

STATEMENT OF HARM

1. The American Civil Liberties Union Foundation (“ACLU”) and the ACLU of South Carolina Foundation (ACLU of SC) (collectively, “Charging Parties”) file this third-party charge of discrimination against the State of South Carolina (the “State”) and the South Carolina Department of Administration (the “Department”), challenging implementation of South Carolina Governor Henry McMaster’s March 5, 2021 executive order mandating that non-essential state employees return to their offices in person (“the Return in Person Order” or “the Order”), on grounds that it discriminates against employees with caregiving responsibilities (disproportionately women and people of color), people who are pregnant or breastfeeding, people of color, and people with disabilities.

2. That Order, accompanied by state-sanctioned guidance provided by the Department of Administration, requires tens of thousands of employees of the state’s 138 agencies and numerous institutions to return to in-person work, as described in this Charge.

3. Categorically mandating the immediate return in person of all non-essential state employees with no valid business justification—and in the absence of critical caregiving infrastructure or adequate accommodations for disability, pregnancy, and lactation—violates Title VII of the 1964 Civil Rights Act (“Title VII”) and the Americans with Disabilities Act (“ADA”).

4. On information and belief, as implemented, the Return in Person Order has already caused disparate effects, and will potentially trigger a new wave of mass, pandemic-fueled job loss for working women, workers with disabilities, and Black and Brown workers.

5. The Order exacts such harms without any legally sufficient business necessity. Indeed, as has repeatedly been demonstrated over the past unprecedented year, most of the

State's work may be conducted remotely without any diminution in the service, competence, or efficacy afforded to South Carolinians.

6. The ACLU 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, which is the South Carolina affiliate of the ACLU, has over 8,000 members throughout the state, including many members who are employed by state agencies.

7. We file this charge because of the burdens that individual employees face in challenging the Return in Person Order. Charging Parties have spoken with numerous state employees facing immediate decisions affecting their careers, income, families' well-being, and their health who are reluctant to file individual charges because of concerns about retaliation, while others have already been forced to leave their jobs and are focused on regaining their economic footing. Moreover, because the Order applies with equal force to the dozens of state agencies and institutions, this charge presents an ideal vehicle for the EEOC to undertake a systemic investigation on a statewide basis. While individual agencies typically have some discretion in making accommodation decisions, the Governor's Order and the Department's implementing guidance have had the effect of constraining this discretion—essentially compelling state agencies to violate federal antidiscrimination laws.

I. Factual Background

8. On March 19, 2020, during the early days of the COVID-19 pandemic, Governor McMaster issued an executive order, EO 2020-11, directing all “non-essential” state employees

not to report to work in person.¹ The order “direct[ed] that 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 at 3-4 (Mar. 19, 2020).

9. According to Governor McMaster, 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.*

10. Pursuant to the executive order, tens of thousands of non-essential employees working for the state’s agencies and institutions—ranging from the Department on Aging to the Department of Motor Vehicles to the Workers’ Compensation Commission—continued to work remotely for the next year, successfully performing their jobs in the midst of challenges caused by the pandemic, including perpetual health risks and unrelenting family caregiving obligations.

11. On March 5, 2021, however, Governor McMaster issued a new executive order, EO 2021-12 (the “Return in Person Order”) (attached as Exhibit A), which directed state agencies to “immediately expedite” the return of non-essential state employees to their offices for in-person work. EO 2021-12 at 12.

¹ See Off. of the Governor Henry McMaster, Executive Order 2020-11 at 3-4 (Mar. 19, 2020), <https://governor.sc.gov/executive-branch/executive-orders>. The Order defined “essential” employees as “those designated by, and in the sole discretion of, the corresponding Agency Head, or their designee, as essential or mission-critical to the State’s ongoing preparation for and response to emergency conditions related to COVID-19 or otherwise necessary to serving the State of South Carolina by ensuring the continuity of critical operations of state government.” *Id.* at 4. The term “non-essential” is not defined in the order but is by implication everyone not designated as “essential” pursuant to the Order.

12. The 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 immediately return to the office—in person, full-time. Specifically, it 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.” *Id.* The Return in Person Order also directed the Department to continue to provide supplemental guidance, as needed, to the agencies, regarding implementation of the Return in Person Order. *Id.*

13. The same day that Governor McMaster issued the Return in Person Order, the Department issued a memorandum to the directors of all state agencies and institutions of higher education entitled “State Government Staffing—Return to Normal Operations” (the “Memorandum”) (attached as Exhibit B). The Memorandum required state agencies and institutions to submit to the Department for approval their plans for compliance with the Return in Person Order within five days and offered guidance in the form of “Frequently Asked Questions.”

