RECEIVED
Aug 19 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Clifton B. Newman, Circuit Court Judge

Lower Court Case No. 2013-CP-06-00059
Appellate Case No. 2019-000599

Lorena Robinson, Elaine Nix, Archie Patterson,
and Tami Bollerman, ... Plaintiffs,

Of Whom Archie Patterson and Tami Bollerman are the Respondents,

v.

South Carolina Department of Employment and
Workforce ..... Appellant.

FINAL BRIEF OF APPELLANT SOUTH CAROLINA DEPARTMENT OF EMPLOYMENT AND WORKFORCE

Vordman Carlisle Traywick, III (SC Bar 102123)
Robert E. Stepp (SC Bar 5335)
Robert E. Tyson, Jr. (SC Bar 10820)
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
ltraywick@robinsongray.com
rstepp@robinsongray.com
rtyson@robinsongray.com

William H. Davidson, II (SC Bar 1558)
Kenneth P. Woodington (SC Bar 6213)
DAVIDSON WREN & DEMASTERS, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222
wdavidson@dml-law.com
kwoodington@dml-law.com

Counsel for Appellant South Carolina Department of Employment and Workforce

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, and Rules

Secondary Sources

STATEMENT OF THE ISSUES ON APPEAL

I. Did the circuit court err in holding DEW was required to promulgate regulations when provisos in the annual appropriations act specified the agency's responsibilities?

II. Should the circuit court have dismissed the complaint because Respondents failed to exhaust the exclusive administrative remedies provided by statute?

III. Did the circuit court err in certifying a class when Respondents failed to meet the prerequisites or establish standing and, in the alternative, by revoking its order requiring a claims-made process?

STATEMENT OF THE CASE

This appeal arises out of Respondents Archie Patterson and Tami Bollerman's challenge to the online work search requirement that the General Assembly directed the South Carolina Department of Employment and Workforce (DEW) to implement pursuant to a budget proviso in the general appropriations act from 2012 to 2016.

Unemployment Insurance Benefits in South Carolina

By way of background, in South Carolina, unemployment compensation benefits are paid to "persons unemployed through no fault of their own." S.C. Code Ann. § 41-27-20. The right to receive unemployment benefits, however, is conditioned on DEW finding a claimant is "able to work and is available for work" in his usual employment—or other similar employment for which the claimant is qualified—and he is "actively seeking work." S.C. Code Ann. § 41-35-110(3).

The claimant bears the burden of showing that he or she is available for work, able to work, and actively seeking work. See, e.g., Hyman v. S.C. Emp. Sec. Comm'n, 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959). And each week of unemployment constitutes a new claim period for which the claimant must meet his burden of showing compliance with the statutory requirements. (R. pp. 478–79). This need for a new showing every week renders the procedure for obtaining unemployment benefits substantially different from other entitlements, such as Social Security or permanent disability claims, where an initial showing permits the person to continue to receive the benefit indefinitely absent a change in circumstances.

Before 2012, DEW verified a claimant's work searches by requiring the claimant to maintain a paper form (UCB-303) documenting four contacts with potential employers each week. (R. p. 479). The form required claimants to list details about each job search contact, including the date of the contact, the employer contacted, the type of work sought, the person contacted, and

the results of the contact. (Id.). If a claimant was eligible for benefits but still unemployed at the beginning of a new weekly claim period, he would renew the claim for a benefit on a weekly basis typically by phone or online. (Id.). When seeking to renew, the claimant was required to provide DEW a series of statements to the effect that, during the week in question, the claimant had not worked or received earnings and was able, available, and looking for work. (Id.).

At the time, it was impracticable for DEW to conduct a detailed review of each and every claimant's weekly efforts to comply with the statutory requirement to actively seek work. Nevertheless, DEW periodically verified claimants' weekly information. (Id.). When that occurred, randomly selected claimants were required to submit proof of work searches on the completed Form UCB-303. (Id.). DEW would then verify the information provided by the claimant on the form.[1] (R. p. 479). If DEW's review of the job search contact information revealed that a claimant submitted a verifiably false claim of a job search contact, DEW required repayment of the claim amount for the period in question. (Id.).

Because of the issues and inefficiencies described above, the General Assembly sought to improve the job search verification process. In 2012, the General Assembly—referencing subsection 41-35-110(3)—enacted the following proviso:

> 67.7 (DEW: SUTA Contingency Assessment Funds) Thirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers shall be spent on enforcement of Section 41-35-110(3) and Section 41-35-120(5) of the 1976 Code, via Eligibility Reviews, Random Verification of Job Contacts and Wage Cross Matches during those weeks covered by the South Carolina State Unemployment Tax Authority (SUTA),

[1] In practice, it was difficult for DEW to verify whether a claimant listed contacts the claimant never actually made. (R. p. 480). Potential employers were not and are not required to keep records of contacts by jobseekers. (Id.). And potential employers often could not remember whether a particular individual had contacted them about potential employment. (Id.). As a result, a claimant would not necessarily have to repay benefits from a past week merely because a listed employer job contact could not confirm that the claimant made contact with that employer during the period in question.

> and to ensure seated meetings with Unemployment Insurance claimants and requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified. The agency must also inform claimants in advance that Eligibility Reviews and Random Verification of Job Contacts will be used by the Department to verify compliance with laws administered by the agency.

Act No. 288, 2012 S.C. Acts 448, § 67.7 (emphases added). Identical provisos were passed the next three budget cycles as well. See Act No. 101, 2013 S.C. Acts 475–76, § 83.6; Act No. 286, 2014 S.C. Acts 503, § 83.6; Act No. 91, 2015 S.C. Acts 484–85, § 83.5.

Following the General Assembly's directions, and after an abundance of notice to claimants and potential claimants, DEW began implementing the proviso in August 2012, requiring claimants for unemployment compensation benefits to conduct at least one job search each week using DEW's online work search website. (R. pp. 480–81). As before, claimants still had to document the other three job searches on the written form UCB-303. (R. p. 479). And the periodic interview process remained unchanged. (Id.).

The new job search verification process, however, led to a number of disqualifications due to claimants' failure to perform the online work search for a given benefit week. (R. p. 481). That said, DEW often restored the previously denied benefits after only a minimal showing from the claimant. Some claimants, for instance, had their weekly benefits restored after advising DEW they were unaware of the online work search requirement—even though it was highly publicized—through the appeals process. See (R. pp. 481–82). Others had their benefits restored because of technical errors on their part or on DEW's part. (R. p. 482). Even if a claimant's benefit was not restored in the first stage of DEW's review process, it was often restored at the next level.[2] (Id.).

[2] This statutorily required appeals process is not complicated and routinely used by laypersons. Indeed, DEW provides every claimant detailed instructions on how to navigate the appeals process. (R. p. 482).

All told, the proviso mandating DEW's enforcement of the online job search requirement was in effect from July 1, 2012 to June 30, 2016.

But the General Assembly changed course in 2016. When it proposed different language in Proviso 83.5 that year, Governor Nikki Haley vetoed the proviso with this message:

> Since 2013, a proviso has required that at least one of the four required weekly job search contacts be conducted through the SC Works Online System (SCWOS), so that it can be electronically verified by the Department of Employment and Workforce. This anti-fraud provision helped provide an objective verification method of an unemployment beneficiary's job searches.
>
> Unfortunately this year, the proviso was amended to remove the requirement that at least one job search be conducted online, now allowing individuals to perform job searches in any manner they choose. Because verification of these searches is extremely difficult, the effect of this amendment will be to make the job search process less accountable and more open to fraud.

Gov. Veto Messages, 2016–2017 Gen. Appropriations Act at 8–9 (June 8, 2016), https://www.scstatehouse.gov/sess121_2015-2016/appropriations2016/gmbvto16.pdf. And the House sustained the Governor's veto. See H.5001, 121st Gen. Assemb., 2d Reg. Sess., H.J. 67 (2016).

Beginning July 1, 2016, the proviso was no longer in effect. DEW then began the rulemaking process to establish requirements for online work searches. As a result, on May 26, 2017, the following regulation took effect:

> 47-104. Work Search.
>
> A. Section 41-35-110(3) provides that a claimant is eligible to receive benefits with respect to a week only if the Department finds the claimant engaged in an active search for work. Absent good cause, an active search for work during a week must include at least two (2) job searches conducted through the South Carolina Works Online System (SCWOS), so that the search can be electronically verified.
>
> B. The Department may waive the requirement to perform at least two (2) weekly job searches through SCWOS for good cause. Good

> cause includes, but is not limited to, verifiable electronic access and/or language barriers, and is determined by the Department on a case by case basis.

