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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-000883

Sheena Brannon, Shane Stencil, Tina Sullivan, and Brandon Beaty

Appellants

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce

Respondents.

FINAL BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

I. Did the Circuit Court err in finding that S.C. Code Ann. § 41-29-230 does not obligate Respondents to make Pandemic Unemployment Benefits available to the citizens of South Carolina?

II. Did the Circuit Court err in finding that Appellants do not have a private right of action to challenge Respondents' early withdrawal from Pandemic Unemployment Benefits?

III. Did the Circuit Court err in finding that Respondents have discretion to determine what constitutes an "advantage" under S.C. Code Ann. § 41-29-230?

STATEMENT OF THE CASE

Appellants filed this action on July 28, 2021, seeking declaratory and injunctive relief or, in the alternative, a writ of mandamus directing Respondents to reinstate South Carolina's participation in three unemployment benefit programs that were part of the Congressional response to the COVID-19 pandemic. Appellants moved for a preliminary injunction the same day they filed their complaint. Respondents filed a brief in opposition to Appellants' motion and moved to dismiss Appellants' complaint on August 6, 2021.[1] The Circuit Court heard Appellants' motion for preliminary injunction and Respondents' motion to dismiss on August 11, 2021.

Appellants argued that Respondents' actions in prematurely withdrawing the State from these unemployment benefit programs before they expired on September 6, 2021, was in violation of S.C. Code Ann. § 41-29-230(1) which requires Respondent South Carolina Department of Employment and Workforce to participate in the programs at issue. Respondents chiefly argued that Section 41-29-230(1) does not require Respondents to participate in the benefit programs at issue, that Section 41-29-230(1) does not limit the Governor's discretionary authority to withdraw from these programs, and that Appellants' action was barred by Laches.

The Circuit Court heard Appellants' motion for preliminary injunction and Respondents' motion to dismiss on August 11, 2021. Shortly after the hearing ended, the Circuit Court indicated

[1] Respondents also moved to strike certifications that Appellants filed in support of their motion for preliminary injunction and to require that Appellants identify themselves. These certifications identified Appellants by first and last initial only. After an August 11th hearing, the Circuit Court denied Respondents' motion as moot in light of the fact that the Court had granted Respondents' motion to dismiss. But the Court also indicated that it would have granted the motion if it were not moot. Appellants have not appealed this ruling and have identified themselves in this appeal to avoid further dispute on this question.

by memorandum to the parties that it would deny Appellants' motion for preliminary injunction and grant Respondents' motion to dismiss. The Court entered a formal order to this effect on Friday, August 13, 2021, which was served on the parties' counsel electronically that day. Appellants served their notice of appeal on Monday, August 16, 2021.

STATEMENT OF FACTS

Congress Provides Pandemic Unemployment Benefits to Alleviate the Economic Hardship Caused by the COVID-19 Pandemic

To alleviate some of the economic hardship that the COVID-19 pandemic caused, Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. Signed into law on March 27, 2020, the CARES Act provides for a variety of pandemic relief programs including several types of enhanced unemployment benefits. (collectively "Pandemic Unemployment Benefits"). 15 U.S.C. § 9001 *et seq*.

Pandemic Unemployment Assistance ("PUA") is one type of Pandemic Unemployment Benefit and is available to workers who would not otherwise be eligible for regular Unemployment Insurance ("UI") benefits including the self-employed, underemployed, independent contractors, and others whose unavailability or inability to work was caused by COVID-19. 15 U.S.C. § 9021. Pandemic Emergency Unemployment Compensation ("PEUC") is a second type of Pandemic Unemployment Benefit and provides additional weeks of benefits for workers who have exhausted their regular UI benefits. 15 U.S.C. § 9025. Federal Pandemic Unemployment Compensation ("FPUC") is a third type of Pandemic Unemployment Benefit which increases the weekly benefit amount available to an individual who receives any other type of unemployment benefit, including

regular UI, PUA, or PEUC. FPUC increased benefits by $600 per week from March 27, 2020, through July 31, 2020. 15 U.S.C. § 9023. From July 31, 2020, to December 27, 2020, FPUC benefits lapsed. They were reinstated beginning December 27, 2020, at $300 per week and are currently scheduled to continue through September 6, 2021. Continued Assistance for Unemployed Workers Act of 2020 ("CAUWA"). Pub. L. No. 116-260, § 200–01, 206; American Rescue Plan Act of 2021 ("ARPA"). Pub. L. No. 117-2, § 9013 (March 11, 2021).