14. The Memorandum sets as its default the expectation that agencies and institutions would return most employees to the workplace in just 10 days—i.e., by March 15, 2021—thereby permitting only “a limited amount of time” for agencies and institutions to seek exemptions from EO 2021-12 and to modify their workplaces and operations to mitigate the risk of exposure to COVID-19. Memorandum at 2 (Mar. 5, 2021). As an exemplar of an approvable agency plan, the Memorandum cited a plan that envisioned having 60% of its workforce physically in the office on March 15, 75% on March 22, and the remainder in early April—even including employees “who work in close environments such as cubicles or shared offices.” *Id.* If

an agency did not submit a plan or have a final approved plan by March 12, the agency was expected to have *all* of its staff return to in-person work on March 15. *Id.* at 1.

15. Significantly, as to workers with caretaking responsibilities, the Memorandum expressly provides that, even if a caregiver's child care center or school is not available for in-person attendance, those employees nevertheless must report to the workplace in person. *Id.* at 3. Although the Order and Memorandum are silent as to the consequences of failing to report to work in person, upon information and belief, employees who do not do so are at high risk of termination. Although the Memorandum permits agencies to request additional time for caregiving employees to return to the office, the Memorandum is clear that this safe harbor is just a "short time," and that only a plan that would require such employees to return full time to the workplace by April 5 is likely to be approved. *Id.*

16. As a result, on information and belief, state workers with caregiving obligations have been required to scramble to make alternative, usually inferior caregiving arrangements, risk returning to work without such arrangements in place (thereby endangering their children and potentially opening themselves to prosecution or other scrutiny for neglect), or leave work altogether.

17. For employees with disabilities that the Centers for Disease Control and Prevention (CDC) has identified as being 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." *Id.* at 2. The Memorandum does not take into account that the vaccine may be contraindicated for some employees because of their disabilities or medical conditions, or that others may be at higher risk from COVID-19 because of disabilities that are not specifically identified by the CDC.

18. The Memorandum also states that “it should be considered an essential job function for employees to be in the workplace”—even though, on information and belief, non-essential state employees have, in fact, been fulfilling their job functions remotely since March 2020. *Id.* The Memorandum does not permit agencies to grant accommodations that would allow employees with disabilities to work remotely, instead instructing state agencies to “identify accommodations that would enable the employee to report to the workplace.” *Id.*

19. The Memorandum also 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.” *Id.* On information and belief, some state agencies have interpreted this ambiguous directive to mean that even where they have policies in place to allow employees to request to work remotely, no new telework requests could be approved—regardless of the reasons for the request, or whether the individual request would merit approval under pre-pandemic policy.

20. On information and belief, under EO 2021-12, state employees with disabilities at increased risk of severe complications from COVID-19, such as people with chronic lung diseases or compromised immune systems, have had to decide whether workplace conditions would permit them to return safely (often without having had access to full—or any—protection from a vaccine, due to contraindications). According to reports from ACLU of SC members and other affected state employees, workers who have requested accommodations to permit them to continue working remotely have almost universally had their requests denied or simply ignored.

21. At the time the Return in Person Order and the Memorandum were issued, on information and belief, adults under the age of 55 were not eligible to receive the COVID-19

vaccination unless they had a qualifying medical condition or met other criteria, such as being a health care worker or residing in a group home.²

22. Neither the Memorandum nor the Order provides any legitimate business-related need to return non-essential employees to the office in person, nor has the Governor offered any such justification in his public statements regarding the Order.

23. Indeed, in light of the continued operation of state government during the past year of the COVID-19 pandemic while these individuals have performed their job duties remotely, the State cannot show any valid business reason for mandating these workers physically return to the office now. These workers were deemed non-essential by the State since the state of emergency was declared in March 2020, and have been conducting their work both diligently and efficiently from home. Nor has anything materially changed between the issuance of the initial order mandating that these employees work from home and the issuance of the Return in Person Order that suddenly rendered their physical presence in the office an “essential job function.”

24. The ACLU of SC, on behalf of its members, along with a named plaintiff, filed suit against the Governor and the head of the Department on April 6, 2021, seeking to rescind the Return in Person Order.³ This lawsuit raised claims under state law, arguing that issuance of the Return in Person Order exceeded the Governor’s power and was *ultra vires*. The plaintiffs’ request for a preliminary injunction and/or a temporary restraining order based on the state law claims was initially denied, and the lawsuit is ongoing.

