THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

ON PETITION FOR A WRIT OF CERTIORARI

APPEAL FROM BARNWELL COUNTY
In the Court of Common Pleas

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

Appellate Case No. 2024-001207

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

Of Whom Archie Patterson and Tami Bollerman are the Petitioners,

v.

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

RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIOARI

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Pursuant to Rule 242(f), SCACR, Respondent South Carolina Department of Employment and Workforce (DEW) submits this return in opposition to Petitioners Archie Patterson and Tami Bollerman's petition for a writ of certiorari. Petitioners ask the Court to review the court of appeals' opinion reversing the circuit court and finding they needed to exhaust exclusive statutory administrative remedies before bringing this action. *See Patterson v. S.C. Dep't of Emp't & Workforce*, Op. No. 6055 (S.C. Ct. App. filed Apr. 3, 2024) (Howard Adv. Sh. No. 13 at 27). For the reasons below, the Court should deny certiorari. In the alternative, the Court should dispense with further briefing and summarily affirm.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I. Whether the court of appeals properly held Petitioners needed to exhaust exclusive statutory administrative remedies before raising the instant challenge because the administrative tribunals could have decided the issue?

II. Whether the court of appeals properly held the circuit court erred in applying a novel exception to Petitioners' failure to exhaust statutory exclusive administrative remedies?

III. Whether the court of appeals properly held the futility exception did not relieve Petitioners of their failure to exhaust exclusive statutory administrative remedies?

IV. Whether affirmance is required because DEW properly enforced the mandatory budget proviso's online work search requirement without first promulgating a regulation?

COUNTERSTATEMENT OF THE CASE

This appeal arises out of Petitioners' challenge to the online work search requirement that the General Assembly directed DEW to implement under a self-executing budget proviso (the Proviso) in the general appropriations act from 2012 to 2016.

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 benefits, however, is conditioned on DEW finding a claimant has proven—each week benefits are sought—that he or she is available for work, able to work, and actively seeking work. *See* S.C. Code Ann. § 41-35-

110(3); *Hyman v. S.C. Emp't Sec. Comm'n*, 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959). Each week of unemployment is a new claim period to which this burden applies. (R. pp. 478–79).

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 each week 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 review every claimant's weekly effort to comply with the actively seeking work requirement. So the General Assembly sought to improve the job search verification process. In 2012, it 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), 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 [DEW] to verify compliance with laws administered by the agency.

Act No. 288, 2012 S.C. Acts 448, § 67.7 (emphasis added). The General Assembly passed identical provisos 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, DEW began implementing the Proviso in August 2012, requiring claimants 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 searches on the UCB-303 form. (R. p. 479). And "[w]hen a claimant fail[ed] to perform at least one online job search in a given week," he or she was "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 . . . to enforce the online job search requirement." (R. p. 521).

The new job search verification process led to 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.[1] *See* (R. pp. 481–82). Others had 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. (*Id.*). All told, the Proviso was in effect from July 1, 2012 to June 30, 2016.[2]

Because Petitioners did not comply with the online job search requirement, DEW denied them one or more weeks of unemployment benefits. As Petitioners admit, they "did not file an

[1] This statutorily required appeals process is not complicated and routinely used by laypersons. And DEW provides every claimant detailed instruction on how to navigate it. (R. p. 482).

[2] In 2017, after the Proviso expired, DEW promulgated a regulation requiring at least two job searches each claim period to be conducted online. *See* S.C. Code Ann. Regs. 47-104.

administrative appeal" or exhaust the exclusive administrative remedies. Pet. at 8. Indeed, Respondents failed to appeal to DEW's appeals tribunal, its appellate panel, or the administrative law court (ALC). *But see* S.C. Code Ann. §§ 41-35-660, -680, -690 & -740; S.C. Code Ann. § 1-23-380(5). Instead, they filed a putative class action challenging DEW's enforcement of the online work search requirement without promulgating a regulation. (R. p. 164).

What followed was a long and circuitous procedural history that the court of appeals explained well. *See Patterson*, Op. No. 6055, at 27, 31–34. Ultimately, the circuit court entered judgment for Petitioners. (R. pp. 24–73). As relevant here, it found Petitioners "were not required to exhaust administrative remedies before bringing this action," and DEW "was required to promulgate regulations before it began requiring online work searches." (R. p. 24).