Funds have been appropriated by congress for Pandemic Unemployment Benefits and are available in the Unemployment Trust Fund to be distributed to eligible South Carolinians through September 6, 2021. ARPA §§ 9011, 9013, and 9016.[2] The costs of Pandemic Unemployment Benefits and the costs to states of administering these programs, including startup costs and ongoing administration costs, are 100% federally funded. 15 U.S.C. §§ 9021(f)(2), 9023(d)(1)(A), 9025(d)(2)(A).[3] Pandemic Unemployment Benefits and administration costs are funded through Sections 901, 904, and 905 of the Social Security Act, 42 U.S.C. §§ 1101(a), 1104(a), and 1105(a). 15 U.S.C. §§ 9021(g), 9025(d).

Pandemic Unemployment Benefits and regular UI benefits both operate under the same Social Security Act ("SSA") infrastructure. The state agency that processes claims, determines eligibility, and pays regular UI benefits, the South Carolina Department of Employment and Workforce ("DEW") in this case, does the same for the Pandemic Unemployment Benefits. The features of state law which apply to key aspects of regular UI, and which are mandated by the SSA

[2] The CARES Act provided for three additional types of enhanced unemployment benefits which are not at issue in this case.

– like appeal procedures, overpayments, fraud determinations, and work availability or search requirements – also apply to the Pandemic Unemployment Benefits. *See, e.g.*, 15 U.S.C. §§ 9021(c)(5)(B)(ii), 9023(f)(4), 9025(a)(4)(B), (e)(4).

Respondents Prematurely End South Carolina's Participation in Pandemic Unemployment Benefits.

On May 6, 2021, Director Ellzey issued a memorandum to Governor McMaster purporting to assess the impact should South Carolina decide to "opt-out" of Pandemic Unemployment Benefits effective June 27, 2021, rather than participate through the currently scheduled end of those programs in early September 2021. R. p. 142. In his memorandum, Director Ellzey estimated that such action would result in the loss of the following amounts of federal funding between June 27, 2021, and September 4, 2021:

Program	**Anticipated 10-Week Funding Loss (June 27, 2021 – September 4, 2021)**
FPUC	$370.0 million
PEUC	$146.0 million
PUA	$62.0 million
Total	**$578 million**[4]

[4] DEW estimates that an additional $7.3 million in benefits will be lost during this time under the three Pandemic UI Programs that are not at issue in this case. R. p. 142.

Director Ellzey estimated that the total loss of federal funds would be between $600 million and $650 million, or around $63 million for each week of lost program time. R. p. 142. Other sources indicate that closer to $900 million in federal funds would be lost because of Respondents' actions.[5] The same day Director Ellzey issued his memorandum, Governor McMaster directed DEW to terminate South Carolina's participation in the Pandemic Unemployment Benefits effective June 30, 2021. R. p. 144.[6]

The effects of Respondents' actions on vulnerable South Carolinians were swift and dramatic. In the first week after Respondents opted out of Pandemic Unemployment Benefits, the number of South Carolinians receiving unemployment benefits of any kind fell by more 71,000, a reduction of more than 82%.[7]

	June 27 – July 3	**July 4 – July 10**	**Change**
Individuals receiving Unemployment Benefits of any kind	87,018	15,414	(71,604)

[5] Stettner, Andrew, *Fact Sheet: What's at Stake As States Cancel Federal Unemployment Benefits*, The Century Foundation, May 13, 2021 (available at https://tcf.org/content/commentary/fact-sheet-whats-stake-states-cancel-federal-unemployment-benefits/).
[6] Because the last full week of unemployment for which benefits could be claimed before June 30, 2021 ended on June 26, 2021, Respondents' decision effectively ended benefits on June 26th.
[7] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021, for June 27-July 3 data and accessed July 15, 2021, for July 4-July 10 data)

South Carolinians received over $39,000,000 less in Pandemic Unemployment Benefits between July 4, 2021, and July 10, 2021, than they did the week before Respondents' decision to opt out of those benefits took effect.[8] This weekly loss will most likely increase as Respondents' decision takes full effect and DEW estimates an average loss of approximately $63 million per week. R. p. 142.

