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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

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-000883

Case No. 2021-CP-40-03774

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 Workforce and Employment, ... Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Regulation

Rules

Other Authorities

STATEMENT OF THE ISSUES ON APPEAL

I. Did the circuit court abuse its discretion in denying Appellants' request for a mandatory preliminary injunction in light of their unreasonable delay in waiting 83 days to bring this action challenging the State's decision to terminate its participation in three voluntary federal programs, which now expire nationwide in a matter of days?

II. Did the circuit court correctly find Appellants have no private right of action when the statute on which their claims are based is for the benefit of "this State and its citizens"?

III. Did the circuit court rightly conclude the three new federal unemployment benefit programs created by the CARES Act were not part of the Social Security Act and, therefore, section 41-29-230(1) has no bearing on whether the State participates in those programs?

IV. Did the circuit court properly determine Governor McMaster and Director Ellzey have discretion in deciding whether South Carolina participates in three new voluntary federal unemployment programs?

INTRODUCTION

When the 2019 Novel Coronavirus ("COVID-19") first appeared in the United States, it presented an emerging public health threat and disrupted a thriving economy (as well as life generally). Governments at every level responded in unprecedented ways.

Among the responses was the federal government creating expansive new unemployment-benefit programs. To help workers whose jobs were lost or disrupted when COVID-19 struck, Congress enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. As part of the CARES Act, the federal government created new federal programs that (1) provided unemployment benefits to individuals who were traditionally ineligible for unemployment

benefits, (2) provided weeks of federal benefits after a claimant received all benefits they were allowed under state law, and (3) granted generous new benefits on top of whatever benefits claimants could receive under state law. When South Carolina, like every other State, initially agreed to participate in these three new programs, unemployment in the State was over 12 percent, and the pandemic was rapidly evolving.

Now, more than a year later, circumstances have changed. Thanks to natural immunity and vaccines and greater knowledge of COVID-19 and its transmission, COVID-19 does not pose the same uncertain threats to communities in the way it did last spring. Businesses are resuming normal operations. Tens of thousands of jobs are available across South Carolina.

But employers cannot find people ready and willing to fill them. With these federal programs in place, many people were making more money from their unemployment benefits than they had made from their old jobs. They therefore were not reentering the workforce. Faced with a significant labor shortage, Governor McMaster decided to terminate the State's participation in these three voluntary federal programs.

The Governor had the legal authority to do so. These CARES Act programs are voluntary under federal law, and the State is permitted to terminate its participation at any time. No state statute mandates South Carolina's participation in these programs. The state statute on which Appellants rely speaks only to the Department of Employment and Workforce's ("DEW") obligations with respect to four other federal laws expressly enumerated in the statute. *See* S.C. Code Ann. § 41-29-230(1). Moreover, it gives Director Ellzey discretion to determine what is an "advantage" to "this State and its citizens." *Id.* Nowhere does that statute not mention or limit the Governor's authority under state or federal law to decide whether South Carolina participates in these new programs.

Beyond the substantive issues with Appellants' claims, there is a glaring timing problem. The three federal programs expire under federal law in ten days, on September 6, 2021. For two of those programs, if the State does not enter into a new agreement with the U.S. Secretary of Labor by August 28, 2021 (tomorrow), the ability to obtain benefits under those programs will be gone. Appellants created this time crunch. They let 83 days go by after Governor McMaster's announcement that the State would stop participating in these programs before they sued to challenge that decision, and they did not seek a writ of supersedeas or injunction pending appeal in this Court. There was ample time to litigate the questions Appellants raise. But they let that time pass. Now, it is too late.

Timing questions aside, the relief Appellants seek is also against the vast weight of authority. Appellate courts across the country have repeatedly sided with state officials on this issue. For example, after state officials lost in trial courts in Arkansas and Oklahoma, appellate courts in those States promptly granted stays pending appeal, and the Arkansas legislature even passed a bill designed to overturn the trial court's decision. The Indiana Court of Appeals has now ruled for Indiana's governor on the merits. These cases all favor Governor McMaster and Director Ellzey here for good reason: neither the timing nor the merits supports the challenges to decisions to incentivize people to get back to work. The circuit court got the analysis correct. This Court should therefore affirm.

STATEMENT OF THE CASE

The question that strikes at the heart of this case is whether the CARES Act benefits, which were newly created during the COVID-19 pandemic and funded through general appropriations from the United States Treasury, must be construed as advantages to the State and its citizens under the provisions of the Social Security Act. To analyze that question, an understanding of South

Carolina's traditional unemployment insurance program and its relationship with the Social Security Act is necessary.