S.C. Code Ann. Regs. § 47-104.

Procedural History

In the meantime, after Proviso 67.7 had been in effect for about six months, Respondents Archie Patterson and Tami Bollerman, among others, filed a putative class action in the Court of Common Pleas for Bamberg County challenging the online work search requirement. (R. p. 164). The original plaintiffs[3] alleged DEW wrongfully denied them one or more weeks of unemployment benefits stemming from its implementation of the new method for verifying job searches online. (R. p. 168). At an early stage in the case, the Honorable Doyet A. Early, III designated the case as complex and referred it to himself for management and disposition. (R. p. 114).

After learning of the proviso under which DEW implemented the online job search requirement, see (Supp. R. p. 12), Respondents nevertheless continued to argue the requirement was invalid because DEW did not promulgate a regulation. Because the proviso foiled Respondents' claims, DEW moved for summary judgment. (R. pp. 573–90). Following submissions of briefs and arguments from the parties during a hearing, the circuit court summarily denied the motion. (R. pp. 573–90, 562–72 & 105).

Respondents then moved for leave to file an amended complaint. (Supp. R. p. 3). DEW consented as to the addition of new parties but opposed the inclusion of new allegations against the agency. Id. The circuit court entered an order granting Respondents leave to file an amended complaint. Id. Shortly thereafter, DEW filed an answer—and subsequently an amended answer—to Respondents' amended complaint. (R. pp. 122–38).

---

[3] Lorena Robinson and Elaine Nix were initially plaintiffs, too, but are not Respondents on appeal. Other plaintiffs were added along the way, as well, but dropped off for various reasons. See, e.g., (R. p. 103).

Less than two months later, the parties filed cross-motions for summary judgment. (R. pp. 532–36). Respondents also moved to certify a class, and DEW opposed their motion. (R. pp. 591–93, 547–56). All parties filed memoranda in support of and in opposition to the pending motions. (R. pp. 522–31, 370–521, 349–66, 367–69, 329–41, 342–48 & 319–28). On May 5, 2016, the circuit court issued an order denying the cross-motions for summary judgment and an order certifying a class. (Supp. R. p. 6); (R. pp. 93–100). DEW timely moved to alter or amend both judgments under Rule 59(e), SCRCP. (R. pp. 312–18).

At the unopposed request of DEW, the circuit court scheduled an evidentiary hearing to determine whether the individual plaintiffs had standing to maintain this action. (R. pp. 311, 83). After two hearings, the circuit court issued an order finding the plaintiffs had individual standing, as well as standing under the public importance exception, and concluding they had "standing on the basis of suffering harm tha[t] is capable of repetition but evading review." (R. pp. 83–90). DEW filed another motion to alter or amend judgment. (R. pp. 284–303). On October 30, 2017, the circuit court issued an order denying both of DEW's Rule 59(e) motions. (R. pp. 78–80). DEW attempted to appeal these orders, but a court of appeals judge dismissed the appeal, finding class certification orders are not immediately appealable. (R. pp. 118–19). A three-judge panel of the court of appeals denied DEW's petition for rehearing on that decision, and our supreme court later denied the petition for a writ of certiorari. (R. pp. 117, 120).

On September 24, 2018, the parties appeared for a status conference at which they agreed the matter was ready for a final merits hearing to resolve all issues. (R. pp. 74–77). Prior to the merits hearing, Respondents submitted a proposed class notice that DEW opposed. (R. p. 273–83, 263–72). Ultimately, the circuit court issued a final order on February 15, 2019, entering judgment in favor of Respondents and approving their proposed class notice. (R. pp. 24–73).

Five days later, however, Respondents moved to alter or amend judgment. (R. pp. 242–47). DEW did the same the next day and supplemented its motion on February 25, 2019. (R. pp. 206–41, 204–05). For their part, Respondents took issue with the circuit court's decision—in relevant part—to have the class action proceed on a claims-made basis. (R. pp. 242–47). DEW, of course, contested the circuit court's rulings on the merits, most of which are the subject of this appeal. (R. pp. 198–204). The circuit court denied both parties' motions but took the class administration issue under advisement. (R. pp. 22–23). On March 21, 2019, the court granted Respondents' motion, in part, absolving class members of their burden of proving entitlement to benefits. (R. pp. 5–21). DEW therefore filed another motion to alter or amend judgment as well as an amended motion. (R. pp. 188–97).

Meanwhile, on April 4, 2019, DEW filed a notice of appeal from six orders of the circuit court. On April 11, 2019, Respondents filed a cross-appeal.[4] The court of appeals subsequently granted DEW's motion to hold the appeal in abeyance and partially remanded the case back to the circuit court to issue a ruling on the outstanding Rule 59(e) motion. Because the presiding judge had since retired, the chief judge for administrative purposes heard the motion. (R. pp. 2–4). The circuit court then issued an order approving a partial stipulation regarding the definition of the class and otherwise denying the motion. (Id.). DEW amended its notice of appeal to include the July 22, 2020 order, bringing the total number of orders on appeal to seven. This appeal follows.

ARGUMENT

While this case has a long and circuitous procedural history, the issues are straightforward. The Court should reverse and remand with instructions to dismiss the amended complaint for three reasons. First, given the presence of an unambiguous budget proviso, DEW was not required to

[4] On January 13, 2021, Respondents narrowed the issues in the case by withdrawing their cross-appeal.

promulgate regulations. Second, Respondents failed to exhaust their exclusive administrative remedies provided by statute. And third, Respondents failed to meet the prerequisites for class certification. Even if class relief were appropriate, reversal is still required because the circuit court erred in recanting its order directing the class to proceed on a claims-made basis.

I. *DEW was not required to promulgate regulations when a budget proviso specified the agency's responsibilities.*

The circuit court's declaratory judgment on the thrust of the budget proviso is incorrect as a matter of law. In the face of an unambiguous mandate from the General Assembly, DEW was required to implement the online work search requirement. And DEW did not need to promulgate regulations to do so.

A. *The Court's standard of review is de novo.*

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland Cty., 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). "The issue of interpretation of a statute is a question of law for the court." Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). An appellate court "reviews questions of law de novo." Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). "In a case raising a novel question regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." N.Y. Times Co. v. Spartanburg Cty. Sch. Dist. No. 7, 374 S.C. 307, 310, 649 S.E.2d 28, 29 (2007).

B. *A review of the proviso unambiguously reveals that enforcing the online work search requirement meant denying benefits for failure to comply.*

"The General Assembly must provide annually for all expenditures in a general appropriations act . . . to fund the ordinary expenses of state government and to direct the

expenditure of these funds." Amisub of S.C., Inc. v. S.C. Dep't of Health & Env't Control, 407 S.C. 583, 592, 757 S.E.2d 408, 413 (2014). As part of the General Assembly's "duty and authority to appropriate money as necessary for the operation of the agencies of government," it "has the right to specify the conditions under which the appropriated monies shall be spent." Edwards v. State, 383 S.C. 82, 90, 678 S.E.2d 412, 416 (2009). "Executive agencies are required to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid." Id. at 91, 678 S.E.2d at 417.

"As a creature of statutes, regulatory bodies . . . have only the authority granted them by the [General Assembly]." Responsible Econ. Dev. v. S.C. Dep't of Health & Env't Control, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007). In other words, the "regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991). "Of course, where the General Assembly hits the proverbial bulls-eye and assigns enforcement of a statute to an administrative agency with the command of 'shall,' then the agency shall act accordingly, free from the duplicative effort of formally promulgating a regulation." Joseph v. S.C. Dep't of Lab., Licensing & Regul., 417 S.C. 436, 465, 790 S.E.2d 763, 778 (2016) (Kittredge, J., concurring).

After all, "[u]nder the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the [General Assembly]'s intent to enact a mandatory requirement." Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002); cf. State v. Hill, 314 S.C. 330, 332, 444 S.E.2d 255, 256 (1994) ("The word 'may' ordinarily 'signifies permission and generally means the action spoken of is optional or discretionary.'" (quoting Robertson v. State, 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1981))). Here, the Court is called upon to interpret a budget proviso in the annual

appropriations act.[5] "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the [General Assembly]." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994).

"In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "It is well settled that statutes dealing with the same subject matter are in para materia and must be construed together, if possible, to produce a single, harmonious result." Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000); see also Senate ex rel. Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) (recognizing the Court "must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous'" (quoting CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011))).

Further, when "one statute address[es] an issue in general terms and another statute deal[s] with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468–69 (2010) (quoting Spectre, LLC v. S.C. Dep't of Health & Env't Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010)).