	June 27 – July 3	**July 4 – July 10**	**Change**
FPUC Benefits Paid	$29,311,525.00	$3,479,806.00	($25,831,719.00)
PEUC Benefits Paid	$10,583,318.00	$1,062,149.00	($9,521,169.00)
PUA Benefits Paid	$4,276,299.00	$445,028.00	($3,831,271.00)
Total	**$44,171,142.00**	**$4,986,983**	**($39,184,159.00)**

While Respondents' decision to opt out of Pandemic Unemployment Benefits has taken effect, that action is revocable. On July 12, 2021, the United States Department of Labor ("DOL") issued guidance to state workforce agencies which clarified that "[a]ny state that has provided notice to [DOL] of its intent to terminate any of the Pandemic Unemployment Benefits prior to the

[8] https://www.dew.sc.gov/data-and-statistics/data-dashboard (accessed July 14, 2021, for June 27-July 3 data and accessed July 15, 2021, for July 4-July 10 data)

September 6, 2021, end date may reinstitute participation in any or all programs it previously indicated it would be terminating." R. p. 152.

DOL's July 12 guidance indicates that if the date on which a state has indicated it will terminate participation in Pandemic Unemployment Benefit programs has passed, as it has in South Carolina, those programs may still be restarted, but the state may need to enter into a new agreement with DOL to reinstitute operations. Doing so may result in a lapse in FPUC and PEUC benefits because the new agreement would become effective the week of unemployment after that agreement is signed. R. p. 152. Thus, every week that passes without an agreement between DEW and DOL to administer Pandemic Unemployment Benefits may result in the permanent loss of tens of millions in federal unemployment benefits for South Carolinians unemployed through no fault of their own, including Appellants.[9] DOL has indicated that PUA benefits will not lapse if a state enters into a new agreement to administer these benefits because the state would be required to provide individuals receiving PUA an opportunity to certify for the missing weeks. R. p. 152.

Tens of thousands of South Carolina families have faced, and continue to face, significant hardships because of Respondents' actions. Appellants' stories provide a few examples of these hardships, which include the risk of homelessness, loss of utility service, food insecurity, and lack of needed medical treatment.

[9] It appears that the state of Indiana has been able to reinstate all Pandemic Unemployment Benefits retroactively after that state's governor prematurely withdrew from those programs and his withdrawal was declared unlawful under a statute very similar to our Section 41-29-230(1). *See* R. p. 464. However, DOL has not issued guidance which indicates that this result would be replicable or whether it is permanent. Thus, the possibility of permanent benefit loss remains.

Appellants filed this action on July 28, 2021, in the Court of Common Pleas for Richland County as *S.B. v. McMaster*, Case No. 2021-CP-40-03774. R. p. 17. Appellants moved for a preliminary injunction the same day. R. p. 155. Respondents moved to dismiss on August 6, 2021. R. p. 224.[10] By order dated August, 13, 2021, the Circuit Court denied Appellants' motion for preliminary injunction and granted Respondents' motion to dismiss with prejudice finding 1) that Appellants do not have a cause of action to challenge Respondents' early withdrawal from Pandemic Unemployment Benefits, 2) that Section 41-29-230(1) does not obligate Respondents to make Pandemic Unemployment Benefits available to the citizens of South Carolina, and 3) Respondents have discretion to determine what is an "advantage" under Section 41-29-230(1). R. p. 2. Appellants filed and served their notice of appeal on August 16, 2021. R. p. 398. Appellants moved for emergency review and expedited certification to this Court pursuant to Rule 204(b), SCACR on August 16, 2021. R. p. 414. On August 17, 2021, the South Carolina Court of Appeals entered an order transferring this case to this Court. R. p. 13. That same day, Respondents filed a return to Appellants' motion for expedited review. R. p. 467. On August 19, 2021, this Court entered an order granting Appellants' motion to certify and request for expedited consideration. R. p. 14.