A. Unemployment insurance generally.

Unemployment benefits are historically paid by the State under state law. Individuals who meet certain requirements under South Carolina law are eligible for these benefits. *See* S.C. Code Ann. § 41-35-110. Our State's employers fund these benefits by paying quarterly unemployment taxes. *See id.* § 41-31-10; *id.* § 41-33-10.

The administrative costs for running the unemployment-insurance program are funded by the federal government, as long as DEW administers this program in compliance with certain federal requirements. To that end, the General Assembly enacted section 41-29-230(1) to instruct DEW to remain in compliance with four federal statutes, thereby ensuring South Carolina receives these administrative expenses and efficiently operates the unemployment-insurance program.

The first of these four federal laws is the Social Security Act. This law provides federal funds "for the purpose of assisting the States in the administration of *their* unemployment compensation laws." 42 U.S.C. § 501 (emphasis added); *see also id.* § 1101(c)(1)(A) (appropriating funds for this purpose). Congress created the Unemployment Trust Fund to facilitate the transfer of this administrative funding. *See id.* § 1101(a). No traditional unemployment benefits to individuals are funded under the Social Security Act.

The second federal law is the Federal Unemployment Tax Act. This act imposes a federal tax on employers (separate from and in addition to the unemployment taxes imposed under state law), *see* 26 U.S.C. § 3301, but provides tax credits for employers if state law meets certain federal requirements, *see id.* § 3303.

The third federal law is the Wagner-Peyser Act. This act created the United States Employment Service, *see* 29 U.S.C. § 49, and funds the public employment offices in States, *see id.* § 49d.

The fourth federal statute mentioned in section 41-29-230(1) is the Federal-State Extended Unemployment Compensation Act of 1970. This law provides "extended benefits" (between 10 and 16 extra weeks of benefits for claimants) during periods of high unemployment, with half of the benefits paid by the States and half by the federal government. *See* 26 U.S.C. § 3304; 42 U.S.C. § 1105(d). The Federal-State Extended Unemployment Compensation Act added a new account to the Social Security Act to facilitate payment of these extended benefits. *See* 42 U.S.C. § 1105(a).

B. CARES Act unemployment benefits.

COVID-19 disrupted life in myriad ways, including employment. Many industries were affected by the changes to life's rhythms, and unemployment increased significantly and quickly. (R. p. 256). Attempting to alleviate the economic hardship that was expected to follow, Congress passed the CARES Act, Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020). The CARES Act created, among other programs, three sources of optional federal unemployment benefits. For States wishing to participate in these programs, the U.S. Department of Labor required Governors or their designees to enter into participation agreements with the Secretary of Labor. Like every other governor in the country, Governor McMaster agreed this State should participate in all three of these new federal unemployment-assistance programs.

The day after the CARES Act became law, the Governor notified DEW that he had delegated his authority to Director Ellzey to enter into an agreement with the U.S. Secretary of Labor for South Carolina to participate in the three programs at issue. (R. p. 255). Under federal law and the terms of this agreement, the State could withdraw participation in the programs at any

time with at least 30 days' advance notice to the Department of Labor. *See, e.g.*, 15 U.S.C. § 9023(a). Unlike traditional unemployment-insurance programs that are funded by employer contributions and the tax imposed by the Federal Unemployment Tax Act, the federal government funded both the administrative costs and the benefits themselves under the CARES Act through a general appropriation by the United States Treasury. *See* 15 U.S.C. § 9021(g) (PUA); *id.* § 9023(d) (FPUC); *id.* § 9025(d) (PEUC). As a brief summary of the three programs at issue here:

First, there is Pandemic Unemployment Assistance ("PUA"). *See* 15 U.S.C. § 9021. This provided unemployment benefits to people who were ineligible for them under existing unemployment programs, including the self-employed, the underemployed, and independent contractors.

Second, there is Pandemic Emergency Unemployment Compensation ("PEUC"). *See id.* § 9025. This provision provided up to 51 weeks of federal unemployment benefits for claimants who exhausted the traditional 20 weeks they can receive under state law. Thus, it allowed claimants to receive federal unemployment benefits for almost an entire year after state benefits had been exhausted.

Third, there is Federal Pandemic Unemployment Compensation ("FPUC"). Here, Congress appropriated money to provide a federal unemployment benefit of $600 per week on top of any other federal or state benefit. *See id.* § 9023. Congress initially allowed this benefit to lapse, before reinstating it at $300 per week starting December 27, 2020. *See* Consolidated Appropriations Act, 2021, Pub. L. 116-260, § 203, 134 Stat 1182, 1953 (Dec. 27, 2020); American Rescue Plan Act of 2021 ("ARPA"), Pub. L. 117-2, § 9013, 135 Stat. 4, 119 (Mar. 11, 2021).

On May 6, 2021, more than a year after agreeing South Carolina should participate in these programs, Governor McMaster directed Director Ellzey and DEW to terminate South Carolina's participation in PUA, PEUC, and FPUC effective June 30, 2021. (R. pp. 145–46).