Against this backdrop, the Court must determine the reach of the proviso directing DEW to enforce an online work search requirement for claimants seeking to prove entitlement to

[5] Courts apply the same canons for statutory construction when interpreting a proviso. See Richland Cty. Sch. Dist. Two v. S.C. Dep't of Educ., 335 S.C. 491, 496, 517 S.E.2d 444, 447 (Ct. App. 1999).

unemployment benefits. During four fiscal years, the General Assembly mandated that DEW "shall" spend "[t]hirty percent of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers . . . on enforcement of Section 41-35-110(3)" by "requiring that one of the four job search contacts required per week be conducted through SC Works Online System (SCWOS), so that it can be electronically verified." Act No. 288, 2012 S.C. Acts 448, § 67.7 (emphasis added); see also Act No. 101, 2013 S.C. Acts 475–76, § 83.6; Act No. 286, 2014 S.C. Acts 503, § 83.6; Act No. 91, 2015 S.C. Acts 484–85, § 83.5.

According to Respondents, DEW was nevertheless required to promulgate regulations to enforce the online work search requirement in the proviso. Not so. "An appropriation act, though generally in duration temporary, has equal force and effect as a permanent statute for the time being. State ex rel. McLeod v. Mills, 256 S.C. 21, 27, 180 S.E.2d 638, 641 (1971). Thus, the proviso had the same effect as a permanent statute. And as with a permanent statute, DEW was not required to promulgate a regulation to enforce an unambiguous and specific proviso. Further, "[i]f approved subsequently to such permanent act, and there is irreconcilable conflict, the latter is suspended during the time the appropriation act is of force." Id. Here, there is no conflict. Proviso 67.7—as well as its successor provisos—expressly incorporates the requirements for demonstrating entitlement to unemployment compensation benefits set forth in subsection 41-35-110(3). Cf. Rivas, 342 S.C. at 109, 536 S.E.2d at 375. As noted above, that statute requires claimants to show they are able to work, available for work, and actively seeking work, and the proviso merely clarified how claimants are to comply with, and DEW is to enforce, the "actively seeking work" requirement. S.C. Code Ann. § 41-35-110(3).

For over sixty years, our appellate courts have recognized that "[t]he burden is upon the claimant for benefits to show that he has met the benefit eligibility conditions and that he is

available for work." Hyman, 234 S.C. at 379, 108 S.E.2d at 559.[6] Indeed, "[i]t is the duty of the claimant for unemployment benefits to show that he has made a reasonable effort to obtain employment in his usual trade or occupation or other suitable employment." Id. at 379–80, 108 S.E.2d at 559. And the claimant cannot "make this showing simply by providing that he has registered with the employment office of the Commission." Id. at 380, 108 S.E.2d at 559. When a claimant fails "to make a personal search for work during the period of his unemployment," our supreme court has found that "is ample evidence to support the finding of fact by the Commission that he was unavailable for work" and, therefore, not entitled to benefits. Id. at 380, 108 S.E.2d at 559–60.

In other words, this is nothing new. Under the unemployment insurance statutes and the case law interpreting those provisions, a failure to meet all the requirements translates into disqualification for benefits. All the proviso did was express the General Assembly's intent that claimants' work search activity include an online component to verify compliance. To give this verification method teeth, the General Assembly told DEW it "shall" enforce it. And it is worth noting Proviso 67.7 was not a one-time thing—the General Assembly included the proviso in the State budget for four straight years. See Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992) (citing with approval Grove City College v. Bell, 465 U.S. 555 (1984), in which the U.S. Supreme Court recognized that reenactment of a statute with knowledge of the administrative interpretation thereof is a strong indication of legislative approval of that interpretation).

[6] The South Carolina Employment Security Commission was the predecessor agency to DEW. See S.C. Code Ann. § 41-29-10 (rptr. note).

Respondents, however, made the startling assertion below that the provisos were "nothing more than an appropriation of funds from a particular tax to be spent on enforcement." (R. p. 567). That much does not follow. Part I.A of the General Assembly's annual appropriations act, to be sure, establishes the funding levels of state agencies and is the "dollars" portion of the act. Part I.B, on the other hand, regulates the expenditure of those funds appropriated in Part I.A, gives specific directions to agencies for that fiscal year, and temporarily supersedes statutes. The provisos under challenge, of course, appeared in Part I.B. of the general appropriations act for four years. If Respondents' novel take on the structure and force of the budget were correct, it would represent a sea change in how the General Assembly makes provisions for the operation of state government in Part I.B on an annual basis. Fortunately, they are wrong. The Court can therefore dispense with this argument in short order because it is manifestly without merit.

In an effort to scuttle this inconvenient truth, Respondents pivot to two separate portions of the South Carolina Code as further support for their argument. According to Respondents, section 41-29-110 of the South Carolina Code and the Administrative Procedures Act (the APA)[7] both required DEW to promulgate regulations regarding the denial of unemployment benefits. DEW will address each in turn.

As for the DEW enabling legislation, it is true the statute provides DEW "must promulgate regulations necessary to carry out the provisions of Chapters 27 through 41 of this title." S.C. Code Ann. § 41-29-110. But it is equally well-settled that a specific statute will prevail over one of general application. Denman, 387 S.C. at 138, 691 S.E.2d at 468–69 (quoting Spectre, LLC, 386 S.C. at 372, 688 S.E.2d at 852). Viewed through this lens, Respondents' effort to invoke a general statute about DEW's agency authority to trump what the General Assembly's proviso—

[7] S.C. Code Ann. §§ 1-23-10 through -680.

which "has equal force and effect as a permanent statute for the time being," Mills, 256 S.C. at 27, 180 S.E.2d at 641—says about the specific requirements for demonstrating entitlement to unemployment benefits is unavailing.

Respondents' circumscribed focus on the word "must" is similarly misplaced. S.C. Code Ann. § 41-29-110. The statute also says "necessary." Id. Because DEW was following the General Assembly's directions in an unambiguous and mandatory budget proviso, more regulations were not "necessary" for DEW to carry out its duties. Edwards, 383 S.C. at 90, 678 S.E.2d at 416 (stating as part of the General Assembly's "duty and authority to appropriate money as necessary for the operation of the agencies of government," it "has the right to specify the conditions under which the appropriated monies shall be spent"). When reading section 41-29-110 as a whole—as the Court must—Respondents' myopic construction simply cannot hold water. Senate ex rel. Leatherman, 425 S.C. at 322, 821 S.E.2d at 912 (recognizing the Court "must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous'" (quoting CFRE, LLC, 395 S.C. at 74, 716 S.E.2d at 881)).

Nor does the APA save the day for Respondents. Under the APA, a regulation is defined as an "agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law." S.C. Code Ann. § 1-23-10(4) (2005). "Whether a particular agency creates a regulation or simply announces a general policy statement depends on whether the agency action establishes a 'binding norm.'" Joseph, 417 S.C. at 454, 790 S.E.2d at 772 (majority) (quoting Home Health Serv., Inc. v. S.C. Tax Comm'n, 312 S.C. 324, 328, 440 S.E.2d 375, 378 (1994)). As our supreme court has noted,

> [t]he "key inquiry" is "the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to

> follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action has not established a binding norm.

Id. (quoting Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 491, 636 S.E.2d 598, 618 (2006) (Toal, C.J., dissenting)).

Again, this is not an agency policy or a binding norm—DEW was following the unmistakable directives of the General Assembly expressed in a duly enacted proviso.[8] See Edwards, 383 S.C. at 91, 678 S.E.2d at 417 ("Executive agencies are required to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid."). The APA thus has no application here. See Joseph, 417 S.C. at 465, 790 S.E.2d at 778 (Kittredge, J., concurring) (asserting when "the General Assembly hits the proverbial bulls-eye and assigns enforcement of a statute to an administrative agency with the command of 'shall,' then the agency shall act accordingly, free from the duplicative effort of formally promulgating a regulation"). After all, the APA cannot outrank the General Assembly's authority "to fund the ordinary expenses of state government and to direct the expenditure of these funds." Amisub of S.C., Inc., 407 S.C. at 592, 757 S.E.2d at 413.