² See Off. of the Governor Henry McMaster, *South Carolina to Move to Phase 1b of COVID-19 Vaccination Plan on March 8, 2021* (Mar. 2, 2021), <https://governor.sc.gov/news/2021-03/south-carolina-move-phase-1b-covid-19-vaccination-plan-march-8-2021>.

³ See *Mihal v. McMaster*, Civil Action No. 2021-CP-40-01599 (S.C. Ct. Com. Pl., Fifth Judicial District).

25. In pleadings opposing the state court lawsuit, Governor McMaster has still failed to provide any reasoned explanation for the need to issue EO 2021-12, let alone for the tight timeframes provided by its terms or under the interpretive Memorandum issued by the Department.

26. Meanwhile, on information and belief, South Carolina state agencies and institutions have denied and continue to deny their employees reasonable accommodations to work remotely based on the Return in Person Order—due to caregiving obligations, disability, or other personal vulnerabilities such as pregnancy or other risk factors—despite severe limits on access to child care and the ongoing risk of COVID-19 infection.

II. Violations of Title VII of the Civil Rights Act – Discrimination Against Women, Pregnant Workers, and Black Workers

27. Title VII, which bars employment discrimination on the basis of race and sex, among other protected characteristics, not only prohibits intentional discrimination, but also discrimination arising from a neutral policy that has a disparate impact on a protected class without a valid business necessity. The Return in Person Order, and the Memorandum implementing it, have a disparate impact based on a number of protected characteristics, including sex, pregnancy and lactation, and race.

A. Disparate Impact Based on Sex—Caregiving

28. Under the Return in Person Order, caregivers of school-age children and adult dependents are now required to return to in-person work, regardless of their ability to find safe

and adequate coverage for care in light of remote schooling and the sharp reduction in available care options.

29. Caregiving responsibilities disproportionately are fulfilled by women.⁴

30. The disruptions caused by the COVID-19 pandemic have increased the caregiving burdens for all individuals, but the brunt of these burdens have fallen on women. During the pandemic, “most mothers report that they are doing all, much more, or somewhat more child care than others.”⁵ Those burdens continue and will likely not be eliminated while the pandemic continues.

31. As of the time the Return in Person Order was to take full effect, about 20% of public schools in South Carolina were 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.⁶ On information and belief, even where full in-person schooling was an option, those who had previously opted for remote schooling—including Deborah Mihal, the lead plaintiff in the South Carolina state lawsuit—were not being permitted to switch to hybrid in-person school at the time the Order was issued.

⁴ Sarah Jane Glynn, *An Unequal Division of Labor: How Equitable Workplace Policies Would Benefit Working Mothers*, Ctr. for Am. Progress (May 18, 2018), <https://www.americanprogress.org/issues/women/reports/2018/05/18/450972/unequal-division-labor/>.

⁵ 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/>.

⁶ This number was reported on the South Carolina Department of Education website as of April 1, 2021. See South Carolina Dep’t of Educ., *Current Operational Status*, <https://web.archive.org/web/20210401141924/https://ed.sc.gov/districts-schools/schools/district-and-school-closures/operational-status/> (archived version as of Apr. 1, 2021) (last visited May 7, 2021). The website currently lists all 1,261 schools as “full face to face” operations, but does not indicate whether families who elected for remote instruction were permitted to switch back, or on what timeframe. See South Carolina Dep’t of Educ., *Current Operational Status*, <https://ed.sc.gov/districts-schools/schools/district-and-school-closures/operational-status/> (last visited May 7, 2021).

32. Black, Hispanic, and Asian American students were more likely to live in a “remote-only” school district,⁷ and were more likely to opt for remote school.⁸

33. In addition, child care availability in South Carolina, already scarce before the pandemic,⁹ 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, with many operating at sharply reduced capacity as a result of CDC social distancing guidelines.¹⁰ Studies suggest that many of these closures may be permanent.¹¹

34. Inadequate child care options can lead to a variety of harms, the risk of prosecution for child neglect should the caregiver have to leave her child unsupervised to continue working, and job loss where the caregiving worker is unwilling to assume such profound risk.¹² In South Carolina, child neglect is a felony that carries a sentence of up to 10

⁷ See Ember Smith & Richard V. Reeves, *Students of color most likely to be learning online: Districts must work even harder on race equity*, Brookings Inst. (Sept. 23, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/09/23/students-of-color-most-likely-to-be-learning-online-districts-must-work-even-harder-on-race-equity/>; Kalyn Belsha et al., *Schools that are mostly Black, Latino favor starting online*, Wash. Post (Sept. 11, 2020), https://www.washingtonpost.com/health/schools-that-are-mostly-black-latino-favor-starting-online/2020/09/11/1b615188-f3ec-11ea-8025-5d3489768ac8_story.html.