C. History of the proceedings.

Eighty-three days after the Governor's May 6 decision and 28 days after termination of the State's participation in these programs, Appellants sued Governor McMaster and Director Ellzey to challenge the decision to stop participating in PUA, PEUC, and FPUC. Appellants (who originally sued anonymously but have now identified themselves) allege that they are South Carolina residents who received unemployment benefits, including the new federal benefits, after the COVID-19 pandemic began. (R. pp. 28, 30–32). They also allege that they received notice in June 2021 that the extra federal unemployment benefits would not be continuing. (R. pp. 29–32).

Appellants sought a declaratory judgment that section 41-29-230(1) required DEW to participate in these three CARES Act programs and that the decision to terminate that participation was unlawful. (R. pp. 33–34). They demanded injunctive relief to require DEW to participate in PUA, PEUC, and FPUC. (R. pp. 34–35, 156). In the alternative, they requested a writ of mandamus to obtain this same extraordinary relief. (R. p. 35). Governor McMaster and Director Ellzey, meanwhile, moved to dismiss. *See* (R. p. 225).

Following a hearing, the circuit court granted the Motion to Dismiss and denied the Motion for Preliminary Injunction. (R. p. 12). Appellants timely appealed. (R. p. 399). This Court granted a motion to certify the appeal and expedited the briefing schedule. (R. p. 16).

STANDARD OF REVIEW

This Court reviews an order granting a motion to dismiss de novo, applying "the same standard of review as the trial court." *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732

S.E.2d 876, 878 (2012); *see also Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Off.*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001) (recognizing novel issues can be decided on a motion to dismiss when they raise a question of law). The Court reviews an order denying a motion for preliminary injunction for abuse of discretion. *Hook Point, LLC v. Branch Banking & Tr. Co.*, 397 S.C. 507, 510, 725 S.E.2d 681, 683 (2012).

ARGUMENT

I. It is too late for Appellants to obtain the extraordinary relief they seek.

Appellants say nothing about the timing issues here. But as a practical matter, two impending deadlines for the three federal programs at issue preclude the relief Appellants seek from this Court.

The first is the September 6, 2021 deadline—just ten days from now and seven days after Appellants' reply brief is due—that Appellants focused on in their motion to certify this case. That date is the statutory deadline on which PUA, PEUC, and FPUC all officially end (no matter whether a State terminated its participation early). *See* 15 U.S.C. § 9021(c)(1)(A)(ii) (PUA); *id.* § 9023(e)(2) (FPUC); *id.* § 9025(g)(2) (PUEC); *cf.* Letter from Sec'y Yellen & Sec'y Walsh to Chairman Wyden & Chairman Neal, U.S. Dep't of Treasury (Aug. 19, 2021), https://tinyurl.com/b357s7kk (recognizing these programs expire on September 6, 2021, and mentioning no intention to try to have the programs extended); *id.* ("The temporary $300 boost in benefits will expire on September 6th, as planned. As President Biden has said, the boost was always intended to be temporary and it is appropriate for that benefit boost to expire.").

The second deadline is even more pressing. For PEUC and FPUC, tomorrow (August 28) is the critical date. As Appellants recognize in their brief, *see* Appellants' Br. 8, for those two programs, the federally required participation agreement between the State and the U.S. Secretary

of Labor must be in place before these federal benefits can be paid. "An agreement entered into under [these] section[s for PEUC and FPUC] shall apply to weeks of unemployment beginning after the date on which such agreement is entered." 15 U.S.C. § 9025(g) (PEUC); *id.* § 9023(b)(3)(A) (FPUC). South Carolina's unemployment week starts on Sunday. *See* S.C. Code Ann. Regs. 47-24(A)(1). The State therefore must have an agreement with the Secretary of Labor by a Saturday for anyone to be eligible for PEUC and FPUC benefits for the next week that starts the next day on Sunday. The week of Sunday, August 29 is the last potential week of benefits before the statutory end of the programs. Thus, if no agreement is in place by tomorrow (August 28), an injunction would not provide any relief with respect to PEUC and FPUC.

Between now and tomorrow, or even between now and September 6, getting any of these three programs back up and running is a tall, if not practically impossible, order. When South Carolina was participating in these programs, DEW increased staffing to operate them. Then, after South Carolina stopped participating in them, DEW reduced its staffing. DEW also made the programmatic and technical changes to end these programs. There is no magical switch to flip to restart those programs. Ramping staffing back up and making the required technical changes in a few days is unrealistic. DEW currently has the staff required to carry out its existing operations. Nevertheless, imposing an urgent mandate to add three new programs to those operations will not only be unmeetable but also result in the delay of state unemployment benefits to existing claimants.[1]

[1] That the federal government provides funding for operating these programs is not the issue here. Timing and manpower are. No matter who ultimately foots the bill, DEW cannot feasibly hire and train the necessary staff and make the required technical and programmatic changes by the deadlines.