The Court need not entertain the fruitless regulatory hoops through which Respondents would have DEW—and, frankly, the General Assembly—jump to carry out an unambiguous budget proviso. "Under longstanding rules of statutory construction," the Court can quickly "find

[8] Admittedly, DEW had a brief period—from February to November of 2013—in which it did not disqualify claimants from obtaining benefits solely for failing to perform a job search online. (R. p. 483). But the circuit court's takeaway from this temporary reallocation of resources to streamline other aspects of the unemployment insurance program is wrong. DEW never discontinued the online search requirement, nor could it.

the [proviso] means what it says." Anderson v. S.C. Election Comm'n, 397 S.C. 551, 554, 725 S.E.2d 704, 705 (2012) (per curiam). How else could one interpret the word "enforcement" in the online work search requirement enacted by the General Assembly? If a claimant fails to prove he meets the legal requirements for obtaining unemployment compensation benefits, then he is not entitled to those benefits. See S.C. Code Ann. § 41-35-120(5). That has always been the case, see Hyman, 234 S.C. at 380, 108 S.E.2d at 559–60, and the General Assembly recognized as much by incorporating the two pertinent statutes into the proviso. See Act No. 288, 2012 S.C. Acts 448, § 67.7 (citing S.C. Code Ann. §§ 41-35-110(3) & -120(5)).

Promulgating a regulation would have amounted to nothing more than an exercise in throat-clearing. Cf. Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) ("The Court must presume the [General Assembly] intended its statutes to accomplish something and did not intend a futile act."); see also Joseph, 417 S.C. at 465 n.11, 790 S.E.2d at 778 n.11 (Kittredge, J., concurring) (acknowledging the Sloan majority's "concern over this potential redundancy" because "requir[ing] compliance with the APA 'would lead to the absurd result that before an agency may enforce a statute, it would have to enact a regulation explaining its interpretation and application of the statute in detail before enforcing it,'" but finding that concern misplaced as to the statute in question as it "did not require the Board to do anything" and only spoke "in permissive terms, in anticipation of agency-crafted regulations promulgated pursuant to the APA" (quoting Sloan, 370 S.C. at 475, 636 S.E.2d at 610, overruled by Joseph, 417 S.C. at 443, 790 S.E.2d at 766)).

Respondents' interpretation, as adopted by the circuit court, that DEW acted unlawfully in following the proviso is simply untenable. The General Assembly enacted the proviso to give DEW a mechanism for verifying claimants' work searches prior to awarding unemployment

compensation benefits to ensure only substantiated claims are paid. In other words, this was an accountability measure. Retroactively stripping DEW of the enforcement authority that the General Assembly granted it in four successive budgets and requiring DEW to pay unsubstantiated unemployment benefit claims would directly run afoul of that legislative intent and lead to an absurd result. See State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the [General Assembly] or would defeat the plain legislative intention."). That is not, nor can it be, what the General Assembly intended.

The Court should therefore reverse and remand with instructions to dismiss Respondents' amended complaint with prejudice.

II. The circuit court should have dismissed the complaint because Respondents failed to exhaust the exclusive administrative remedies provided by statute.

"Whether a court has subject matter jurisdiction is a question of law [an appellate court] review[s] de novo." First Citizens Bank & Tr. Co., Inc. v. Taylor, 431 S.C. 149, 162, 847 S.E.2d 249, 256 (Ct. App. 2020) (quoting Deborah Dereede Living Tr. v. Karp, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019)).

Subject matter jurisdiction "refers to a tribunal's constitutional or statutory power to decide a case," and it "is a question of law" for the Court. Brown v. S.C. Dep't of Health & Human Servs., 393 S.C. 11, 16, 709 S.E.2d 701, 704 (Ct. App. 2011) (quoting Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104, 431 S.E.2d 631, 631 (Ct. App. 1993)). "South Carolina circuit courts are vested with original jurisdiction in civil and criminal cases, except those in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law." Rainey v. Haley, 404 S.C. 320, 323, 745 S.E.2d 81, 83 (2013) (citing S.C. CONST. art. V, § 11).

As a plurality of our supreme court has held, "[t]he Uniform Declaratory Judgment[s] Act is not an independent grant of jurisdiction." Tourism Expenditure Rev. Comm. v. City of Myrtle Beach, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013) (quoting Brown v. Or. State Bar, 648 P.2d 1289, 1292 (Or. 1982)). The Act "is remedial and procedural in nature and does not create substantive rights or duties." Felts v. Richland Cty., 299 S.C. 214, 216, 383 S.E.2d 261, 262–63 (Ct. App. 1989). Indeed, "[d]espite the Act's broad language, it has its limits." Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). And it "may not be invoked to avoid or circumvent the [General Assembly]'s exclusive method for challenging" certain practices. Tourism Expenditure Rev. Comm., 403 S.C. at 82, 742 S.E.2d at 374.

"In determining whether the [General Assembly] has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009). Here, the exclusive method for challenging DEW determinations regarding unemployment benefits is set forth in section 41-35-690 of the South Carolina Code. The statute, which is titled "[e]xclusive procedure for appeals," provides as follows:

> The procedure provided in this chapter for appeals from a determination or redetermination to the appeal tribunal and for appeals from the tribunal, first to the Department of Employment and Workforce Appellate Panel, as established by Section 41-29-300, and afterward to the administrative law court, pursuant to Section 41-29-300(C)(1), is the sole and exclusive appeal procedure.

S.C. Code Ann. § 41-35-690 (emphasis added).[9] And the General Assembly drove this point home by providing that "judicial review is permitted only after a party claiming to be aggrieved by

[9] Under this sole and exclusive remedy, a "claimant or any other interested party" has "ten days after the determination" to "file an appeal from an initial determination, redetermination, or subsequent determination." S.C. Code Ann. § 41-35-660. Because Respondents failed to file an appeal or otherwise attempt to seek review within the statute of limitations, their claims are also time-barred. See id.

[DEW's decision] has exhausted his administrative remedies as provided by Chapters 27 through 41 of this Title." S.C. Code Ann. § 41-35-740.

Although Respondents argue that exhaustion of administrative remedies is a discretionary doctrine, that confuses the issue. Here, the General Assembly has outlined the exclusive means by which one can file a claim for unemployment benefits and appeal an adverse decision. "The general rule is that while there are several exceptions that may be applied to the judicially-imposed exhaustion requirement, those that apply to a statutory requirement are few."[10] Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000) (emphasis added). But "[w]hen the exhaustion of remedies is statutorily mandated, as it is here, legislative intent prevails." Id. at 18–19, 538 S.E.2d at 247; see also S.C. Code Ann. § 41-35-740. Because Respondents failed to pursue these matters in the forum with exclusive jurisdiction, as required by statute, their complaint fails right out the gate. See, e.g., Berry v. S.C. Dep't of Health & Env't Control, 402 S.C. 358, 742 S.E.2d 2 (2013) (agency, then ALC); Haley, 404 S.C. 320, 745 S.E.2d 81 (General Assembly); Hunt v. Avondale Mills, Inc., 385 S.C. 616, 686 S.E.2d 190 (2009) (Public Service Commission).

In an effort to circumvent their failure to exhaust, Respondents argue exhaustion would have been futile because they are challenging DEW's agency authority. See, e.g., Brown v. James, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010) ("A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act."). That does not change the result. First,

[10] For instance, "if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting on an administrative ruling." Id. at 19, 538 S.E.2d at 247. After all, "[r]equiring a party to go before an agency or ALJ who cannot rule on the constitutionality of a statute would be a futile act." Id. Respondents have not presented any facial constitutional challenges here.

DEW's Appellate Panel had not taken a hard-and-fast position on the issue raised here. See id. Second, addressing this issue was squarely within the authority of the agency and the ALC.

Nothing in the statute prevented DEW's Appeals Tribunal from addressing this issue.[11] See S.C. Code Ann. § 41-35-680 (providing that "an appeal tribunal, after affording the parties reasonable opportunity for a fair hearing, after notice of not less than seven days, must make findings and conclusions"); S.C. Code Ann. Regs. § 47-51(C)(1) & (E)(1)(a) (authorizing hearing officers to "consider all issues affecting the claimant's right to benefits" and mandating that "[a]ll issues relevant to the appeal shall be considered and passed upon"). Likewise, nothing prevented the Appellate Panel—which is separate and distinct from DEW—or the Administrative Law Court from hearing the instant challenge.[12] That was squarely within those tribunals' authority. See S.C. Code Ann. § 1-23-380(5)(a)–(c) (allowing a party to challenge agency action on the grounds that it is "in violation of constitutional or statutory provisions," or "in excess of the statutory authority of the agency," or "made upon unlawful procedure"). Respondents' futility argument thus fails as a matter of law.

Because the circuit court improperly excused Respondents' failure to pursue their exclusive statutory remedies for obtaining unemployment benefits and raising these issues, the Court should reverse and remand with instructions to dismiss the amended complaint.