On appeal, after mulling over the briefs and arguments of counsel, the court of appeals reversed the circuit court's decision. *Patterson*, Op. No. 6055, at 27–40. The court of appeals held "the record does not support the circuit court's ruling that [Petitioners'] pursuit of administrative remedies would have been futile." *Id.* at 37. It also held "the circuit court erred by concluding [Petitioners] were excused from pursuing administrative remedies based on their claim that DEW lacked authority to implement the online work search requirement." *Id.* at 40.

Petitioners petitioned for rehearing, DEW filed a return in opposition, and Petitioners replied. The court of appeals denied rehearing. Petitioners then petitioned for a writ of certiorari, asking this Court to review the court of appeals' opinion. This return in opposition follows.

ARGUMENT

The court of appeals found Petitioners needed to exhaust exclusive administrative remedies before bringing this lawsuit, and their failure to do so was not excused by the futility exception or because DEW purportedly "acted outside its authority" in enforcing the Proviso. *Patterson*, Op.

No. 6055, at 35–40. On certiorari, Petitioners raise three issues. *First*, they argue the court of appeals "failed to consider" that "this declaratory judgment action was not an appeal from a" decision on "benefits and therefore [was] not subject to DEW's administrative procedures." Pet. at 10. *Second*, they contend the court of appeals "erred in finding exhaustion . . . was not excused because DEW was acting outside its authority." *Id.* at 14. *Third*, they accuse the court of appeals of "reweigh[ing] the evidence presented to the [c]ircuit [c]ourt where the appropriate standard of review was abuse of discretion." *Id.* at 19. As explained below, each contention lacks merit.

I. The court of appeals properly found Petitioners needed to exhaust administrative remedies, and those administrative tribunals could have considered the issue Petitioners raise here.

"[I]t is well settled a court ordinarily will refuse to grant a declaratory judgment where a special statutory remedy has been provided." *Smith v. S.C. Ret. Sys.*, 336 S.C. 505, 527, 520 S.E.2d 339, 351 (Ct. App. 1999). Declaratory "[r]elief is not generally available to one who has not exhausted administrative remedies." *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 821 (1995). After all, the Uniform Declaratory Judgments Act "does not create substantive rights," *Felts v. Richland Cnty.*, 299 S.C. 214, 216, 383 S.E.2d 261, 262–63 (Ct. App. 1989), "has its limits," *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004), and "may not be invoked to avoid or circumvent the [General Assembly]'s exclusive method for challenging" certain matters, *Tourism Expenditure Rev. Comm. v. City of Myrtle Beach*, 403 S.C. 76, 82, 742 S.E.2d 371, 374 (2013).

"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). Interpreting "a statute is a question of law," *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007), this Court "reviews . . . de novo," *Town of Summerville v. City of N. Charleston*, 378 S.C.

107, 110, 662 S.E.2d 40, 41 (2008), "with no particular deference to the lower court," *N.Y. Times Co. v. Spartanburg Cnty. Sch. Dist. No. 7*, 374 S.C. 307, 310, 649 S.E.2d 28, 29 (2007).

For over a century, the Court has recognized "[t]he general rule is that, where a new right is created by a statute, which also prescribes the remedy or method of enforcing the right, the method prescribed by the statute is exclusive." *Bethea v. Allen*, 101 S.C. 350, 357, 85 S.E. 903, 905 (1915); *see also Daniel v. Conestee Mills*, 183 S.C. 337, 344, 191 S.E. 76, 79 (1937) ("Where a statute creates a new right and prescribes the remedy of enforcing it, the statutory remedy is exclusive."); *State ex rel. Hutchinson*, 182 S.C. 369, 374, 189 S.E. 475, 477 (1937) (stating the Court has "held that a statutory remedy to enforce a new right or liability created by the same statute is exclusive unless the statute clearly shows a contrary intention").

Unemployment benefits did not exist at all until they were statutorily created in the wake of the Great Depression. *See Faile v. S.C. Emp. Sec. Comm'n*, 267 S.C. 536, 542, 230 S.E.2d 219, 222 (1976). Because unemployment benefits are a creature of statute, a claimant can obtain those benefits only by applying for them with DEW under the statutory scheme. *See* S.C. Code Ann. § 41-35-10 ("All benefits shall be paid through employment offices, in accordance with such regulations as the department may prescribe."); S.C. Code Ann. Regs. 47-21 (explaining a "request" for DEW to determine one is an insured worker "shall be filed at the Department office").