For practical purposes, then, Appellants' request for mandatory injunctive relief is about to be moot, if it is not already. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court."). Appellants are thus left only with their request for an advisory opinion via a declaratory judgment. But a declaratory judgment cannot be used simply to declare a past wrong. *See Abebe v. Seymour*, No. 3:12-cv-377-JFA-KDW, 2012 WL 1130667, at *3 (D.S.C. Apr. 4, 2012) ("A declaratory judgment is meant to define the legal rights and obligations of the parties in anticipation of some future conduct, not simply to proclaim liability for a past act." (quoting *Lawrence v. Keunhold*, 271 F. App'x 763, 766 (10th Cir. 2008))); S.C. Code Ann. § 15-53-140 (the State's declaratory judgment law should be harmonized with the federal declaratory judgment law); *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970) ("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").

This issue is entirely of Appellants own making. Governor McMaster announced his decision that South Carolina would stop participating in PUA, PEUC, and FPUC on May 6, 2021. (R. pp. 145–46). That termination was effective 55 days later, on June 30, 2021. (R. p. 146). Appellants did not bring this lawsuit until July 28—another four weeks later—and did not even seek a temporary restraining order. (R. pp. 20–37, 158). After the circuit court denied Appellants' Motion for Preliminary Injunction and granted Respondents' Motion to Dismiss on August 13, Appellants then waited three more days to appeal. And when they appealed, Appellants did not seek a writ of supersedeas or an injunction pending appeal.

Had Appellants moved more quickly, they could have sought to preserve the status quo and this entire dispute could have been resolved *before* South Carolina's participation in PUA, PEUC, and FPUC terminated. Then, if Appellants were right on the merits, DEW could have simply continued operating as it had been through the September 6 deadline.

But as it stands now, South Carolina has not participated in these programs for nearly two months, and Appellants are seeking a mandatory injunction to change the status quo. Such a drastic remedy is not available, given both Appellants' delay and the impending end of the programs.[2] *Cf. Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010) (a "preliminary injunction should issue *only* if necessary to preserve the status quo" (emphasis added)); *Gantt v. Clemson Agr. Coll. of S.C.*, 208 F. Supp. 416, 418 (W.D.S.C. 1962) (a mandatory injunction should be granted only "in rare instances in which the facts and law are clearly in favor of the moving party").

II. Appellants do not have a private right of action.

Before even reaching the merits of Appellants' claims, they face another insurmountable threshold hurdle: They do not have the right to bring this action.

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[2] Appellants' conclusion to their brief asks this Court to enter a preliminary injunction. *See* Appellants' Br. 19. On direct appeal, that is not relief that Appellants can obtain. And in any event, their brief fails to raise any arguments about the preliminary injunction factors other than likelihood of success on the merits, thereby waiving those issues. *See* Rule 208(b)(1)(E), SCACR. For example, Appellants never discuss how the declaratory judgment they demand is not an adequate remedy at law. *See S.C. Lottery Comm'n v. Glassmeyer*, 433 S.C. 244, 250, 857 S.E.2d 889, 892 (2021).

Appellants alternatively request in their conclusion that this Court issue a writ of mandamus. *See* Appellants' Br. 19. But they devote no time to discussing the elements for a writ of mandamus, *see Wilson v. Preston*, 378 S.C. 348, 354, 662 S.E.2d 580, 582–83 (2008), and thus have also waived that issue. Regardless, Appellants are not entitled to "the highest judicial writ" because they cannot show "a specific right to be enforced, a positive legal duty to be performed, and no other specific remedy." *City of Rock Hill v. Thompson*, 394 S.C. 197, 199, 563 S.E.2d 101, 102 (2002).

A litigant has a private right of action under a statute only if the General Assembly intends to create such a right. *See Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011). When the General Assembly does not expressly create a private right of action, an implied private right of action exists only "if the legislation was enacted for the special benefit of the private party." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009). By contrast, "[i]f the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party," and there is no private right of action. *Id.*

Appellants' claims here are based on section 41-29-230. That section requires DEW to promulgate rules, regulations, methods, and standards to secure advantages "to this State and its citizens" available under four specified federal laws. S.C. Code Ann. § 41-29-230(1). It is hard to fathom how a statute could be more about the "public in general" than a statute that focuses on "this State and its citizens." *Id.* If a private right of action existed, the statute would have to read something like advantages for "unemployment claimants."