---

[11] Although Romi Robinson's testimony admittedly appears to suggest otherwise, Respondents' and the circuit court's reliance on her testimony is misplaced. The Court must determine whether the Appellate Panel and the ALC had the power to determine questions of agency authority. Stated differently, that is a question of law for the Court, not a factual question on which an agency employee's testimony would control. In any event, her testimony about how far the tribunal would have gone was speculative and cannot contravene what is permissible under state law.

[12] S.C. Code Ann. § 41-29-300(A) (creating the DEW Appellate Panel, "which is separate and distinct from the department's divisions," with the "sole purpose" being "to hear and decide appeals from decisions of the department's divisions"). To underscore the Appellate Panel's independence from the agency, the General Assembly elects its members every four years, and they are subject to the Code of Judicial Conduct. S.C. Code Ann. §§ 41-29-300(B)(2) & (F)(1).

III. *The circuit court's class certification order cannot stand because Respondents failed to meet the prerequisites for class certification, and the court erroneously absolved class members of their legal burden by dispensing with the claims-made requirement.*

"Proponents of class certification bear the burden of proving five prerequisites under South Carolina law." Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 20, 577 S.E.2d 190, 200 (2003). Specifically, the plaintiffs must demonstrate the following:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23(a), SCRCP. Our supreme court has emphasized "[i]t is imperative the [circuit] court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied." Waller v. Seabrook Island Prop. Owners Ass'n, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990). The "failure to satisfy even one prerequisite is fatal to class certification." Gardner, 353 S.C. at 20, 577 S.E.2d at 200. An appellate court "generally defer[s] to the [circuit] court's discretion in granting class certification absent an error of law." Id.

A. Respondents failed to meet the prerequisites for class certification.

At the outset, the Court should reverse the circuit court's order certifying a class because Respondents did not, and cannot, meet three prerequisites for class certification. Specifically, they failed to show (1) commonality, (2) typicality, and (3) adequacy of the representative parties.

1. The need for individualized, fact-intensive inquiries for every claimant in each weekly claim period necessarily defeats commonality.

First, the circuit court erred in certifying a class because Respondents failed to meet their burden of showing commonality. See Rule 23(a)(2), SCRCP.

"To establish commonality, a party must show that 'there are questions of law or fact common to the class.'"[13] Gardner, 353 S.C. at 21, 577 S.E.2d at 200 (quoting Rule 23, SCRCP). "In practical terms this means the party must articulate the existence of 'significant common, legal, or factual issues' which bind the proposed class together." Id. (quoting Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 64 (S.D. Ohio 1991)). A question is not common, however, "if its resolution 'turns on a consideration of the individual circumstances of each class member.'" Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 319 (4th Cir. 2006). Although class members must "have suffered the same injury," that "does not mean merely that they have all suffered a violation of the same provision of law." Dukes, 564 U.S. at 350 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)). The answer to the common question must be "apt to drive the resolution of the litigation." Id.

Respondents did not, and cannot, show commonality because the myriad individualized issues pertaining to each putative class member eclipse the alleged common thread concerning whether a claimant was improperly denied benefits for not conducting an online search. Under state law, a claimant—at all times—bears the burden of proving he or she is available for work, able to work, and actively seeking work. See S.C. Code Ann. § 41-35-110(3). And the claimant must satisfy this burden anew every week. After all, each week of unemployment constitutes a new claim period for unemployment benefits. Applying this burden of proof to the entire class is unworkable.

With that in mind, even if the Court were to determine DEW should not have stopped paying unemployment benefits due to the claimant's failure to perform an online job search, it

[13] "That language is easy to misread, since '[a]ny competently crafted class complaint literally raises common questions.'" Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349 (2011) (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. REV. 97, 131–32 (2009)).

does not follow that the claimant would automatically be entitled to benefits for the week in question. The claimant, or putative class member, still must individually show that he or she conducted the requisite four weekly job searches in some fashion, was available for work, and was able to work. Stated differently, the Court cannot presume that the claimant was otherwise entitled to benefits for any given week, irrespective of whether that person complied with the online work search requirement. Accordingly, the circuit court's finding that Respondents "limited the definition of the class to all persons who were denied benefits because of the failure to comply with the online work search requirement" does not solve the problem. Instead, it merely glosses over whether the individual was otherwise entitled to benefits.

"Commonality is met only where the class shares a determinative issue." Gardner, 353 S.C. at 21, 577 S.E.2d at 200–01; see also Stott v. Haworth, 916 F.2d 134, 145 (4th Cir. 1990) (holding "[c]lass certification is only proper when a determinative critical issue overshadows all other issues," and when the "question is in no way dispositive and simply propels the action into a posture where judicial scrutiny is necessary for just adjudication," requiring "a district court to do a case by case, position by position, activity by activity analysis," that is "proof positive that class disposition . . . is inappropriate"); Peoples v. Wendover Funding, Inc., 179 F.R.D. 492, 498 (D. Md. 1998) (holding "a representative plaintiff cannot establish commonality . . . if the court must investigate each plaintiff's individual claim").

Here, answering the question about the online work search requirement would not be "apt to drive the resolution of the litigation." Dukes, 564 U.S. at 350. The Court would still need to conduct a painstaking review of every plaintiff to determine whether that individual otherwise qualified for unemployment benefits for each week in question over a three-year period. Specifically, the claimant would still need to prove (1) he made four job searches during the week

or weeks for which the claim was made; (2) he did not in the meantime receive all the benefits to which he was entitled; and (3) no other reasons—such as being incarcerated, on vacation, or in school—would disqualify him from receiving a benefit for the week or weeks in question.

Take, for example, two of the namesakes in this litigation: Lorena Robinson and Elaine Nix. Respondents shed both of them from the class because an individualized review of their claims showed that, notwithstanding the disqualification for failing to do an online work search, they had other issues that would have prevented them from being eligible for unemployment during the weeks in question. (R. pp. 483–84). For her part, Robinson was disqualified for the weeks in question because she actually owed DEW money for other weeks of benefits she wrongfully collected. (Id.). And DEW could not find where Nix was ever disqualified from receiving unemployment compensation benefits for failure to comply with the only work search requirements. (R. p. 483). Although these claimants are out of the picture, their situations only prove the point that the parties are destined to be sparring over individual claims to determine whether class members are truly eligible for benefits.

Thus, as in Gardner, "the factual differences . . . are the crux of a predominant legal issue." 353 S.C. at 22, 577 S.E.2d at 201. As the Gardner court recognized, "[a] representative class cannot exist where the court must investigate each plaintiff's prejudice claim where it is one of the two predominate issues in the case. Requiring such individualized examination negates the benefits of a class action suit." Id.; see also O'Quinn v. Beach Assocs., 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978) ("The very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action."). The same is true here. Whether a claimant was denied benefits due to the online work search requirement only partially answers the question. And while Respondents convinced the circuit court to change course and

absolve them of their burden of proof altogether, that is of no moment here and only begs the question. The Court must review this threshold determination of commonality before flipping to the end of the book and deciding how the class must proceed.

Because the circuit court cannot dispose of the class claims in one stroke, commonality is lacking. Respondents failed to meet their burden of proof on this point. The circuit court therefore erred in certifying a class, and this Court should reverse.

2. Respondents' claims lack typicality.

Second, in a similar vein, the circuit court erred in certifying a class because Respondents failed to show typicality. See Rule 23(a)(3), SCRCP.

"To establish the typicality requirement, the 'claims or defenses of the representative parties [must be] typical of the claims or defenses of the class.'" Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Ct. App. 2011) (alteration in original) (quoting Rule 23(a)(3), SCRCP). A "plaintiff's claim cannot be so different from the claims of absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." Deiter v. Microsoft Corp., 436 F.3d 461, 466–67 (4th Cir. 2006). While typicality does not require "the plaintiff's claim and the claims of class members be perfectly identical or perfectly aligned[,] . . . when the variation in claims strikes at the heart of the respective causes of actions," courts have "readily denied class certification." Id. at 467. And courts have not hesitated to deny class certification when the potential harm was "dependent upon consideration of the unique circumstances pertinent to each class member." Boley v. Brown, 10 F.3d 218, 223 (4th Cir. 1993).

Resolving class members' claims unavoidably requires individualized, fact-intensive determinations that turn on "the unique circumstances" of each claimant. Id. To that end, a "typical" claim would involve an inquiry into whether the claimant proved (1) he made four job

searches in a given week and benefits were stopped because none of them were online, (2) he has standing, (2) the claim is not moot, and (3) all administrative remedies were exhausted. What is more, the claimant would have to otherwise meet the statutory requirements to qualify for unemployment benefits. See S.C. Code Ann. § 41-35-110(3). As noted above, whether the claimant performed one job search online is not dispositive of the individual's entitlement to unemployment benefits.