[10] Respondents also moved to strike Appellants' certifications, which had been filed identifying Appellants by initials only, or required that Appellants publicly identify themselves. Appellants provided Respondents with unredacted certifications, and the Circuit Court subsequently denied Respondents' motion as moot because the Court granted Respondents' motion to dismiss. However, the Circuit Court indicated that it would have granted Respondent's motion to require Appellants to identify themselves had it not been rendered moot. As noted above, Appellants have not appealed this ruling and have identified themselves in this appeal.

STANDARD OF REVIEW

The questions presented in this case are subject to *de novo* review. "An order granting or denying an injunction is reviewed for abuse of discretion." *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018). "An abuse of discretion arises where the trial court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support." *Charleston Cty. Sch. Dist. v. Charleston Cty. Election Comm'n*, 336 S.C. 174, 179, 519 S.E.2d 567, 570 (1999) (citing *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). "Determining the proper interpretation of a statute is a question of law, and this 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)

ARGUMENT

I. The Circuit Court erred in finding that S.C. Code Ann. § 41-29-230 does not obligate Respondents to make Pandemic Unemployment Benefits available to the citizens of South Carolina.

The Circuit Court found that Pandemic Unemployment Benefits are not "advantages available under the provisions of the Social Security Act that relate to unemployment compensation" and, as a result, Section 41-29-230 does not impose any obligation on Respondents to make these benefits available to South Carolinians. R. pp. 5-7. This finding was erroneous for the reasons that follow.

The Court's rationale is based on the fact that Pandemic Unemployment Benefits were enacted under provisions of the CARES Act rather than as amendments to the Social Security Act

("SSA"). R. pp. 5-7. However, Section 41-29-230 does not require that benefits be enacted as amendments to the SSA in order for DEW to be obligated to secure them. Rather, benefits need only be "available under the provisions of the [SSA]" to be covered by Section 41-29-230.

The relevant statute provides that

> In the administration of Chapters 27 through 41 of this title, **the department must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters, and act**, through the promulgation of appropriate rules, regulations, administrative methods and standards, **as necessary to secure to this State and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation**, the Federal Unemployment Tax Act, the Wagner-Peyser Act, and the Federal-State Extended Unemployment Compensation Act of 1970.

S.C. Code Ann. § 41-29-230(1) (emphasis added). As an initial matter, because Section 41-29-230 is social legislation, it should be construed to provide protection to as many employees as possible. *C.f. Stone Manufacturing Co. v. South Carolina Employment Security Commission*, 219 S.C. 239, 64 S.E. (2d) 644 (1951) (referring to the Employment Security Law, the predecessor of the statutory scheme at issue in this case).

Contrary to the Circuit Court's rationale, nothing in Section 41-29-230 requires that an "advantage" be enacted by amendment to the Social Security Act in order for it to be "available under the provisions of the [SSA]."[11] The Circuit Court's interpretation reads language into the statute that is not there.

[11] Section 41-29-230(1) also requires that the advantage "relate to unemployment compensation." It appears to be undisputed that Pandemic Unemployment Benefits meet this criterion.

Further, Pandemic Unemployment Benefits are "available under the provisions of the [SSA]" and would not be available but for those provisions. Interpreting this language breaks down into two questions: (1) what does "available" mean, and (2) what does it mean for benefits to be available under the provisions of the SSA? "Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." *Anderson v. South Carolina Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012). Answering the first question is fairly simple. "Available" means "present or ready for immediate use."[12] The second question is whether the availability of Pandemic Unemployment Benefits is pursuant to the provisions of the SSA. Answering this question requires a look into what the SSA does.