The exclusive method for challenging DEW determinations on unemployment benefits is set forth in section 41-35-690 of the South Carolina Code. Aptly titled "[e]xclusive procedure for appeals," the statute 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).[3] And the General Assembly drove this exclusivity point home by providing that "judicial review is permitted *only after* a party claiming to be aggrieved by [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 (emphasis added).

"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." *Ward v. State*, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000) (emphasis added). "When 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.

Here, the court of appeals found Petitioners' failure to exhaust their exclusive statutory administrative remedies was fatal to their case because no exception applied. *See Patterson*, Op. No. 6055, at 35–40. Petitioners, for their part, claim they were not required to exhaust because "this declaratory judgment action was not an appeal from a determination or redetermination of [a] claimant's eligibility for benefits." Pet. at 10. But this argument misses that the General Assembly gave DEW "the exclusive right to decide those issues subject only to an appeal for judicial review of [its] decisions," *Bennett v. S.C. Dep't of Corr.*, 305 S.C. 310, 313, 408 S.E.2d 230, 232 (1991). *See* S.C. Code Ann. § 41-35-740.

Nothing in the statutes governing the administrative appeals process prevented DEW's Appeals Tribunal from addressing the issue Petitioners present here. In fact, the Appeals Tribunal

[3] 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.

had the authority to consider *all* issues affecting the denial of Petitioners' benefits. *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) (stating hearing officers can "consider *all* issues affecting the claimant's right to benefits" and "*[a]ll* issues relevant to the appeal shall be considered and passed upon" (emphasis added)).

Likewise, nothing prevented the Appellate Panel—which is separate and distinct from DEW—or the ALC from hearing the challenge either.[4] Indeed, this issue was squarely within those tribunals' authority. *See* S.C. Code Ann. § 1-23-380(5)(a)–(c) (allowing a challenge to 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").[5] While Petitioners twist DEW employee Romi Robinson's words to imply otherwise, her testimony did not and cannot contravene DEW's authority under state law. *See infra* Section III.

Nor does the Court's commentary in *Shelton v. Oscar Mayer Foods Corp.* limit any of these tribunals' authority. 325 S.C. 248, 481 S.E.2d 706 (1997). There, the Court considered "the purpose of ESC[6] hearings" to determine whether collateral estoppel applied to "findings of fact"

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[4] 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).

[5] Further, as the court of appeals found and as Petitioners admit, they "have not challenged the constitutionality of a statute or regulation." Pet. at 19; *Patterson*, Op. No. 6055, at 39. And that is the only conceivable ground on which DEW and the ALC could not rule in the administrative appeals process. *See Ward*, 343 S.C. at 19, 538 S.E.2d at 247.

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

from those hearings to bar an employer from relitigating them in an employee's subsequent wrongful discharge case. *Id.* at 251–54, 481 S.E.2d at 708–09. The Court was concerned about "ESC hearings becoming forums for employers and employees to engage in lengthy civil litigation of claims relating to an employee's discharge." *Id.* at 252, 481 S.E.2d at 708. Thus, the Court held that "findings of fact made during an ESC hearing will not be given preclusive effect in any subsequent litigation between the employer and employee." *Id.* at 251, 254, 481 S.E.2d at 707, 709. But the *Shelton* Court did not consider—and certainly did not limit—the authority of DEW's Appeals Tribunal, Appellate Panel, or the ALC to consider issues squarely within their statutory authority like the one presented here.

A case challenging a town ordinance similarly has no bearing on the General Assembly's intent to create an exclusive right and remedy for unemployment benefits. *See* Pet. at 13 (citing *Charleston Trident Homebuilders v. Town Council of Summerville*, 369 S.C. 498, 632 S.E.2d 864 (2006)). Indeed, the statutes Petitioners tiptoe past expressly give each rung on the appellate ladder the ability to rule on issues like the one Petitioners raise here. *See* S.C. Code Ann. §§ 41-35-660, -680, -690 & -740; S.C. Code Ann. § 1-23-380(5). And even Petitioners admit "the issue in this case affects a claimant's entitlement to benefits." Pet. at 13. They just want to skip all three rungs and go straight to circuit court. Aside from offering misleading statistics[7] and conclusory statements that DEW's appeals process is "not designed" to consider this issue, Pet. at 11 & 13, Petitioners do not and cannot contest the court of appeals' reading of those unambiguous statutes that shows they are incorrect as a matter of law. *See Patterson*, Op. No. 6055, at 39–40.