The circuit court, however, found that the claims were typical because "each member has had his/her unemployment benefits denied for at least one week because of the online work search requirement policy. Further, each Plaintiff is capable of becoming employed in the future and suffering harm from this policy." (R. p. 97). Respectfully, that is neither a fair nor a logical leap. Each class member must make these showings—among others—and the court cannot simply presume the other requirements were also met. Yet that is exactly what the circuit court did here. In any event, as explained in greater detail below, a review of Respondents' respective situations confirms the unique, atypical nature of each claim and the impracticability of moving forward with a class. Patterson's claim, for example, is moot. See Deiter, 436 F.3d at 466 ("The typicality requirement goes to the heart of [] representative parties' ability to represent a class, particularly as it tends to merge with the commonality and adequacy-of-representation requirements.").

Given that the claims and defenses vary among the class, and even as to the individual Respondents, the circuit court erred in finding they established typicality. The Court should therefore reverse the order certifying a class.

3. The representative parties lack standing and cannot fairly and adequately protect the interests of the class.

Third, a review of Respondents' respective situations reveals they cannot adequately represent the class. See Rule 23(a)(4), SCRCP. Because the adequacy-of-representation element

is inextricably tied to questions of justiciability, DEW will address them together.

It is well settled that "a class representative 'must be part of the class and possess the same interest and suffer the same injury as the class members.'" Hosp. Mgmt. Assocs., Inc. v. Shell Oil Co., 356 S.C. 644, 664, 591 S.E.2d 611, 622 (2004) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625–26 (1997)); see also Rule 23(a)(4), SCRCP (stating a class can only move forward "if the court finds . . . the representative parties will fairly and adequately protect the interests of the class"). For that reason, when "the named plaintiffs' claims become moot after class certification by death or other means, the class claims become moot unless intervenors can be substituted as named plaintiffs." Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 566, 564 S.E.2d 94, 98 (2002). After all, "an individual or group must have standing to proceed" with a "class action." Berry v. McLeod, 328 S.C. 435, 446 n.2, 492 S.E.2d 794, 800 n.2 (Ct. App. 1997). The adequacy-of-representation element thus necessarily implicates justiciability. And that makes sense, particularly where, as here, Respondents obtained a declaratory judgment.

The Uniform Declaratory Judgments Act[14] allows a person "whose rights, status or other legal relations are affected by a statute" to "have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30. "To state a cause of action under the . . . Act, a party must demonstrate a justiciable controversy."[15] Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). "A justiciable controversy is a real and substantial

[14] S.C. Code Ann. §§ 15-53-10 through -140.

[15] The Act, of course, has its limits. See Power v. McNair, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970) ("While it has been held that the declaratory judgment statute should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships without awaiting a violation of the rights or a disturbance of the relationships, it is uniformly held that the Declaratory Judgments Act does not require the court to give a purely advisory opinion as to the issues sought to be raised.").

controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical[,] or abstract character." Sloan v. Greenville Cty., 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). "The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." Joseph, 417 S.C. at 466, 790 S.E.2d at 779 (quoting Sloan, 356 S.C. at 547, 590 S.E.2d at 546). Rulings on justiciability are reviewed de novo on appeal. Jowers v. S.C. Dep't of Health & Env't Control, 423 S.C. 343, 354, 815 S.E.2d 446, 452 (2018).[16]

With these principles in mind, Respondents failed to demonstrate they can adequately represent the class. A review of Patterson's and Bollerman's unique situations confirms as much.

a. Archie Patterson is not a proper representative.

Respondent Patterson cannot adequately represent the class because he has not suffered the same injury as the purported class. Specifically, Patterson did not apply for benefits that were otherwise available to him and, therefore, failed to mitigate his damages and rendered his claims here moot.

"A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages." Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 285, 573 S.E.2d 830, 838 (Ct. App. 2002). "Whether [a plaintiff] has fully mitigated his damages is a question of fact to be determined from the circumstances of each case." Chastain v. Owens Carolina, Inc., 310 S.C. 417, 420, 426 S.E.2d 834, 836 (Ct. App. 1993).

[16] Accordingly, this element for class relief implicates a two-tiered standard of review. The Court must first conduct a de novo review to determine whether Patterson and Bollerman have presented a justiciable controversy. DEW contends they have not and, therefore, the Court should reverse and remand with instructions to dismiss the amended complaint. To the extent the Court disagrees, it must then proceed to a review of the adequacy-of-representation element—through an abuse of discretion lens—to determine if the circuit court erred in certifying a class.

Patterson failed to appeal his initial determination and, thus, is time-barred from asserting it. See S.C. Code Ann. § 41-35-660. Further, after Patterson was denied benefits for failing to perform the required online job search, he left several weeks of benefits unclaimed. (R. p. 31). Specifically, he stopped applying for benefits in June of 2013 after allegedly becoming frustrated with the claims process. (Id.); cf. Floyd v. S.C. Emp. Sec. Comm'n, 281 S.C. 483, 487, 316 S.E.2d 143, 146 (1984) (finding a statute "is not rendered invalid because individuals find it difficult to meet the necessary qualifications"). But he still could have applied for and received the total amount of benefits available during the pertinent claim period from DEW. See S.C. Code Ann. § 41-35-50 ("The maximum potential benefits of any insured worker in a benefit year are the lesser of: (1) twenty times his weekly benefit amount;" or "(2) one-third of his wages for insured work paid during his base period."); 26 U.S.C. § 3304(a)(11) ("The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that . . . extended compensation shall be payable as provided by the Federal-State Extended Unemployment Compensation Act of 1970."); Pub. L. 91-373, title II, 84 Stat. 708 (26 U.S.C. 3304 note) (Aug. 10, 1970) (comprising the Federal-State Extended Unemployment Compensation Act of 1970); S.C. Code Ann. § 41-35-310 through -450 (providing for payment of extended unemployment benefits for up to thirteen weeks under certain conditions).

Had Patterson applied for and obtained those benefits, the loss of the week's benefit in August 2012 would not have mattered. Given that he elected not to claim and exhaust all available benefits, and quite literally left money on the table, Patterson waived his right to obtain them and cannot now ask this Court to compel DEW to pay him additional weeks of unemployment benefits. Stated differently, Patterson failed as a matter of law to mitigate his damages and cannot retroactively obtain those benefits that he abandoned. This also renders his claims moot. See

Sloan v. Greenville Cty., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("The court does not concern itself with moot or speculative questions."); id. (observing a case is moot "when some event occurs making it impossible for the reviewing court to grant effectual relief").

Because Patterson's unique issues defeat his ability to maintain this challenge, he cannot adequately and fairly represent the class. See Rule 23(a)(4), SCRCP; Ferguson, 349 S.C. at 566, 564 S.E.2d at 98 (holding when "the named plaintiffs' claims become moot after class certification by death or other means, the class claims become moot . . . unless intervenors can be substituted as named plaintiffs").

b. Tami Bollerman is not a proper representative.

Respondent Bollerman is similarly not suited to represent the class because she cannot demonstrate entitlement to benefits for the week of October 7, 2012.

As for Bollerman, the circuit court focused on the fact that she had computer issues in trying to conduct the online search for this benefit week. (R. p. 30). Had she appealed the determination of the claims adjudicator on this ground alone, Bollerman's benefits likely would have been restored through the DEW administrative appellate process. (R. p. 482). Bollerman, however, failed to appeal the initial determination and, therefore, is time-barred from asserting it. See S.C. Code Ann. § 41-35-660. But this was not the only problem with Bollerman's application for benefits. Indeed, during the hearing on issues of standing, Bollerman did not provide documentation showing she conducted any job searches—whether online or otherwise—for that benefit week. (R. p. 872). Thus, even when putting aside the proviso's online work search requirement, Bollerman still did not prove she qualified for unemployment compensation benefits for the week of October 7, 2012. See S.C. Code Ann. §§ 41-35-110(3) & -120(5). No one is challenging those requirements.

Because Bollerman could not meet the legal requirements provided by statute, she was not entitled to unemployment compensation benefits. See id. She therefore experienced no prejudice from application of the online job search requirement. See Evins v. Richland Cty. Historic Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000) (holding "a private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom"). Under these circumstances, Bollerman has not suffered a cognizable injury-in-fact traceable to any action of DEW, particularly as it relates to the online job search requirement. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (holding a plaintiff must show "a causal connection between the injury and the conduct complained of" that is fairly traceable "to the challenged action of the defendant" and can likely be redressed by a favorable decision from the court).