Among other things, the SSA establishes the Unemployment Trust Fund, 42 U.S.C. § 1104, and two accounts within that Fund: the employment security administration account and extended unemployment compensation account, 42 U.S.C. §§ 1101 and 1105, respectively. Each of the Pandemic Unemployment Benefits is funded through one of these accounts. PUA benefits are funded through the extended unemployment compensation account of the Unemployment Trust Fund. 15 U.S.C. § 9021(g)(1)(A). Any costs that states incur in the administration of PUA benefits are funded through the employment security administration account of the Unemployment Trust Fund. 15 U.S.C. § 9021(g)(2)(A). PEUC benefits and their administration costs are likewise funded through the extended unemployment compensation and employment security administration accounts of the Unemployment Trust Fund, respectively. 15 U.S.C. §

[12] https://www.merriam-webster.com/dictionary/available

9025(d)(1)(A) (PEUC benefits); 15 U.S.C. § 9025(d)(2)(A) (PEUC administration costs). FPUC benefits are included in the weekly benefit amount for both the PUA and PEUC programs and, as a result, are funded through the extended unemployment compensation account just like those benefits. 15 U.S.C. § 9021(d)(1)(A) (defining PUA amount of assistance to include FPUC); 15 U.S.C. § 9025(a)(4) (same for PEUC). In short, the money to pay Pandemic Unemployment Benefits to claimants and the money to pay the costs that states incur in administering these benefits is in accounts created by the SSA. This money is available, that is "present and ready for immediate use." because of, and only because of, the provisions of the SSA.

In support of its conclusion that Pandemic Unemployment Benefits are not available under the provisions of the SSA, the Circuit Court notes that "the Social Security Act does not provide any unemployment benefits (*i.e.* a check) to any individual claimant." R. p. 6. This is true, but irrelevant. Funding for Pandemic Unemployment Benefits is provided either as an advance payment to States, or by way of reimbursement to the States, as determined by the United States Secretary of Labor. 15 U.S.C. § 9021(f)(3) (PUA), 15 U.S.C. § 9023(d)(1)(B) (FPUC), 15 U.S.C. § 9025(c)(3) (PEUC). Ultimately, benefits are paid by the state to individual claimants. But these benefits are still available under the provisions of the SSA because they are funded, administered, and governed by the provisions of the SSA and would not be present or ready for immediate use without these provisions. The fact that the state ultimately cuts the check to an individual claimant does not change this fact.

Further, the provisions of the SSA have more to do with Pandemic Unemployment Benefits than just creating the accounts where the funds for those benefits are placed. Pandemic

Unemployment Benefits, like regular UI benefits, are governed by other provisions of the SSA. The state agency that processes claims, determines eligibility, and pays regular UI benefits, DEW in this case, does the same for the Pandemic Unemployment Benefits. The features of state law which apply to key aspects of regular UI and which are mandated by the SSA – like appeal procedures, overpayments, fraud determinations, and work availability or search requirements – also apply to the Pandemic Unemployment Benefits. *See, e.g.*, 15 U.S.C. §§ 9021(c)(5)(B)(ii), 9023(f)(4), 9025(a)(4)(B), (e)(4).

The Circuit Court's conclusion seems to presume that Pandemic Unemployment Benefits are either a creature of the CARES Act or of the SSA, but not both. But this conclusion presumes that Section 41-29-230 makes a distinction based on what legislative mechanism Congress used to enact Pandemic Unemployment Benefits. It does not. Section 41-29-230 simply requires that an advantage be present or ready for immediate use under the provisions of the SSA. While Congress chose to enact Pandemic Unemployment Benefits through the vehicle of the CARES Act, it chose to fund, administer, and govern those benefits through the provisions of the SSA. Those benefits are available, and would not be available but for, the provisions of the SSA. As a result, the Circuit Court erred in finding that Respondents were not obligated to make Pandemic Unemployment Benefits available to the citizens of South Carolina.

II. The Circuit Court erred in finding that Appellants do not have a private right of action to challenge Respondents early withdrawal from Pandemic Unemployment Benefits.