Buttressing this conclusion is section 41-29-25(D), which provides, "Nothing 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." *Id.* § 41-29-25(D). That section charges the executive director with acting in good faith to carry out DEW's mission, which includes "reduc[ing] and prevent[ing] unemployment," *id.* § 41-29-120(A)(1)(a), and "promot[ing] the reemployment of unemployed workers," *id.* § 41-29-120(A)(1)(d); *see also id.* § 41-29-25(A). Part of carrying out those duties requires deciding what is an "advantage" to "this

State and its citizens" under section 41-29-230(1).[3] The General Assembly has made clear Director Ellzey cannot be sued based on what he decides. Contrary to Appellants' contention, *see* Appellants' Br. 15, this is not the general trumping the specific. Rather, it is reading the statutes harmoniously, so that Director Ellzey's overriding obligations imbue all that DEW does. *See Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) ("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."); (R. pp. 488–89 (Appellants' admission that the Court must read related statutes together)).

And if the General Assembly did not want DEW's executive director sued on these decisions, neither could it have wanted the Governor to be sued on them. *Cf. Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.").

Nor can Appellants fall back on the Uniform Declaratory Judgments Act. That 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). As the circuit court put it, that Act "provides a remedy, not a legal right." (R. p. 7).

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[3] *Cf. Bd. of Bank Control v. Thomason*, 236 S.C. 158, 169, 113 S.E.2d 544, 549 (1960) ("By incorporating the convenience and advantage clause, the legislature determined that the public interest required a limitation on the number which should be licensed. Obviously no definite yardstick could be fixed. The standard prescribed is necessarily elastic. There are numerous circumstances to be considered, some of them requiring experience, expert knowledge and judgment. The Board of Bank Control was selected as having the necessary competence in this field."); *Haesloop v. City Council of Charleston*, 123 S.C. 272, 115 S.E. 596, 600 (1923) ("The measure of the council's fiduciary obligation is clearly and definitely prescribed by the grant in the words 'conducive to the welfare and advantage of the said city and the inhabitants thereof.' In the discharge of that trust the legal test of validity to be applied to the council's action, as we apprehend, differs in no essential particular from the standard applicable under the law of trusts to a like exercise of discretion by the trustee of a private estate, vested with discretionary authority to manage and dispose of property for the advantage or best interests of the estate.").

None of the cases Appellants cite are to the contrary. *See* Appellants' Br. 16–17. They rely most heavily on *Linder v. Insurance Claims Consultants, Inc.*, 348 S.C. 477, 560 S.E.2d 612 (2002). *Linder*, however, involved the unauthorized practice of law, which is uniquely the province of this Court. *See, e.g.*, S.C. Const. art. V, § 4; Rule 407, SCACR (Rules of Professional Conduct). Unlike with unemployment, this Court expressly allows parties to obtain a declaratory judgment in its original jurisdiction on questions surrounding the unauthorized practice of law. *See In re Unauthorized Prac. of L. Rules Proposed by S.C. Bar*, 309 S.C. 304, 422 S.E.2d 123 (1992). But even with that procedure in place, the Court held "there is no private right of action in South Carolina for the unauthorized practice of law" that would allow a party to raise "a private claim for damages." *Linder*, 348 S.C. at 497, 560 S.E.2d at 623. Yet here, Appellants seemingly seek both a declaratory judgment and mandatory injunctive relief akin to an award of damages on behalf of an unspecified number of South Carolinians. *See* (R. p. 36). Neither is supported by *Linder*. As for the other cases Appellants cite, none of them appears to have raised or expressly decided this question, so they cannot be binding authority. *See United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not binding precedent on this point."). Appellants thus cannot rely solely on the Uniform Declaratory Judgments Act to keep this case in court.

III. Appellants' claims fail on the merits.

Even if Appellants did have a private right of action that was not practically or legally moot, their claims still fail on the merits. First, section 41-29-230(1) does not apply to the CARES Act, and PUA, PEUC, and FPUC are provisions of the CARES Act. Second, even assuming PUA, PEUC, and FPUC could somehow be construed as provisions of the Social Security Act instead,

the Governor and Director Ellzey still have discretion to determine whether those programs are advantages at a time when the State has more than 81,000 open jobs.