⁸ See *More non-white than white parents prefer remote learning for their children*, Economist (Mar. 14, 2021), <https://www.economist.com/united-states/2021/03/14/more-non-white-than-white-parents-prefer-remote-learning-for-their-children>.

⁹ See Inst. for Child Success, *The Initial Economic Impact of COVID-19 On South Carolina’s Child Care Sector* (May 2020), <https://www.instituteforchildsuccess.org/themencode-pdf-viewer/?file=https://www.instituteforchildsuccess.org/wp-content/uploads/2020/05/ICS-2020-COVID-19-Survey-Report.pdf>.

¹⁰ Ariel Gilreath, *Nearly half of South Carolina’s families live in a child care desert. The pandemic may make it worse.*, Greenville News (June 26, 2020), <https://www.greenvilleonline.com/story/news/education/2020/06/26/coronavirus-contribute-child-care-desert-closed-sc-pandemic/5340991002/>.

¹¹ See Steven Jessen-Howard & Simon Workman, *Coronavirus Pandemic Could Lead to Permanent Loss of Nearly 4.5 Million Child Care Slots*, Ctr. for Am. Progress (Apr. 24, 2020), <https://www.americanprogress.org/issues/early-childhood/news/2020/04/24/483817/coronavirus-pandemic-lead-permanent-loss-nearly-4-5-million-child-care-slots/>.

¹² See, e.g., Nadine Grimley, *Mom arrested for leaving kids at motel to go to work; community raises more than \$100,000 in donations for her to buy home*, Fox8 News (Feb. 19, 2021), <https://myfox8.com/news/mom-arrested-for-leaving-kids-at-motel-to-go-to-work-community-raises-more-than-100000-in-donations-for-her-to-buy-home/>.

years in prison if convicted. *See* S.C. Code Ann. § 63-5-70. Children, too, may be developmentally harmed.

35. Not surprisingly, in light of women’s disproportionate responsibility for child care, losing full-time child care and remote schooling has had a disproportionate impact on women’s labor force participation. Studies have long shown that women are more likely to adjust their schedules and reduce hours when the needs of children and other family members collide with work.¹³ Indeed, mothers with young children have reduced their work hours four to five times more than fathers, growing the gender gap in work hours by 20-50%.¹⁴ And labor statistics show that women have left the labor force during the pandemic at a far greater rate than men,¹⁵ with Black and Latina women showing the highest rates of job losses.

36. On information and belief, individual employees—again, disproportionately women—will be forced to shoulder the formidable pragmatic and financial burden of finding alternative care arrangements largely on their own—a burden that will place children at risk of suffering further educational deficits, or, at worse, harm.

37. On information and belief, workers from a variety of agencies and institutions have had to take unpaid time off or quit altogether due to inadequate child care availability during the pandemic, a situation that will persist until such time as all students across the state

¹³ *See* Kim Parker, *Women More Than Men Adjust Their Careers for Family Life*, Pew Res. Ctr. (Oct. 1, 2015), <https://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/>.

¹⁴ *See generally* Nat’l Women’s L. Ctr., *Resource: Covid-19 Jobs Day Reports*, <https://nwlc.org/resources/2020-jobs-day-reports/>; *COVID-19 and gender equality: Countering the regressive effects*, McKinsey & Co. (July 15, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects#>; Caitlyn Collins et al., *COVID-19 and the gender gap in work hours*, 28 *Feminist Frontiers* 101 (2020), <https://onlinelibrary.wiley.com/doi/full/10.1111/gwao.12506>; *Policy Prescriptions to Foreground Black and Latinx Women When Addressing the Caregiving Crisis*, Times Up, <https://timesupfoundation.org/wp-content/uploads/2021/04/First-TUMU-Quarterly-Brief-Caregiving-031721.pdf> (last visited May 7, 2021).