The Circuit Court found that Appellants "cannot bring any cause of action here." R. p. 4. It relied on two theories to reach that conclusion. First, the Circuit Court relied on S.C. Code Ann. § 41-29-25(D) for the proposition that "the General Assembly has specifically prohibited such an action against Director Ellzey." R. p. 4. Second, the Circuit Court found that S.C. Code Ann. § 41-29-230 does not create a private cause of action. R. p. 4-5. The Circuit Court's conclusion was in error for the following reasons.

First, Section 41-29-25 simply spells out the general obligations of the Director of DEW including the obligation of good faith and reasonable care. That Section provides that "[n]othing in **this section** gives rise to a cause of action against the executive director or any decision made by the executive director concerning departmental operations or development." S.C. Code Ann. § 41-29-25(D) (emphasis added). Thus, by its plain terms, Section 41-29-25 does not create a cause of action. But neither does it bar an action against the Director based on obligations created elsewhere. Appellants brought this action under the Uniform Declaratory Judgments Act seeking to enforce obligations imposed by Section 41-29-230. Section 41-29-25 simply does not speak to Appellants' claims. To read the more general Section 41-29-25 to bar Appellants' action to enforce more specific obligations under Section 41-29-230 would both read words into the statute, and violate the well-established canon of statutory construction that a statute dealing with an issue (here the obligations of Director Ellzey) in general terms will give way to a statute that addresses that issue in more specific terms (the obligations of DEW to make specific benefits available for South Carolinians). *See e.g. Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010) ("Furthermore, '[w]here there is one statute addressing an issue in general terms and another statute dealing 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.'").

Second, it is not necessary for Section 41-29-230 to create, expressly or implicitly, a private cause of action for Appellants to be entitled to a declaratory judgment. Rather than an express or implied private right of action, all the Uniform Declaratory Judgments Act requires is that the party seeking the judgment demonstrate a justiciable controversy. *Brown v. Wingard*, 285 S.C. 478, 479, 330 S.E.2d 301, 302 (1985). "A justiciable controversy is a real and substantial 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 South Carolina Uniform Declaratory Judgments Act is remedial in nature and is to be liberally construed and administered. S.C. Code Ann. § 15-53-130. "Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Id*.

This Court has clearly held that a private cause of action is not a prerequisite to a declaratory judgment. In *Linder v. Ins. Claims Consultants, Inc.* this Court issued a declaratory judgment concerning whether certain conduct was the unauthorized practice of law while expressly holding that "there is no private right of action for the unauthorized practice of law." 348 S.C. 477, 496, 560 S.E.2d 612, 623 (2002). Further, South Carolina declaratory judgment jurisprudence is replete with cases granting declaratory relief where no private cause of action is identified. *See e.g. Cornelius v. Oconee Cty.*, 369 S.C. 531, 633 S.E.2d 492 (2006) (declaring that a county could not fund sewer expansion using certain tax revenue); *Richland Cty.*, 422 S.C. 292,

811 S.E.2d 758 (the S.C. Dep't of Revenue could not withhold penny tax funds from a county); *Adams v. McMaster*, 432 S.C. 225, 851 S.E.2d 703 (2020) (Governor could not allocate CARES Act funds for the direct benefit of private educational institutions). Thus, an independent private cause of action is not a prerequisite to Appellants' entitlement to a declaratory judgment.

This case presents a justiciable controversy and declaratory relief is appropriate. There is nothing contingent, hypothetical, or abstract about the controversy here. Appellants have suffered, and will continue to suffer, the loss of benefits which Respondents have caused DEW to forfeit in violation of its statutory obligations as explained herein. Thus, a real and substantial controversy exists between the parties which a declaratory judgment will resolve.

III. The Circuit Court erred in finding that Respondents have discretion to determine what constitutes an "advantage" under S.C. Code Ann. § 41-29-230.

The Circuit Court found that, even if Section 41-29-230 applied to Pandemic Unemployment Benefits, it created no obligation on the part of Respondents to accept them because Respondents have discretion in determining whether those benefits constitute an "advantage" to the state and its citizens. R. p. 7. This was error for the reasons that follow.