A. Section 41-29-230(1) does not require the State to participate in PUA, PEUC, and FPUC.

1. PUA, PEUC, and FPUC are provisions of the CARES Act, not the Social Security Act.

Section 41-29-230(1) provides:

> 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).[4] Recognizing that this provision applies to only four specific federal laws (none of which is the CARES Act), Appellants contend PUA, PEUC, and FPUC are provisions of the Social Security Act merely because Congress directed the Secretary of the

[4] Appellants, relying on a "liberal" interpretation of dicta in *Stone Manufacturing Co. v. S.C. Employment Security Commission*, 219 S.C. 239, 64 S.E.2d 644 (1951), which involved a previous statutory scheme, contend this statute must be read broadly as "social legislation." *Compare* Appellants' Br. 11, *with Stone Mfg. Co.*, 219 S.C. at 247, 64 S.E.2d at 647 ("While the statute under consideration is to be liberally construed in order to effect its beneficient purpose, we are not at liberty to adopt a construction which is wholly beyond the limits of the plain legislative intent."). Whatever the legislation, it must be interpreted based on its plain language. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581. That a statute may have a remedial purpose to some extent is not license to rewrite the statute. *See 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."). Nevertheless, the statutory scheme in effect today charges DEW with, among other things, "reduc[ing] and prevent[ing] unemployment," S.C. Code Ann. § 41-29-120(A)(1)(a), and "promot[ing] the reemployment of unemployed workers," *id.* § 41-29-120(A)(1)(d); *see also id.* § 41-29-25(A).

Treasury to utilize existing Social Security Act-related accounts to transfer money appropriated under the CARES Act.

Before delving into the statutory minutiae to demonstrate why Appellants are wrong, a quick reminder on how unemployment benefits traditionally work may be helpful. Benefits to individuals are funded by employers through state-imposed unemployment taxes. The administrative costs are paid by the federal government. Against that background, consider what PUA, PEUC, and FPUC did: They created new federal benefits that are paid to individual citizens. That is something that has never happened under the Social Security Act. Thus, these three CARES Act programs cannot be an extension or expansion of—much less "under the provisions of"—the Social Security Act.

The legislative record supports the conclusion that PUA, PEUC, and FPUC are not provisions of the Social Security Act. *First*, these three programs were created as part of the CARES Act, without any amendment to the Social Security Act. *See* CARES Act, Div. A, Title II, § 2102, 134 Stat. at 313 (PUA, codified at 15 U.S.C. § 9021); *id.* Div. A, Title II, § 2107, 134 Stat. at 323 (PEUC, codified at 15 U.S.C. § 9025); *id.* Div. A, Title II, § 2107, 134 Stat. at 323 (FPUC, codified at 15 U.S.C. § 9023). That is important because, in the flurry of COVID-19-related relief legislation (including in the CARES Act itself), Congress amended the Social Security Act on multiple occasions. *See, e.g.*, CARES Act, Div. A, Title II, § 2103, 134 Stat. at 317 (amending the Social Security Act regarding unemployment benefits for employees of governmental entities and nonprofits); Families First Coronavirus Response Act, Pub. L. 116-127, § 4012, 134 Stat. 178, 192–93 (Mar. 18, 2020) (amending the Social Security Act to provide additional administrative funding for States' unemployment-insurance programs). Congress

therefore knew how to amend and expand the Social Security Act when it wanted to. It chose not to do so here.

Second, PUA, PEUC, and FPUC were codified in a new chapter of Title 15 of the United States Code. They were not codified in Title 42 where the Social Security Act is found. *See Smith v. Doe*, 538 U.S. 84, 94 (2003) (where an act is codified is "probative of the legislature's intent").

Third, if there is any ambiguity in this issue, the U.S. Department of Labor's views should be considered. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The Department of Labor issued six directives (or formal guidance) on PUA, four directives on PEUC, and six directives on FPUC. *See Unemployment Insurance Relief during COVID-19 Outbreak*, U.S. Dep't of Labor, https://tinyurl.com/3p9jcryy (last visited Aug. 24, 2021) (collecting formal Department of Labor guidance on COVID-19 issues). Such a deluge of guidance would be unnecessary for "old" programs. Plus, this guidance repeatedly refers to PUA, PEUC, and FPUC as "new" federal programs. *See, e.g.*, Unemployment Insurance Program Letter 16-20 at 7, U.S. Dep't of Labor (Apr. 5, 2020) (PUA is a "new federal program"), https://tinyurl.com/ymetcwvh; Unemployment Insurance Program Letter 17-20 at 7, U.S. Dep't of Labor (Apr. 10, 2020) (PEUC is a "new federal program"), https://tinyurl.com/82v2zfrp.

2. Appellants' arguments to the contrary are unavailing.

Appellants argued below that PUA, PEUC, FPUC do "not create new benefits," but instead are authorizations for "states to draw from benefits already conferred under the [Social Security Act]." (R. p. 166); *see also* (R. p. 292 (PUA, PEUC, and FPUC "are not new benefits" but were "temporary enhancements" under the Social Security Act)). As a result, DEW had an obligation to secure these existing benefits. Or so Appellants said.

Now on appeal, Appellants have abandoned this argument on which they relied so heavily below and have conceded Judge McIntosh correctly held—despite their repeated arguments to the contrary—that "the Social Security Act does not provide any unemployment benefits (i.e., a check) to any individual." Appellants' Br. 13. Nevertheless, Appellants still contend the State must participate in the voluntary CARES Act programs until they expire. The Court should reject Appellants' three remaining arguments for what they are: a results-oriented moving target, detached from the rules of statutory construction.