[7] Petitioners' statistics about how many benefit determinations DEW made during a 7-month period has no bearing on whether its administrative process was "equipped for hearing questions regarding whether DEW was required to promulgate regulations." Pet. at 12. Even so, only around 1,300 claimants appealed adverse decisions within that 7-month period, (R. p. 482), not 61,900 claimants as Petitioners suggest, Pet. at 12.

The court of appeals therefore properly held Petitioners could and should have raised this issue first in the administrative forum and exhausted their exclusive statutory remedies.[8]

II. The court of appeals properly rejected Petitioners' argument that they were excused from exhausting exclusive statutory remedies because they are challenging DEW's authority.

Petitioners next argue exhaustion was not required because they are challenging DEW's authority, and in their view, the online work search requirement is null and void. Pet. at 14–15. But that begs the question.

As putative support for this novel theory to excuse their failure to exhaust, Petitioners cite a host of inapposite cases. *See* Pet. at 14–18 (citing *Responsible Econ. Dev. v. S.C. Dep't of Health & Env't Control*, 371 S.C. 547, 641 S.E.2d 425 (2007); *Brown v. James*, 389 S.C. 41, 697 S.E.2d 604 (Ct. App. 2010); *Ex parte Allstate Ins. Co.*, 248 S.C. 550, 151 S.E.2d 849 (1966); *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 413 S.E.2d 12 (1991); *Triska v. Dep't of Health & Env't Control*, 292 S.C. 190, 355 S.E.2d 531 (1987); *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 790 S.E.2d 763 (2016); *Charleston Television, Inc. v. S.C. Budget & Control Bd.*, 301 S.C. 468, 392 S.E.2d 671 (1990); *Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (2000); *Hardy v. Francis*, 273 S.C. 677, 259 S.E.2d 115 (1979); *Murphee v. Mottel*, 267 S.C. 80, 226 S.E.2d 36 (1986); *Bazzle v. Huff*, 319 S.C. 443, 462 S.E.2d 273 (1995)). According to Petitioners, "[i]n all these cases the court

[8] Until this petition, Petitioners have not argued they did not "know to raise this issue, much less how to raise it" because they were "unrepresented" and had no "adequate time to secure counsel." Pet. at 12. Nor have they argued "DEW's interests" were not represented. *Id.* The Court should not entertain these new arguments. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("an issue cannot be raised for the first time on appeal"). Further, while Petitioners sprinkle conclusory references to "concerns" under article I, section 22 of the South Carolina Constitution in their petition, Pet. at 14 & 19, this is not a constitutional case. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691–92 (Ct. App. 2001) ("conclusory" assertion with "no supporting authority" "is insufficient to preserve the argument for review").

treated the unauthorized administrative acts as if they did not happen." Pet. at 18. But none connects the dots between the separate questions of exhaustion and the merits. Nor do they hold that a plaintiff does not have to exhaust *exclusive statutory administrative remedies* if the agency acted outside of its authority. *Cf. Ward*, 343 S.C. at 18–19, 538 S.E.2d at 247 ("When the exhaustion of remedies is statutorily mandated, as it is here, legislative intent prevails.").

Only one case mentions whether a plaintiff can be excused from exhaustion if "an agency has acted outside of its authority." *Brown*, 389 S.C. at 55, 697 S.E.2d at 611–12. But in *Brown*, the court of appeals did not explain this novel exception or state whether it could apply in the face of exclusive statutory administrative remedies. In fact, the court did not even apply it.[9] *Id.* And the case *Brown* cited as putative support for this previously unrecognized exception does not stand for that proposition. *See Responsible Econ. Dev.*, 371 S.C. 547, 641 S.E.2d 425. Thus, at best, the drive-by statement in *Brown* is dicta. *See Dennis v. S.C. Nat'l Bank*, 299 S.C. 34, 40, 382 S.E.2d 237, 240 (Ct. App. 1988) (stating dicta is "an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision," and the "general rule as to dicta . . . is particularly applicable where there is a contrary statute"). The court of appeals properly distinguished *Brown* here for these very reasons. *See Patterson*, Op. No. 6055, at 38.