¹⁵ *See* Robert Paul Hartley et al., Nat’l Women’s L. Ctr., *A Lifetime’s Worth of Benefits, The Effects of Affordable, High-quality Child Care on Family Income, the Gender Earnings Gap, and Women’s Retirement Security* 5 (Mar. 2021), <https://nwlc.org/wp-content/uploads/2021/04/A-Lifetimes-Worth-of-Benefits- FD.pdf>.

are able to switch to in-person learning and child care centers return to pre-pandemic staffing and capacity.

38. For example, one former employee of the [REDACTED], [REDACTED], was forced to resign rather than return to in-person work in part in order to ensure that her son's virtual learning needs were met due to his ADHD and learning disability; she shares joint physical custody of her son with her ex-husband, but her ex-husband has full legal custody and did not agree to switch him from remote to in-person learning.

39. Another individual who worked as a web developer for the [REDACTED] [REDACTED] and who is a caregiver for a nine-year-old who has a high-risk medical condition was forced to resign at the end of March 2021 rather than return to in-person work. This employee was not permitted to continue working remotely, despite having worked fully or partially remotely for the two years prior to the pandemic.

40. The Governor's public statements and his actions demonstrate not only callousness toward the plight of parents during the pandemic, but also overt animus toward caregivers, as well as blatant gender stereotypes that women with children prioritize child care over work. For example, with respect to Ms. Mihal, the Governor implied in his briefing opposing the issuance of a preliminary injunction in the state litigation that she had not in fact been working during the pandemic, stating, "given the candid admissions in her own affidavit about how much time she spends caring for her child while working from home, which necessarily means she is not doing the business of the State for which she is paid a salary, the

people of South Carolina should continue footing the bill for this chosen arrangement.”¹⁶ As this Agency has recognized, such statements may constitute evidence of *intentional* discrimination.¹⁷

B. Disparate Impact Based on Pregnancy/Lactation

41. On information and belief, state agencies and institutions following the guidelines of the Return in Person Order will also cause harm to people who are pregnant. The CDC identifies pregnancy as creating a higher risk for severe illness resulting from COVID-19, and also has made clear that the decision whether to receive a vaccination is a personal choice for those who are pregnant, given the “limited data on the safety of COVID-19 vaccines in pregnant people.”¹⁸

42. South Carolina also enacted the Pregnancy Accommodations Act in 2018, which requires employers covered under the state Human Affairs Law to provide reasonable accommodations to employees for medical needs arising from pregnancy, childbirth, or related medical conditions, including lactation. S.C. Code Ann. §§ 1-13-30(T), 1-13-80(A).

43. 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.

44. The same is true for those who are breastfeeding/lactating. According to the CDC, “Because the vaccines have not been studied on lactating people, there are no data available on

¹⁶ See Brief of Gov. McMaster in Opp. to Pls.’ Mot. for TRO at 16, *Mihal v. McMaster*, Civil Action No. 2021-CP-04-01599, at 15-16 (S.C. Ct. Com. Pl., Fifth Judicial District).

¹⁷ See Equal Employment Opportunity Comm’n, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities#assumption>.

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

the: [s]afety of COVID-19 vaccines in lactating people[,] [e]ffects of vaccination on the breastfed baby[, or] effects on milk production or excretion.”¹⁹

45. 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, the Order fails to address the uncertainty in this area of research, forcing those who are pregnant or breastfeeding/lactating to get vaccinated regardless of the unknown risks, or to risk losing their jobs.

46. For instance, one employee of the [REDACTED] was forced to return to work even though she is breastfeeding, and has not sought the vaccine based on the recommendation of her doctor because of the uncertain effect of the vaccine on those who are breastfeeding.

C. Disparate Impact Based on Race

47. In addition to the caregiving barriers highlighted above, which will themselves have disparate effects on women of color, on information and belief the Return in Person Order as applied by state agencies and institutions will likely have a disparate impact based on race because it will exacerbate existing disparities in the most severe outcomes of COVID-19 infection: hospitalizations and deaths.

48. Black people constitute 27% of the South Carolina population, yet they have accounted for 38% of COVID hospitalizations and 32% of COVID deaths.²⁰ Black people also

¹⁹ *Id.*

²⁰ See COVID Tracking Project, Racial Data Dashboard (Mar. 7, 2021), <https://covidtracking.com/race/dashboard/>.

make up 44% of the full-time staff at regulatory agencies.²¹ At the same time, only 29.3 percent of South Carolina’s population was fully vaccinated by May 7, 2021.²² Black people represent only 19% of those vaccinated, compared to 64% who were white.²³