First, Appellants argue the statutory framework for PUA, PEUC, and FPUC is "irrelevant" because "under the provisions of the Social Security Act" does not mean a federal benefit has to amend the Social Security Act to fall within section 41-29-230(1). *See* Appellants' Br. 12. Appellants are mistaken. It is axiomatic that courts, legislators, and lawyers regularly use "under" to refer to provisions of a particular statute. This Court, for instance, routinely refers to a provision "under" an act when discussing a provision that was enacted as part of or amended that act. *See, e.g.*, *Mack v. State*, 433 S.C. 267, 273, 858 S.E.2d 160, 162 (2021) ("under the PCR Act"); *Glassmeyer*, 433 S.C. at 250, 857 S.E.2d at 892 ("under the Declaratory Judgments Act"); *State v. Harrison*, 432 S.C. 448, 458, 854 S.E.2d 468, 473 (2021) ("under the State Ethics Act"); *S.C. Human Affairs Comm'n v. Zeyi Chen*, 430 S.C. 509, 522, 846 S.E.2d 861, 867 (2020) ("Under the federal Fair Housing Act"); *Crane v. Raber's Disc. Tire Rack*, 429 S.C. 636, 644, 842 S.E.2d 349, 353 (2020) ("under the Administrative Procedures Act"). Even more tellingly, the General Assembly uses "under the provisions of" the same way in statutes. *See, e.g.*, S.C. Code Ann. § 9-1-1910 ("under the provisions of the South Carolina Retirement Act"); *id.* § 9-3-10 ("under the Social Security Act"); *id.* § 37-5-302(1) ("under the provisions of the Federal Truth in Lending Act"). Just as all of these examples involve a provision that is part of a statute, so too does section

41-29-230(1) refer to provisions that are part of the Social Security Act. In the face of these authorities, Appellants' cursory references to the plain-meaning canon and the dictionary definition of the word "available" are unconvincing. *See* Appellants' Br. 12.

Second, Appellants insist that PUA, PEUC, and FPUC are "funded through" the Social Security Act accounts. That is incorrect. In reality, all of the funding for PUA, PEUC, and FPUC is newly appropriated—in the CARES Act, not the Social Security Act—from the "general fund of the Treasury." 15 U.S.C. § 9021(g)(1)(B) (PUA); *id.* § 9025(d)(1)(B) (PEUC); *id.* § 9023(d)(3) (FPUC). Therefore, Appellants' characterization of the funding of these programs is inaccurate. As the Indiana Court of Appeals just explained in ruling for that state's governor in a case nearly identical to this one, "[u]tilizing this established accounting system and specifying how funds should be moved around and made available for distribution is entirely different from creating a new federal benefit program, which the CARES Act is." *Holcomb v. T.L.*, ___ N.E.3d ___, 2021 WL 3627270, at *5 (Ind. Ct. App. Aug. 17, 2021).

Appellants' attempt to use this funding argument in support of their claim for FPUC benefits is particularly problematic because only the funding for PUA and PEUC goes through the account in 42 U.S.C. § 1105. *See* 15 U.S.C. § 9021(g)(1)(A); *id.* § 9025(d)(1)(A). To try to overcome this hurdle, Appellants contend a claimant's PUA and PEUC payment also includes an FPUC payment, so the FPUC money must flow through the same path as the PUA or PEUC benefit. *See* Appellants' Br. 13. That conclusion does not follow. Nowhere in the FPUC statute is any Social Security Act-related account mentioned. *See id.* § 9023. The "Payments to States" subsection of the FPUC statute is lacking the references to the Social Security Act-related accounts found in the PUA and PEUC statutes. *Compare id.* § 9023(d) (FPUC), *with id.* § 9021(g)(1)(A) (PUA); *id.* § 9025(d)(1)(A) (PEUC). FPUC payments are simply appropriations from the general

fund of the U.S. Treasury to the States. *See id.* § 9023(d)(3). Therefore, there is no basis to conclude that FPUC funds are maintained in a Social Security Act-related account, much less that they are advantages available *under* the Social Security Act.