Further, the court of appeals thoroughly analyzed and distinguished *Responsible Economic Development* and *Ex parte Allstate* too. *See Patterson*, Op. No. 6055, at 38–39. As stated above,

[9] Contrary to Petitioners' argument, the court of appeals in *Brown* did not apply or rely on this exception to find the plaintiff there was excused from exhaustion. It applied the futility exception. *See* 389 S.C. at 55, 697 S.E.2d at 613 (finding "a hearing after the fact would have likely proven futile."). In fact, it does not appear the plaintiff in *Brown* even raised this purported exception. *See id.* at 55, 697 S.E.2d at 611 (stating the plaintiff's argument as "exhaustion was not required because her case satisfied *one* of the exceptions to the exhaustion requirement"); *id.* at 55, 697 S.E.2d at 612 ("Brown argues she was not required to participate in a hearing after a final determination had already [because] such a pursuit would constitute a futile act.").

Responsible Economic Development has nothing to do with exhaustion or administrative remedies. *See generally* 371 S.C. 547, 641 S.E.2d 425. And while the Court in *Ex parte Allstate* may have applied a version of this exception, that case did not involve—as the court of appeals recognized—a statute mandating the exclusive administrative remedies like this case does. *See Ward*, 343 S.C. at 18, 538 S.E.2d at 247 ("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." (emphasis added)).

Finally, Petitioners' reliance on *Captain's Quarters Motor Inn*, *Triska*, *Joseph*, *Charleston Television, Inc.*, *Vulcan Materials*, *Hardy*, *Murphee*, and *Bazzle* is misplaced because none of those cases considered the purported exception to exhaustion Petitioners claim applies here. And they did not involve a specific statutory scheme granting a state agency exclusive authority to decide cases within its domain. Those context-specific cases relating to various agencies' authority are irrelevant to whether this exception could apply in the face of exclusive statutory administrative remedies. Again, the court of appeals decided this case on exhaustion grounds, not the merits. And even if this exhaustion exception could apply, to prove DEW "acted outside its authority," Petitioners would have to succeed on the merits. They cannot. *See infra* Section IV.

Because the court of appeals properly reversed the circuit court's ruling on this issue, the Court should decline to grant certiorari.

III. The court of appeals properly held the futility exception did not excuse Petitioners' failure to exhaust.

Petitioners also argue the court of appeals "impermissibly reweighed the evidence" in finding their futility argument was unsupported by the record. Pet. at 19. But the court of appeals correctly held that "the record does not support a finding that DEW took a hard-and-fast position that made an adverse ruling a certainty." *Patterson*, Op. No. 6055, at 37.

"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." *See, e.g.*, *Brown*, 389 S.C. at 54, 697 S.E.2d at 611. "Futility, however, must be demonstrated by a showing comparable to the administrative agency taking 'a hard and fast position that makes an adverse ruling a certainty.'" *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (quoting *Thetford Props. IV Ltd. P'ship v. U.S. Dep't of Hous. & Urban Dev.*, 907 F.2d 445, 450 (4th Cir. 1990)).

The problem for Petitioners is that DEW had not taken a hard-and-fast position on the issue raised here, and losing on appeal based on factual issues—like the ones they raised at the DEW office—was not guaranteed. Petitioners nevertheless contend Romi Robinson testified that "the appellate tribunal would not have considered the issue of whether DEW should have promulgated the online work search requirement by regulation." Pet. at 20. And they contend the court of appeals "impermissibly reweighed the evidence" in finding otherwise. Not so.

For one, Robinson's testimony cannot vitiate DEW's authority under state law. *See Spectre, LLC v. S.C. Dep't of Health & Env't Control*, 386 S.C. 357, 368, 688 S.E.2d 844, 850 (2010) (asserting "statements by agency employees alone may not abrogate the authority granted by statute"). Put differently, whether the Appellate Panel and the ALC had the power to determine questions of agency authority is a question of law for the Court, not a factual question on which an agency employee's testimony would control. The court of appeals cogently recognized "notwithstanding Robinson's testimony," nothing in the statute prevented DEW's "Appeal Tribunal or Appellate Panel from deciding the issue of whether DEW was required to promulgate regulations to implement the online work search requirement." *Patterson*, Op. No. 6055, at 39. "Moreover, if the Appeal Tribunal and Appellate Panel ruled against [Petitioners], the ALC could

have ruled on the issue upon review of such determinations." *Id.* (citing S.C. Code Ann. § 1-23-380(5)(a)–(c)). Petitioners cannot and do not contest these findings.

