

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Apr 14 2021

SC Court of Appeals

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

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

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

APPELLANTS,

v.

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

RESPONDENTS.

**NOTICE OF MOTION AND MOTION TO EXPEDITE HEARING ON
PETITION FOR A WRIT OF SUPERSEDEAS**

TO: APPELLEES GOVERNOR HENRY D. MCMASTER AND EXECUTIVE
DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF ADMINISTRATION
MARCIA S. ADAMS, AND THEIR ATTORNEYS

YOU WILL PLEASE TAKE NOTICE that Appellants move before this Court to expedite the hearing on their Petition for a Writ of Supersedeas, pursuant to Rule 263(b), SCACR. The supersedeas seeks to enjoin Defendants Governor Henry D. McMaster and Executive Director Marcia S. Adams, and anyone on their behalf from enforcing the provision in Executive Order 2021-12 (Mar. 5, 2021) requiring non-essential employees to return to the workplace without reasonable accommodations.

As explained in Appellants' Memorandum of Law in Support of the Motion to Expedite Hearing on Petition for a Writ of Supersedeas, filed contemporaneously with this Court, as well as in the Petition itself, Appellants will suffer the very irreparable harms that their suit was intended to prevent—and with the passage of time, their case will become essentially unreviewable—unless the Court enjoins the challenged provision.

Accordingly, Appellants, through their undersigned attorneys, hereby move to expedite a hearing on the Petition for a Writ of Supersedeas.

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*Application for admission *pro hac vice*
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Attorneys for Plaintiffs

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Charleston, South Carolina
Date: April 14, 2021

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RESPONDENTS.

I hereby certify that on April 14, 2021 I served a copy of the Notice of Motion and
Motion to Expedite Appeal to the following:

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

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

- VIA CERTIFIED MAIL
- VIA FIRST CLASS MAIL

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

Nancy Bloodgood

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**APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO
EXPEDITE HEARING ON PETITION FOR A WRIT OF SUPERSEDEAS**

On March 5, 2021, after ordering non-essential state employees to work remotely for a year, South Carolina Governor Henry McMaster suddenly reversed course, ordering state agencies to “immediately expedite” the return of non-essential state employees to in-person work. Executive Order 2021-12 (Mar. 5, 2021) (“Return in Person Order”). The Return in Person Order, and the Department of Administration’s memorandum implementing it, require employees with caretaking responsibilities and certain employees with disabilities to return to their offices the week of April 5, 2021, at the latest, regardless of the risk to their health or their ability to find appropriate care coverage.

The COVID-19 pandemic—the basis for the Governor’s emergency authority—is an ongoing threat to the health and wellbeing of South Carolinians, with health authorities continuing to recommend working remotely, as non-essential employees have been doing for the past year. Appellants Deborah Mihal and members of the ACLU of South Carolina (“ACLU of SC”) are already facing irreparable harms if required to return to work in person immediately. The Order would force Mihal to leave her nine-year-old son alone, without adult supervision, for hours, several days a week, creating the risk she could be prosecuted or have her son removed from her care for neglect. She has been unable to reenroll him in in-person learning at his school, and has been unable to find alternative childcare despite diligent efforts—challenges that are not unique to her, as remote schooling continues in many schools across South Carolina and the availability of childcare has dropped during the pandemic. Even if she could find childcare, hiring an in-home caregiver or placing her son in care outside the house, and returning to the office herself, would increase her and her family’s chance of exposure to COVID-19.

Members of the ACLU of SC are likewise unable to identify appropriate care arrangements for their children and have been denied individualized requests to continue to work remotely until they are vaccinated, putting their own and their family’s health at risk. And they are not alone—roughly 24,000 non-essential state employees have been performing their public duties safely, effectively, and remotely for more than a full year, but are now being called on to return to the office, without proper accommodations in place.

On April 6, 2021, Appellants filed their Complaint seeking declaratory and injunctive relief against the Return in Person Order on the basis that it exceeded

Respondents' statutory authority and improperly imposed unlawful burdens on non-essential state employees in violation of Art. I, § 8 of the South Carolina Constitution and is *ultra vires*. Following additional briefing by the parties, the lower court denied the Motion for a Temporary Restraining Order and Preliminary Injunction on April 9, without giving Appellants the opportunity for a hearing to submit additional evidence. Without any injunction in place, these harms continue unabated, demonstrating the need for expedited appellate review.

Further, the conditions that generate the harms Mihal and members of the ACLU of SC currently face are necessarily time-limited, putting this case in danger of being mooted before consideration of the appeal and the important constitutional questions it presents. As more schools return to additional days of in-person learning, more people are able to get vaccinated, and the dangers of COVID-19 abate, the dangers of physically reporting to the workplace will diminish. But by that time, Appellants will have already suffered these irreparable harms they seek to prevent—and the risks they and their families currently face are beyond cavil.

Expedited consideration is merited where, as here, there is a “great public interest in finally determining this matter.” *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 300, 534 S.E.2d 270, 271 (2000), *abrogated on other grounds by Byrd v. City of Hartsville*, 365 S.C. 650, 659, 620 S.E.2d 76, 81 (2005). Just as in *Westside*, here there is a short timeline before the harms of the challenged policy will impact Appellants. *See also George v. Mun. Election Comm’n of City of Charleston*, 335 S.C. 182, 184 n.1, 516 S.E.2d 206, 207 n.1 (1999) (granting the parties’ request to expedite the appeal because of the urgency of deciding an election matter during an election year). Relatedly, courts

expedite appellate procedures where delay would “adversely impact” the ability of the court to ensure a fair hearing on the case. *Matter of Decker*, 322 S.C. 212, 214, 471 S.E.2d 459, 461 (1995).

In this case, the health and safety of state employees and their dependents continue to be imperiled with each day the Return in Person Order is allowed to continue. And there is a real risk that the constitutional question raised by this case as to the limits of the Governor’s authority to act during a public health emergency will be mooted by further delay. Thus, an expedited hearing on the Petition for a Writ of Supersedeas is necessary to serve the public interest.

For the foregoing reasons, Appellants respectfully request this Court to grant their motion to expedite a hearing on the Petition for a Writ of Supersedeas.

Respectfully submitted,

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***Application for admission pro hac
vice forthcoming*

Attorneys for Plaintiffs

Charleston, South Carolina
Date: April 14, 2021