First, Section 41-29-230 uses mandatory language rather than language which would confer discretion. It provides that DEW "must" take certain actions in order to secure all advantages available under the provisions of the SSA that relate to unemployment compensation. "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." *Collins v. Doe*, 352 S.C. 462, 470, 574

S.E.2d 739, 743 (2002). In contrast, use of permissive language like "may" typically confers discretion. *See e.g. Robertson v. State*, 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1981) ("Ordinarily, 'may' signifies permission and generally means the action spoken of is optional or discretionary.")

Had the General Assembly intended to permit Respondents to exercise discretion in determining what constitutes an advantage, it could have done so through the use of permissive language. It did not. And the Circuit Court's finding that Section 41-29-230 conveys such discretion reads its mandatory language out of existence. Its reading is tantamount to finding that the statute says, "you must, but only if you decide to." Such a reading is inconsistent with the canon of statutory construction which provides "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) (citing *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). Similarly, the Circuit Court's interpretation of Section 41-29-230 makes all of the language that follows "advantages" in that statute superfluous as well. If the General Assembly intended "advantages" to confer such broad discretion on Respondents, there would be no need to direct DEW to secure benefits under the listed statutes.

Second, the Circuit Court found that Section 41-29-230 still serves a logical purpose even if it confers broad discretion on Respondents to determine what advantages to seek because "it ensures DEW enacts the necessary rules and regulations for the State to obtain administrative funding under the Social Security Act and other enumerated federal statutes." R. p. 7. However, if one accepts that Section 41-29-230 grants Respondents broad discretion to determine what constitutes an "advantage," the statute does no such thing. If Respondents have the broad discretion

that the Circuit Court's reading would give them to determine what constitutes an advantage under Section 41-29-230, that statute does not require Respondents seek any funding at all, whether for benefits or administrative costs. Instead, reading such broad discretion into a statute which uses mandatory language reads that mandatory language, and the remainder of the statute, out of existence. This Court should not construe Section 41-29-230 in a way that renders it meaningless. *See e.g. Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012).

Finally, the Circuit Court also found that "Section 41-29-230 actually never refers to the Governor, so the statute cannot possibly limit the Governor's discretion." R. p. 7. This finding cannot be squared with separation of powers, S.C. CONST. art. I, § 8., or the Governor's duty to take care that the laws be faithfully executed, S.C. CONST. art. IV, § 15. The Circuit Court's finding would permit the Governor to direct a cabinet agency to act in violation of its statutory duties simply because the General Assembly did not specifically restrain him from doing so. And it would insulate both the Governor, and by extension the agency, from any legal challenge to that action. If the Governor, and by extension DEW, were free to act as they would, there would be no need for Section 41-29-230.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court and enter a preliminary injunction or writ of mandamus as requested in Appellants' complaint.

Respectfully submitted,

August 24, 2021

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-000883

Sheena Brannon, Shane Stencil, Tina Sullivan, and Brandon Beaty

Appellants,

v.

Henry Dargan McMaster, in his official capacity as Governor of the State of South Carolina, and G. Daniel Ellzey, in his official capacity as Director of the South Carolina Department of Employment and Workforce

Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the FINAL BRIEF OF APPELLANTS on Henry Dargan McMaster and G. Daniel Ellzey by E-mail to their counsel of record pursuant to *In Re; Operation of the Appellate Courts During the Coronavirus Emergency (as Amended May 29, 2020),* Appellate Case No. 2020-000447 on August 24, 2021.

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August 24, 2021

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From: Adam Protheroe
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Cc: Sue Berkowitz; jkassel@kassellaw.com
Subject: Brannon v. McMaster - Appellants' Final Brief and ROA
Attachments: Brief of Appellants_FINAL.pdf; Record on Appeal_FINAL.pdf

Good morning,

Please find attached and served upon you pursuant to *In Re; Operation of the Appellate Courts During the Coronavirus Emergency (as Amended May 29, 2020),* Appellate Case No. 2020-000447, Appellants' Final Brief and the Record on Appeal in the above-referenced case. I've also linked these files below in case any are too large to transmit via e-mail.

Kind Regards,
Adam Protheroe

I'm using Adobe Send & Track.
You can view "Brief of Appellants_FINAL.pdf" at:
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