For another, Petitioners are taking liberties with Robinson's testimony. Upon questioning by counsel for Petitioners, Robinson said claimants "would certainly be able to preserve that on the record for appeal, but we would only rule on the facts of what happened." (R. p. 896). On redirect, however, she confirmed the "regulation issues and so forth being within the purview of the hearing officers and the administrative appeal process" had "never been raised to [her] knowledge." (*Id.*). So she really did not "know what would happen if it were to be raised." (*Id.*). As for the Appellate Panel's authority, moreover, Robinson said she did not "know the answer to that," which Petitioners' counsel acknowledged he understood. (R. p. 894); *cf.* 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" (emphasis added)).

Yet the circuit court relied solely on Petitioners' incomplete representation of Robinson's testimony to find DEW's Appeals Tribunal "would not resolve issues of law pertaining to the authority of SCDEW to implement the online work search requirement without first promulgating regulations." *See* (R. pp. 41–42). The statutes and Robinson's testimony do not support the circuit court's factual finding on this issue. Nor does any other evidence in the record.

What is more, Petitioners do not challenge the accuracy of the statistics the court of appeals recited showing claimants' success rate on appeal. *See Patterson*, Op. No. 6055, at 37. They just want the Court to ignore those figures. But Petitioners put at issue whether the agency had a hard-and-fast rule that would prevent a claimant from receiving benefits for failure to comply with the online work search requirement. As the court of appeals noted, "had they appealed the denial of

benefits, DEW might have excused their failures to comply with the requirement and issued their benefits for the applicable week, which would have dispensed with their claims and would not have required a resolution of the question of DEW's authority." *Patterson*, Op. No. 6055, at 39. So appellate winning percentages *were relevant* to show DEW was not blindly enforcing the online work search requirement.

Put it all together, and this is a far cry from a hard-and-fast position that made losing a certainty at each level of review. The court of appeals did not err in considering the relevant statutes and the testimony as a whole—rather than a misrepresentation of one statement—and finding exhaustion would not be futile. To the contrary, DEW could not have taken a hard-and-fast position on the agency authority issue because no claimant ever raised it until Petitioners filed this lawsuit. (R. p. 896). Still, this is not a factual question. And because the "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).

The circuit court abused its discretion in finding DEW's administrative process could not address the issue Petitioners raised here. *See Law*, 368 S.C. at 438, 629 S.E.2d at 650 ("An abuse of discretion occurs where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." (quoting *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990))). It was controlled by an error of law because the relevant statutes governing the administrative process unambiguously establish that the Appeals Tribunal, the Appellate Panel, and the ALC all could have considered the issue. And it was without evidentiary support because Robinson, in fact, did not cede DEW's appellate authority.

Accordingly, the court of appeals properly reversed the circuit court's finding excusing Petitioners' failure to pursue their exclusive statutory remedies based on the futility exception.

IV. In all events, DEW was not required to promulgate regulations when the self-executing Proviso specified its responsibilities.

Petitioners fare no better on the merits. In the face of an unambiguous mandate from the General Assembly, DEW had to implement the online work search requirement. And because the Proviso was self-executing, no regulations were required or needed to implement it.

"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.*, 371 S.C. at 553, 641 S.E.2d at 428. "[A] 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.*, 306 S.C. at 490, 413 S.E.2d at 14.

"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*, 417 S.C. at 465, 790 S.E.2d at 778 (Kittredge, J., concurring). After all, "'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).

Courts apply the same canons of statutory construction when interpreting a proviso. *See Richland Cnty. Sch. Dist. Two v. S.C. Dep't of Educ.*, 335 S.C. 491, 496, 517 S.E.2d 444, 447 (Ct. App. 1999). "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*, 312 S.C. at 447, 441 S.E.2d at 321.

"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 Cnty. 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*, 386 S.C. at 372, 688 S.E.2d at 852).

