higher risk of returning to work prior to receiving vaccination, thus putting them at even higher risk of contracting the virus than their white counterparts, simply as a function of returning to work in person. And this compounds existing disparities in rates of infection, hospitalization, and death already faced by communities of color, and particular African Americans, who already are disproportionately represented in jobs deemed essential—and thus who were required to return to work in person—over the course of the pandemic.[14]

48. There is simply no emergency need, or business necessity, served by requiring non-essential employees to return to the workplace in person at this time. Non-essential state employees have been working remotely successfully for over a year.

FOR A FIRST CAUSE OF ACTION
(Violation of Separation of Powers and Non-Delegation Clauses)
South Carolina Constitution, Art. I, § 8, and Art. III, § 1

49. Plaintiffs hereby incorporate each and every of the foregoing allegations of fact set out in this Complaint into this cause of action, to the extent such allegations are not inconsistent with those that follow.

50. Article I, § 8 of the South Carolina Constitution provides: "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."

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[13] *See* Kaiser Family Foundation, Nambi Ndugga et al., *Latest Data on COVID-19 Vaccinations Race/Ethnicity*, Mar. 31, 2021, https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-race-ethnicity/; Zak Koeske, *Black Latino SC Residents Vaccinated at Much Lower Rates than Whites, Data Show*, The State, Feb. 17, 2021, https://www.thestate.com/news/politics-government/article249304980.html.

[14] *See* Tiana N. Rogers et al., *Racial Disparities in COVID-19 Mortality Among Essential Workers in the United States*, World Med. Health Policy, Aug. 5, 2020, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7436547/pdf/WMH3-9999-na.pdf.

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51. The legislative power of the State is vested in the Senate and the House of Representatives—together the General Assembly of the State of South Carolina. S.C. Const. art. III, § 1.

52. The General Assembly has empowered the Governor with additional authority, including the authority to "issue emergency proclamations and regulations" which "have the force and effect of law," S.C. Code Ann. § 25-1-440(a)(1), when an emergency has been declared—but that authority is limited to adequately discharging the Governor's responsibility to provide for the "safety, security, and welfare of the State." S.C. Code Ann. § 25-1-440.

53. The Governor's 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.

54. These matters present a real and justiciable issue which is presently ripe for decision. Therefore, Plaintiffs respectfully request a declaratory judgment that the provisions of EO-2021-12 requiring non-essential state employees to return to the workplace in person, as implemented by the Memorandum and administered by and through the Department of Administration, are impermissible under the laws of the State of South Carolina, by virtue of the South Carolina Declaratory Judgment Act. S.C. Code § 15-53-10 *et seq.*

FOR A SECOND CAUSE OF ACTION
(Ultra Vires)
S.C. Code Ann. § 25-1-440

55. Plaintiffs hereby incorporate each and every of the foregoing allegations of fact set out in this Complaint into this cause of action, to the extent such allegations are not inconsistent with those that follow.

56. A government actor "commit[s] an *ultra vires* act by exceeding its statutory authority," as it must "act[] within the legal parameters established by the legislature." *Baird v. Charleston Cty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Where a statute assigns a government entity particular "duties and powers," actions that exceed the bounds of those parameters are *ultra vires* and, accordingly, unlawful. *S.C. Pub. Int. Found. v. S.C. Dep't of Transportation*, 421 S.C. 110, 122-24, 804 S.E.2d 854, 861-62 (2017).

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57. The Governor's authority to act when an emergency has been declared is limited to adequately discharging the Governor's responsibility to provide for the "safety, security, and welfare of the State." S.C. Code Ann. § 25-1-440.

58. The Governor's 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 and improperly imposed unlawful burdens on non-essential state employees in violation of Art. I, § 8 of the South Carolina Constitution.

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PRAYER FOR RELIEF

WHEREFORE, having fully stated its claim against Defendants, Plaintiffs respectfully request the entry of an Order which provides for the following relief:

a. Declaring that the Return in Person Order contained in EO-2021-12, as implemented by the Memorandum and administered by and through the Department of Administration, to the extent it requires non-essential state employees to return to the workplace in person without reasonable accommodations for caregiving, health risk, and disability, is unenforceable because such policies and procedures exceed the scope of authority granted to the Governor and/or the Department of Administration and is *ultra vires*;

b. Enjoin, both temporarily and permanently, the Governor and/or the Department of Administration, as well as McMaster's and Adam's successors in office, agents, employees, attorneys, and those persons acting in concert with them or at their direction, from using and/or implementing any policy or procedure requiring non-essential employees to return to the workplace in person, including but not limited to the Return to Work Order contained in EO-2021-12 as implemented by the Memorandum, that is inconsistent with the responsibility to protect the safety, security, or welfare of the State, for the following reasons:

i. The Governor has instituted policies in derogation of the state emergency authority law that have the natural, probable, and actual consequence of causing irreparable harm to Plaintiffs and those who are similarly situated;

ii. the burden on caretakers to find adequate, safe care, and the attendant risks and disruption to dependents, including, for school-aged children, disruption to their education, and dangers from being left alone or without adequate adult supervision;

iii. the risk of unnecessary exposure to COVID-19, with attendant and potentially deadly risks to health and safety;

iv. the threat of job loss by state employees; and

v. There is no adequate legal remedy available that is capable of making Plaintiffs whole.