Accordingly, Bollerman lacks standing to bring this action, and she cannot adequately protect the interests of the class. See Rule 23(a)(4), SCRCP; Berry, 328 S.C. at 446 n.2, 492 S.E.2d at 800 n.2.

* * * *

In sum, because Respondents failed to present a justiciable controversy, they cannot adequately represent the class, and the Court should reverse and remand with instructions to dismiss the amended complaint with prejudice.

c. Respondents find no refuge under the public importance exception.

Nor can Respondents get around their justiciability problems by trying to invoke the public importance exception to standing.

At the outset, our supreme court has recognized it "must be cautious with this exception, lest it swallow the rule." Jowers, 423 S.C. at 360, 815 S.E.2d at 455 (quoting S.C. Pub. Interest

Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013)). The general importance of an issue, without more, is insufficient to invoke the exception because "the same may be said of most legislative and executive actions. For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008).

Although "the need for future guidance generally dictates when the exception applies, the application of the exception in a particular case does not turn on a rigid formula but rather is determined by the competing policy concerns underlying the exception." Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014); see also S.C. Pub. Interest Found. v. S.C. Dep't of Transp., 421 S.C. 110, 118, 804 S.E.2d 854, 859 (2017) ("An appropriate balance between the competing policy concerns underlying the issue of standing must be realized."). To be sure, "[c]itizens must be afforded access to the judicial process to address alleged injustices." Sloan v. Sanford, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). But "standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." Id.

"Thus, when deciding whether to confer public importance standing, courts must take these competing policy concerns into consideration, and must also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed." S.C. Pub. Interest Found., 421 S.C. at 118, 804 S.E.2d at 859. In declining to invoke the public importance exception to standing, however, our supreme court has previously observed as follows:

> In our constitutional system of government with its separation of powers, courts exercise the limited constitutional function of the

> "judicial power." Accordingly, courts are limited to resolving cases and the powers inherent in that function. Courts are not bodies for the resolution of public policy and generalized grievances. Harms suffered by the public at large, like those Plaintiffs allege here, are to be remedied by the legislative and executive branches. If existing laws and regulations or their enforcement fail to protect the public from harm, it is incumbent upon the public to seek reform through their elected officials or failing that, at the ballot box.

Carnival Corp., 407 S.C. at 81, 753 S.E.2d at 853 (quoting S.C. CONST. art. V, § 1).

Here, Respondents cannot invoke the public importance exception because their request to interpret a budget proviso that has not been in effect for nearly five years hardly cries for future guidance from the Court. Indeed, the claims periods at issue here stretch even farther back to 2012 when the subject proviso was first enacted by the General Assembly. Given that claimants—then and now—plainly have the statutory review and appellate process available for challenging a decision from DEW with which they disagree, the Court simply has no role to play here. No future guidance is needed. Any decision would amount to nothing more than an advisory opinion from the Court on a stale issue. Booth v. Grissom, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions.").

While Respondents contend the Court should nevertheless opine on the issue because claimants may be harmed in the future by DEW's failure to promulgate regulations, their speculative request is still insufficient to invoke the public importance exception to standing. As our supreme court has recognized, "[t]he 'has not suffered a particularized injury' language does not remove the injury in fact requirement; instead, it simply allows someone who has not personally suffered an injury to step into the shoes of someone who has." Jowers, 423 S.C. at 367, 815 S.E.2d at 458. "In other words, the exception allows a substitution in place." Id. at 367, 815 S.E.2d at 459. But here, as in Jowers, Respondents "seek not only a substitution in place, but also a substitution in time." Id.

As the court of appeals has held, "a 'prospective concern of future harm' is not sufficient to satisfy the Lujan test."[17] Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Env't Control, 370 S.C. 296, 302, 634 S.E.2d 664, 667 (Ct. App. 2006). Respondents must show some "invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical" to meet the injury-in-fact requirement. Id. at 302, 634 S.E.2d at 666 (quoting Lujan, 504 U.S. at 561). Their second-sighted contention that DEW may violate claimants' rights in the future by implementing some other policy without promulgating regulations is nothing more than rank speculation, and it is insufficient to establish an injury-in-fact. Instead, Respondents have only articulated an unfounded "prospective concern of future harm." Id. at 302, 634 S.E.2d at 667. Because that is insufficient to establish an injury-in-fact for purposes of standing for anyone, Respondents have no license to assert the phantom claim on behalf of everyone.

Our courts have repeatedly recognized that "application of the exception in a particular case does not turn on a rigid formula." Carnival Corp., 407 S.C. at 79, 753 S.E.2d at 853. In that spirit, Respondents' anticipated reliance upon Adams v. McMaster, 432 S.C. 225, 851 S.E.2d 703 (2020), is misplaced. First, the petitioners in Adams challenged the State's expenditure of money, whereas Respondents are challenging DEW's implementation of a legal requirement in a budget proviso. Second, the petitioners in Adams sought immediate injunctive relief in the courts before the Governor even executed the SAFE Grants Program. Here, on the other hand, Respondents are asking the Court to make a retroactive determination regarding the enforcement of a budget proviso

[17] Along these lines, the circuit court erred by invoking the "capable of repetition yet evading review" exception to the mootness doctrine to confer standing on Respondents. (R. pp. 87–88). For starters, this conflates mootness and standing. Further, Respondents are the least likely of future unemployment benefit claimants to fail to perform online job searches because they are the aware of the attendant consequences. To that end, they can avoid any future injury by simply performing a job search online. Regardless, the proviso in question is no longer in effect.

that has not been in effect for five years. Or, in the alternative, they are asking the Court to speculate generally about DEW's potential future enforcement of any number of issues without promulgating regulations. Either way, no future guidance is necessary.

In short, the Court should reject Respondents' invitation to invoke the public importance exception because they failed to show any injury-in-fact or the need for future guidance on this manufactured issue.

B. Even if class relief were appropriate, the circuit court should have directed that the class move forward under a claims-made process.

Finally, assuming without conceding that class relief was appropriate, the circuit court nevertheless erred in revoking its previous order on the issue of a claims-made process.

As one federal court has recognized, "there is nothing inherently suspect about requiring class members to submit claim forms . . . to receive payment." Schulte v. Fifth Third Bank, 805 F. Supp. 2d 560, 593 (N.D. Ill. 2011). And another federal court has found "it perfectly appropriate to require [c]lass members to submit certain information proving that they are entitled to collect the relief awarded." Milliron v. T-Mobile USA, Inc., No. 08-4149-JLL, 2009 WL 3345762, at *6 (D.N.J. Sept. 10, 2009). "Filing a claim form is a 'reasonable administrative requirement' which generally does not impose an undue burden on members of a settlement class." Hamilton v. SunTrust Mortg., Inc., No. 13-60749-CIV, 2014 WL 5419507, at *6 (S.D. Fla. Oct. 24, 2014).

Even if the circuit court's rulings on the merits were affirmed, a claimant would still be required to make the same kind of showing about four weekly job searches that everyone else was required to make during the period in question. Indeed, the only difference would be that one search need not be online. In its February 15, 2019 order, the circuit court agreed with DEW on this point, holding that class membership should be limited to

> persons who were otherwise entitled to unemployment benefits for the weeks in which they were denied a benefit for failure to make an online work search. However, in order for a claimant to show that he or she was actually "eligible to receive unemployment benefits, through SCDEW," claimants must still show that they satisfied the requirements to receive benefits for the week or weeks in question, once the disqualification for failure to make an online work search is removed.

(R. p. 44). After all, that is what the law requires. See S.C. Code Ann. § 41-35-110(3).

The circuit court, recognizing this legal framework, initially held that "the class notice should reflect the need for class claimants to make the same showing required of every other claimant for unemployment benefits at the time, including the need to show that for the period in question they were actively seeking work." (R. p. 48). Indeed, the court of appeals has held that "[w]hether a claimant is available and actively seeking work is an issue of fact to be determined by the administrative agency in accordance with the facts and circumstances of each case." Wellington v. S.C. Emp't Sec. Comm'n, 281 S.C. 115, 117, 314 S.E.2d 37, 39 (Ct. App. 1984) (emphasis added). As further support, the circuit court originally found that both the DEW statutes and the law governing class actions, in general, mandated this approach. (R. pp. 44–48). In so finding, the circuit court relied on a federal class action case involving DEW in which the District of South Carolina ordered the class to proceed on a claims-made basis. See (R. pp. 47–48) (citing Brown v. Porcher, 502 F. Supp. 946, 958–59 (D.S.C. 1980), aff'd in part, 660 F.2d 1001 (4th Cir. 1981)).