49. On information and belief, the concentration of Black workers in regulatory state agencies and the disparities in vaccination mean that people of color will be at 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 disparities in rates of infection, hospitalization, and death already faced by communities of color, and in particular African Americans, who were disproportionately represented in jobs deemed essential—and thus who were already required to return to work in person—over the course of the pandemic.²⁴

III. Violations of the Americans with Disabilities Act

50. The Americans with Disabilities Act (ADA) prohibits employment discrimination against people with disabilities by state agencies.²⁵ Most, if not all, state agencies also receive Federal financial assistance and are thus subject to the parallel requirements of section 504 of the Rehabilitation Act of 1973.²⁶ The ADA requires the provision of reasonable accommodations for

²¹ See *Workforce - County, Gender, and Ethnic Origin*, S.C. Dep’t of Admin. (Apr. 30, 2021), <https://admin.sc.gov/transparency/InsideSC/HRDashboards/Workforce>. Although this source does not define “regulatory” state agencies, it notes that the data excludes state institutions of higher education, as well as certain agencies that are exempt from oversight by the Division of State Human Resources.

²² See COVID Data Tracker: COVID-19 State Profile Report - South Carolina, Ctrs. for Disease Control & Prevention (May 11, 2021), <https://covid.cdc.gov/covid-data-tracker/#state-report-profile>.

²³ See Nambi Ndugga et al., *Latest Data on COVID-19 Vaccinations Race/Ethnicity*, Kaiser Fam. Found. (Mar. 31, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-race-ethnicity/>.

²⁴ See Tiana N. Rogers et al., *Racial Disparities in COVID-19 Mortality Among Essential Workers in the United States*, World Med. & Health Pol’y (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7436547/pdf/WMH3-9999-na.pdf>.

²⁵ 42 U.S.C. § 12111; S.C. Code Ann. § 1-13-80.

²⁶ 29 U.S.C. § 794(a).

persons with disabilities and prohibits using criteria or methods of administration that have the effect of discriminating against people with disabilities.²⁷

51. On information and belief, state agencies and institutions adhering to the Return in Person Order are discriminating against people with disabilities in several ways.

52. State agencies and institutions are permitted by the Return in Person Order and Memorandum only very narrow and inadequate exemptions to address the health risks of COVID-19 for people with disabilities. For employees with disabilities that the CDC has identified as being placed 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.” Memorandum at 2.

53. The Memorandum does acknowledge (as it must) that state agencies are still expected to follow the ADA (as well as the Family and Medical Leave Act), and instructs agencies to handle requests for accommodations on a case-by-case basis. However, it attempts to circumscribe that very case-by-case process by placing limitations on the ability of state agencies to provide reasonable accommodations, in a manner that will harm employees with disabilities. There are some individuals with conditions considered high risk by the CDC but for whom the vaccine may be contraindicated for medical reasons. These employees will continue to face elevated risk from COVID-19 and will not be protected by the limited accommodation authorized by the Memorandum.

54. For example, one former employee of the [REDACTED] [REDACTED] was forced to resign on March 31, 2021 in part because she has

²⁷ See 42 U.S.C. § 12112(b)(3)(A), (b)(5).

respiratory health concerns but has been unable to receive a vaccine because of significant drug allergies. Despite these concerns, this employee was not permitted to continue to work remotely.

55. Also, 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. The Return in Person Order does not permit state 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.

56. State agencies and institutions are also directed by the Memorandum to make the determination that *all* jobs require being physically present at the workplace as an "essential job function" at least with respect to employees who do not have a condition that the CDC lists as putting them at high risk from COVID-19, which conflicts with the letter and spirit of the ADA. Memorandum at 2.

57. The determination of what job functions are essential is fact-specific and depends on the characteristics of each job, and a number of different types of evidence may be relevant to the determination for each particular job.²⁸ There is no support in the law for issuing a blanket declaration that all jobs within the state government have any particular essential functions.

IV. Conclusion

58. In light of the discriminatory impact on women, pregnant people, people of color, and people with disabilities of the Return in Person Order, the ACLU and the ACLU of SC ask

²⁸ See 29 C.F.R. § 1630.2(n).

that the EEOC find reasonable cause to determine that the Order violates Title VII and the ADA. The ACLU and ACLU of SC further request that the EEOC take immediate steps (a) to halt the operation of the Order at least until the state's care infrastructure including schools (and, in summertime, camp and related programs), and child care facilities—have returned to pre-pandemic capacity, (b) to ensure that employees with disabilities receive reasonable accommodations including remote work, and (c) to make whole those workers who have suffered harmful effects.