c. Order the Governor and/or Adams to permit state agencies to process and grant requests for reasonable accommodations based on disability, without the restrictions on the type and duration of accommodations contained in EO 2021-12 and the Memorandum;

d. Retain jurisdiction over this matter until Defendants have complied with all the Orders and Mandates of the Court;

e. Award attorney's fees and costs under South Carolina Code § 15-77-300 should this Court deem such an award just and proper; and,

f. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

By: /s/ Nancy Bloodgood
Nancy Bloodgood (SC Bar # 6459)
BLOODGOOD & SANDERS, LLC
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
Phone: 843-972-0313
Email: nbloodgood@bloodgoodsanders.com

/s/ Susan K. Dunn
Susan K. Dunn (SC Bar # 1798)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF SOUTH CAROLINA
P.O. Box 20998
Charleston, South Carolina 29413
Phone: 843-282-7953
Fax: 843-720-1428
Email: sdunn@aclusc.org

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Lindsey Kaley*
Galen L. Sherwin*
Brian Dimmick*
Daniel Mach*
Alexandra Bornstein*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Phone: 212-519-7823
Email: lkaley@aclu.org
Email: gsherwin@aclu.org
Email: bdimmick@aclu.org
Email: dmach@aclu.org
Email: legal_ab@aclu.org

**Pro hac vice* forthcoming

Attorneys for Plaintiffs

Charleston, South Carolina
Date: April 6, 2021

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EXHIBIT 2

ELECTRONICALLY FILED - 2021 Apr 12 10:19 AM - RICHLAND - COMMON PLEAS - CASE#2021CP4001599

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FOR THE FIFTH JUDICIAL CIRCUIT

DEBORAH MIHAL, and the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA,

PLAINTIFFS,

vs.

GOVERNOR HENRY D. MCMASTER, in His Official Capacity; and MARCIA S. ADAMS, Executive Director of the South Carolina Department of Administration, in Her Official Capacity,

DEFENDANTS.

Case No.: 2021-CP-40-01599

PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Deborah Mihal and the American Civil Liberties Union Foundation of South Carolina, through their undersigned counsel of record, will move before the Honorable L. Casey Manning, Presiding Judge of the Fifth Judicial Circuit in Columbia, South Carolina, for an Order altering or amending the Court's April 9, 2021, Order denying Plaintiffs' Motion for a Preliminary Injunction.

In accordance with Rule 59(e) of the SCRCP, Plaintiffs respectfully request that the Court reconsider its denial of the Preliminary Injunction on the following grounds:

1. Plaintiffs initiated this action, accompanied by their Motion for a Temporary Restraining Order and/or Preliminary Injunction, on Tuesday, April 6, 2021. Plaintiffs in their Notice of Motion requested a hearing be set. *See* Pls' Notice of Motion for Temporary Restraining Order and Preliminary Injunction.

2. A status conference was held on Thursday, April 8, at 9:30 a.m. All parties were present, although no court reporter was present, nor were the parties invited to present argument.

3. The Court permitted Defendants to submit a response to Plaintiffs' Motion and indicated that a decision would issue by the end of the day. The Court further indicated that a hearing on the Motion for a Preliminary Injunction would be set for the following week, starting on April 15, and advised Plaintiffs that live testimony would be recommended.

4. Both Defendants filed their opposition briefs shortly after the status conference. At the Court's invitation, that same evening, Defendant Adams submitted a proposed order denying the Motion for a Temporary Restraining Order and/or Preliminary Injunction. (Defendant McMaster did not submit a separate proposed order.)

5. Plaintiffs filed their Reply brief at 8:20 a.m. on the morning of Friday, April 9, and made clear their intention to submit additional testimony at the scheduled hearing. *See* Pls' Reply at 2, 10, 15.

6. At approximately 11:59 a.m., the Court denied the Motion for a Temporary Restraining Order and Preliminary Injunction, and cancelled the April 15 hearing.

7. This Court should reverse its Order denying Plaintiffs' Motion for Preliminary Injunction because the Order was issued prior to the Plaintiffs' being afforded an opportunity to present additional evidence on disputed factual issues central to the Court's determination, including the premise that Plaintiffs would be able to obtain effective vaccination in time for their mandated return in person, that adequate

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childcare arrangements were available to Plaintiffs, and that adequate safety precautions and/or accommodations were available at their workplaces.