In an about-face, the circuit court reversed itself in the March 21, 2019 order granting Respondents' motion to alter or amend judgment. The circuit court stated, in a conclusory manner, that class members had "met their burden of proving they were otherwise entitled to receive unemployment benefits, and a claims-made process is unnecessary." (R. p. 10). Not so. According to the court, "class members were required to appear at an SCDEW office and were

again required to certify they were able, available and actively seeking work. Class members were also required to bring their form UCB-303 record of work seeking activities to the meeting." (R. p. 7). The circuit court found that "[c]lass members, however[,] have already made this audit form [UCB-303] available to SCDEW." (R. p. 8).

But the record contains no evidence that all, or even many, class members actually reported to a DEW office—with or without a form UCB-303—and made a showing for the week they were denied benefits for failure to make an online work search. To the contrary, if DEW had denied benefits for a given week because no online job search was conducted and the claimant did not appeal the denial, DEW would have had no reason to review the form UCB-303 for that week. The circuit court notes that, "[f]or claimants who are not class members, SCDEW did not conduct a weekly review of the UCB-303 form," (R. p. 8), but that does not mean DEW never reviewed the UCB-303 form for any weeks prior to the review as the order suggests. Rather, the record shows that all claimants' UCB-303 forms were subjected to periodic review. See, e.g., (R. pp. 479, 833–34).

Again, though, DEW had no reason to review the part of a form UCB-303 that pertained to a week in which benefits were denied for failure to perform an online work search. That failure, of course, was dispositive and rendered any further review at the time unnecessary. Thus, to simply conclude all claimants who failed to perform a work search online in any given week were otherwise qualified is neither a fair nor a logical leap. By dinging DEW for not looking into additional grounds on which to deny benefits, the circuit court engaged in classic burden-shifting. The circuit court also ignored a well-settled principle in the law—particularly in appeals—that courts generally do not reach other issues when resolution of a prior issue is dispositive. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

What is more, the circuit court erred in addressing, sua sponte, a ground never raised by any party in a pleading, motion, memorandum, or hearing. Yet the circuit court found "SCDEW failed to promulgate any regulations establishing a mode of procedure adjudicate class members claims as required by Article I, Section 22 of the S.C. Constitution. Such structural defects in procedure violate due process and cannot be considered harmless." (R. p. 8 n.4) (citing McIntyre v. Sec. Comm'r of S.C., 425 S.C. 439, 823 S.E.2d 193 (Ct. App. 2018); see also S.C. CONST. art. I, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.").

Respondents never asserted a due process claim and, therefore, DEW was not on notice that due process was an issue in this case. See Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 574, 743 S.E.2d 778, 785 (2013) ("It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial."); Langston v. Niles, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are."). Further, it is axiomatic a party cannot prevail under a theory he failed to plead or obtain relief he never requested. See Tilley v. Pacesetter Corp., 355 S.C. 361, 375–76, 585 S.E.2d 292, 299 (2003) (finding plaintiffs could not recover under a particular theory when they failed to plead it in their complaint and amended complaint); Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 616, 703 S.E.2d 221, 225 (2010) (explaining a party "cannot benefit from an affirmative defense that was never pled").

Accordingly, the circuit court erred in tethering its decision to reverse its prior order on a new issue raised whole cloth in the order.

Even on the merits, the circuit court's decision finds no support in the record. As Cummings noted in his affidavit, "When a claimant fails to perform at least one online job search in a given week, the claimant is denied benefits using the same procedures that apply whenever a claimant fails to show that he or she is able to work and available for work. No new procedures were necessary in order to enforce the online job search requirement." (R. p. 521). The circuit court thus erred because (1) DEW did not need to implement a new procedure of any kind—whether through regulations or otherwise—to enforce the General Assembly's new method for verifying job searches; and (2) Respondents never claimed that any action of DEW violated due process. To the extent the circuit court's refusal to require a claims-made process was based upon the rogue due process finding, it erred as a matter of law in relying upon this ground.

In sum, for decades, both the General Assembly and the courts have recognized "[t]he burden is upon the claimant for benefits to show that he has met the benefit eligibility conditions and that he is available for work." Hyman, 234 S.C. at 379, 108 S.E.2d at 559; S.C. Code Ann. § 41-35-110(3). No one hid the ball on that. Respondents therefore cannot claim a lack of notice of the process. Indeed, their actions of obtaining benefits for many weeks other than the ones in question show they very much understood the process. By absolving them of their burden, the circuit court rewrote the law, frustrated the purposes behind it, and left the State on the hook to foot the bill.[18] That cannot be what the General Assembly intended when enacting Proviso 67.7,

[18] But see Hodges, 341 S.C. at 87, 533 S.E.2d at 582 (asserting that, "[w]hen the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the [General Assembly]'s language"); Spencer v. Barnwell Cty. Hosp., 314 S.C. 405, 409, 444 S.E.2d 538, 541 (Ct. App. 1994) (per curiam) (declining to adopt an interpretation that "would rewrite the statute and frustrate the purposes of the Act" in question); Fireman's Ins. Co. of Newark, N.J. v. State Farm Mut. Auto. Ins. Co., 295 S.C. 538, 554, 370 S.E.2d 85, 93 (1988) (rejecting an interpretation of the policy and noting "[a]ny

as well as the successor provisos, which was designed to create accountability for unemployment insurance claims.

Respectfully, DEW cannot just give away unemployment benefits. Yet if the circuit court's order is allowed to stand, DEW must mail a check to every class member without even the most minimal inquiry into whether that person is entitled to unemployment compensation benefits. Giving potentially thousands of class members a pass on making any showing that they are otherwise entitled to receive unemployment benefits requires the agency to act in derogation of well-settled law. And it rewards claimants who have jettisoned DEW's statutorily required appeals process and, in doing so, abandoned their requests for benefits. Simply put, this class award would wreak havoc on the Unemployment Insurance Trust Fund and work a gross injustice on both the State and the employers who fund unemployment insurance claims.

CONCLUSION

The Court should reverse the circuit court's orders and remand with instructions to dismiss the amended complaint. In the alternative, the Court should reverse and order that the class proceed on a claims-made basis.

(Signature page to follow)

---

other conclusion redefines and rewrites not only the statute but [the court's] prior holdings"); Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n, 424 S.C. 542, 553, 819 S.E.2d 124, 130 (2018) (Few, J., concurring) ("If it were true courts have the authority to interpret statutes according to a sense of justice and right, then courts would have the power to rewrite statutes to suit their own personal preferences, regardless of legislative intent. Courts do not have that power."); Marshall v. Dodds, 426 S.C. 453, 473, 827 S.E.2d 570, 580 (2019) (James, J., dissenting) (stating "we cannot ignore the policy considerations behind the statute, and 'we are not at liberty to rewrite the statute'" (quoting Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., Inc., 368 S.C. 137, 144, 628 S.E.2d 38, 42 (2006))).

Respectfully submitted,

Vordman Carlisle Traywick, III
SC Bar No. 102123
Robert E. Stepp
SC Bar No. 5335
Robert E. Tyson, Jr.
SC Bar No. 10820
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
ltraywick@robinsongray.com
rstepp@robinsongray.com
rtyson@robinsongray.com

William H. Davidson, II
SC Bar No. 1558
Kenneth P. Woodington
SC Bar No. 6213
DAVIDSON WREN & DEMASTERS, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222
wdavidson@dml-law.com
kwoodington@dml-law.com

Counsel for Appellant South Carolina Department of Employment and Workforce

Columbia, South Carolina
August 19, 2021

RECEIVED
Aug 19 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BARNWELL COUNTY
In the Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Clifton B. Newman, Circuit Court Judge

Lower Court Case No. 2013-CP-06-00059
Appellate Case No. 2019-000599

Lorena Robinson, Elaine Nix, Archie Patterson,
and Tami Bollerman, ... Plaintiffs,

Of Whom Archie Patterson and Tami Bollerman are the Respondents,

v.

South Carolina Department of Employment and
Workforce ..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant South Carolina Department of Employment and Workforce certify that the Final Brief of Appellant complies with Rule 211(b), SCACR.

Vordman Carlisle Traywick, III (SC Bar 102123)
Robert E. Stepp (SC Bar 5335)
Robert E. Tyson, Jr. (SC Bar 10820)
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
ltraywick@robinsongray.com
rstepp@robinsongray.com
rtyson@robinsongray.com

William H. Davidson, II (SC Bar 1558)
Kenneth P. Woodington (SC Bar 6213)
DAVIDSON WREN & DEMASTERS, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222
wdavidson@dml-law.com
kwoodington@dml-law.com

Counsel for Appellant South Carolina Department of Employment and Workforce

Columbia, South Carolina
August 19, 2021