Against this backdrop, for four fiscal years, the General Assembly mandated that DEW "*shall*" spend 30% "of the funds appropriated through the contingency assessment funds collected on taxable wages paid by employers . . . on *enforcement* of Section 41-35-110(3) and Section 41-35-120(5)" 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 Petitioners, DEW was required to promulgate regulations to enforce the online work search requirement in the Proviso.[10] Not so. The Proviso expressly incorporated the able to work, available for work, and actively seeking work requirements in section 41-35-110(3). *Cf. Rivas*, 342 S.C. at 109, 536 S.E.2d at 375. It 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). It also expressly incorporated the good-cause exception for failure to comply with the statutory requirements by referencing section 41-35-120(5). *See* S.C. Code Ann. § 41-35-120(5)(a). Thus, no regulations were required to enforce the Proviso. *See Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 475, 636 S.E.2d 598, 610 (2006) (finding it "absurd" to require "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 and its intention of enforcing it"), *overruled on other grounds by Joseph*, 417 S.C. 436, 790 S.E.2d 763; *State ex rel. McLeod v. Mills*, 256 S.C. 21, 27, 180 S.E.2d 638, 641 (1971) ("An appropriation act, though generally in duration temporary, has equal force and effect as a permanent statute for the time being.").

[10] Although Petitioners' primary argument is that DEW "was acting outside its authority," they refer to the Proviso only once—in the statement of the case—in their petition. Pet. at 5.

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. 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," this Court has found "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. 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 in a specific manner. Nor was this a one-time thing—the General Assembly included the Proviso in the budget for four straight years. *Cf. 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 reenactment of a statute with knowledge of the administrative interpretation thereof is a strong indication of legislative approval of that interpretation).

The Proviso was more than simply "an appropriation of funds from a particular tax to be spent on enforcement." (R. p. 567). 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. for four years.

To scuttle this fact, Petitioners argued section 41-29-110 of the South Carolina Code and the Administrative Procedures Act (the APA) required DEW to promulgate regulations regarding the denial of unemployment benefits. To be sure, 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 any focus on the word "must" is misplaced. S.C. Code Ann. § 41-29-110. The statute also includes the word "necessary." S.C. Code Ann. § 41-29-110. So it is "a mix of mandate and discretion." *Doe v. Keel*, 440 S.C. 427, 433, 892 S.E.2d 282, 285 (2023).

Because DEW followed the General Assembly's unambiguous directions in a mandatory budget proviso, regulations were not "necessary," S.C. Code Ann. § 41-29-110, for DEW to carry out its duties.[11] *See Edwards*, 383 S.C. at 90, 678 S.E.2d at 416 (stating the General Assembly "has the right to specify the conditions under which the appropriated monies shall be spent"); (R. p. 521) ("No new procedures were necessary . . . to enforce the online job search requirement."). When reading section 41-29-110 as a whole, Petitioners' construction therefore cannot hold water. *Cf. Senate ex rel. Leatherman*, 425 S.C. at 322, 821 S.E.2d at 912 (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)); *Bryant v. City of Charleston*, 295 S.C. 408, 411, 368 S.E.2d 899, 900–01 (1988) ("words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation").

[11] To that end, the President of the Senate and the Speaker of the House filed an amicus brief with the court of appeals, arguing "the General Assembly did not intend for the Proviso to be contingent upon" DEW "promulgating regulations," and to interpret it that way would lead to an absurd result. Gen. Assemb. Amicus Br., App. No. 2019-000599, at 8, 9 (available on C-Track).

The APA likewise does not save the day. 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." 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 this 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*, 370 S.C. at 491, 636 S.E.2d at 618 (Toal, C.J., dissenting)).

No matter how many times Petitioners call the online work search requirement a "policy," Pet. at 5–7, 10, 12, 14, 15, it was not an agency policy or a binding norm—DEW was following the unmistakable directives of the General Assembly expressed in a duly enacted proviso. *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, and the circuit court erred in finding otherwise.

Under Petitioners' reading, DEW needed to go through a nearly nine-month process of promulgating a regulation before implementing the proviso *each* fiscal year, leaving DEW only three months a year to enforce the online work search requirement. Yet the General Assembly enacted the Proviso in four successive budgets to give DEW a mechanism for verifying claimants' work searches before awarding unemployment compensation benefits. It was an accountability

measure designed to ensure DEW paid only substantiated claims. Retroactively stripping DEW of its enforcement authority and requiring payment of unsubstantiated claims would directly thwart that legislative intent. *Cf. 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.").

CONCLUSION

The Court should deny certiorari. In the alternative, the Court should dispense with further briefing and summarily affirm the court of appeals.

Respectfully submitted,

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