8. The Order further rested on factual determinations not supported by the Record before the Court, including the finding that the Order furthered the health, safety, and welfare of South Carolinians, and that the Department of Administration's guidance provided state agencies with sufficient flexibility to provide appropriate accommodations to individual employees. *See* Order at 6-8.

9. The Order was further based on errors of law, including the finding that Plaintiffs had adequate remedies at law and that they would not suffer irreparable harm because their economic losses could be compensated via other means. For the reasons stated in Plaintiffs' Reply, the harms Plaintiffs will suffer, and are already suffering, as a result of the Order—including risks to their own health and the health of their children in the face of a deadly pandemic, risks to their children from being left unsupervised during the workday, and risk of prosecution for child neglect—simply cannot be compensated after the fact through an award of money damages.

10. In light of the emergent circumstances and the need for immediate appellate review in order to prevent further irreparable harm, should this Motion not be heard in sufficient time, Plaintiffs further intend to file a notice of appeal, a petition for a writ of supersedeas, and a motion for expedited appeal. Plaintiffs thus request this Court's decision on their Motion for Reconsideration as quickly as practicable and without delay.

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For the foregoing reasons, this Court should reverse its Order denying Plaintiffs' Motion for Preliminary Injunction and reset the previously-scheduled hearing, or in the alternative, issue an order preserving the status quo until an appellate court can review the constitutionality of Executive Order 2021-12 by immediately restraining enforcement of the return to in-person work provision pending appellate review.

By: /s/ Nancy Bloodgood
Nancy Bloodgood (SC Bar # 6459)
BLOODGOOD & SANDERS, LLC
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
Phone: 843-972-0313
Email: nbloodgood@bloodgoodsanders.com

/s/ Susan K. Dunn
Susan K. Dunn (SC Bar # 1798)
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF SOUTH
CAROLINA
P.O. Box 20998
Charleston, South Carolina 29413
Phone: 843-282-7953
Fax: 843-720-1428
Email: sdunn@aclusc.org

Lindsey Kaley*
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Daniel Mach*
Alexandra Bornstein*
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Phone: 212-519-7823
Email: lkaley@aclu.org
Email: gsherwin@aclu.org
Email: bdimmick@aclu.org
Email: dmach@aclu.org
Email: legal_ab@aclu.org

**Pro hac vice* pending

Attorneys for Plaintiffs

Charleston, South Carolina

Date: April 12, 2021

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
DEBORAH MIHAL, and the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTH CAROLINA, PLAINTIFFS,	)	Case No.: 2021-CP-40-01599
vs.	)	**CERTIFICATE OF SERVICE**
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.	)	

I hereby certify that on April 12, 2021 I served a copy of the Motion for Reconsideration of Order Denying Plaintiffs' Motion for Preliminary Injunction to the following:

The Hon. Henry McMaster
Office of the Governor
1100 Gervais Street
Columbia, South Carolina 29201

Marcia S. Adams
South Carolina Department of Administration
1200 Senate Street
Columbia, South Carolina 29201

[ ] VIA CERTIFIED MAIL

[X] VIA EMAIL AND FIRST CLASS MAIL

by placing a copy of said documents in the United States mail with sufficient postage thereon.

/s/ Nancy Bloodgood
Nancy Bloodgood

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RECEIVED
Apr 21 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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.

PROOF OF SERVICE

By my signature below, I certify that on April 21, 2021 I served a copy of Appellants' Reply to Respondent Governor Henry D. McMaster's Return in Opposition to Appellants' Petition for a Writ of Supersedeas via e-mail on the following counsel of record:

For the Respondent McMaster:

V. Carlisle Traywick
1310 Gadsden St.
Columbia, SC 29201
ltraywick@robinsongray.com

Thomas A. Limehouse, Jr.
Anita (Mardi) Fair
1100 Gervais St.
Columbia, SC 29201
tlimehouse@governor.sc.gov
mfair@governor.sc.gov

For Respondent Adams:

Eugene H. Matthews
1900 Barnwell St.
Columbia, SC 29201

gmatthews@richardsonplowden.com

David Avant
P.O. Box 2825
Columbia, SC 29211
david.avant@admin.sc.gov

Respectfully Submitted,

By: /s/ Nancy Bloodgood
Nancy Bloodgood (SC Bar # 6459)
BLOODGOOD & SANDERS, LLC
242 Mathis Ferry Road, Suite 201
Mt. Pleasant, SC 29464
Phone: 843-972-0313
nbloodgood@bloodgoodsanders.com

Attorney for Appellants

Charleston, South Carolina
April 21, 2021