Moreover, the account at the center of Appellants' argument is not even one used to pay benefits under the Social Security Act.[5] The account in 42 U.S.C. § 1105(a) was created in 1970 under the Federal-State Extended Unemployment Compensation Act. *See* Pub. L. 91-373, Title II, § 305, 84 Stat. 695, 716 (Aug. 10, 1970). This account is instead used to pay extended benefits (which provides extra weeks of benefits for claimants during periods of high unemployment, with half of the benefits paid by the States and half by the federal government). *See* 42 U.S.C. § 1105(d) (authorizing appropriations "to carry out the purposes of the Federal-State Extended Unemployment Compensation Act of 1970"). Moreover, when Congress enacted the Federal-State Extended Unemployment Compensation Act and created this extended-benefits program, the General Assembly amended the predecessor statute to section 41-29-230 the next year to ensure South Carolina participated in the new federal law. *See* 1971 S.C. Acts No. 516, § 11 (amending S.C. Code § 68-73 (1962)). The General Assembly did not amend section 41-29-230 to include the CARES Act, despite meeting throughout the summer and fall of 2020 and then for its regular session in 2021.

Finally, logic undermines Appellants' second argument in multiple ways. For one, by using existing accounts in a different Title of the United States Code, Congress was not trying to subtly slip PUA, PEUC, and FPUC into the Social Security Act. Instead, Congress was looking for an

[5] The other account Appellants cite is 42 U.S.C. § 1101. That funds only administrative costs, just as that account funds the administrative costs of the state-funded unemployment-benefits program. It does not fund any benefits to any individual claimants. *See* 15 U.S.C. § 9021(g)(2)(A); *id.* § 9025(d)(2)(A). The account in § 1101 is therefore irrelevant here.

efficient way to get these benefits into people's pockets at the beginning of a once-in-a-century pandemic. This logistical accounting detail is of no legal consequence. *See Holcomb*, 2021 WL 3627270, at *5. And for another, Appellants' interpretation would tie the State's hands to blindly participate in any voluntary federal program that involves the transfer of federal funds via a Social Security Act account, no matter how ill-advised or adverse to the State's interests the State's leaders may find the program or the strings Congress attaches to that money.

Third, Appellants argue that the CARES Act programs are "administered" and "governed" by the Social Security Act. Appellants' Br. 13–14. The PUA, PUEC, and FPUC statutes all refer to state law generally, not the Social Security Act. *See* 15 U.S.C. § 9021(c)(5)(B)(ii) (PUA appeals shall be conducted "under state law"); *id.* § 9023(f)(4) (FPUC fraud and overpayments shall be established under "State unemployment compensation law"); *id.* § 9025(a)(4)(B) (PEUC weekly benefit shall be calculated "under the State law"); *id.* § 9025(e)(4) (PEUC appeals shall be conducted under the "State unemployment compensation law"). There are no comparable provisions requiring South Carolina to comply with any provisions of the Social Security Act to operate these three programs.

B. Section 41-29-230(1) does not apply to the Governor and gives Director Ellzey discretion.

Appellants' claims fail for a second, independent reason. Even if PUA, PEUC, and FPUC could possibly be interpreted to be provisions of the Social Security Act, South Carolina law still gives the Governor and Director Ellzey discretion in determining whether PUA, PEUC, and FPUC are advantages to South Carolina and its citizens.

On its face, section 41-29-230(1) applies only to DEW. It says nothing about the Governor, *see* S.C. Code Ann. § 41-29-230(1) ("the department must . . ."), his office, or his authority, *see* S.C. Const. art. IV, § 1 (the Governor is the State's "Chief Magistrate" with "supreme executive

authority"). Appellants insist this Court should read the Governor into section 41-29-230(1) and, unless it does so, the Governor would be permitted to direct Cabinet or Executive Branch agencies to violate their statutory duties. This dire prediction is misguided. Nowhere in state law is there a policy statement that the State must participate in the CARES Act programs, much less for their entire duration. On the other hand, for each of the statutes actually listed in section 41-29-230(1), the General Assembly has enacted corresponding state laws in Title 41 that make clear what the General Assembly considers to be advantages under those laws. *See* S.C. Code Ann. § 41-31-45(B) (Federal Unemployment Tax Act); *id.* § 41-35-310 *et seq.*; (Federal-State Extended Unemployment Compensation Act); *id.* § 41-42-10 (Wagner-Peyser Act).

To be sure, no one is suggesting that the Governor or Director Ellzey could act in a way that flouts these state laws. The distinction, though, is that there is no corresponding state law related to the CARES Act. With no legislative statement on point, this Court should not strip the Governor or DEW of the discretion afforded them by both federal and state law.

This discussion also underscores the fact that section 41-29-230(1) speaks only to a Cabinet agency's "cooperation" with the federal government and its "promulgation of appropriate rules, regulations, [or] administrative methods and standards." *Id.* § 41-29-230(1). The actions taken by Governor McMaster to terminate the State's agreement with the U.S. Secretary of Labor—*in accordance with the terms of that agreement*—do not equate to DEW's noncooperation or failure to promulgate rules, regulations, administrative methods, and standards. Put another way, section 41-29-230(1) has nothing to say about the State's voluntary agreements with the federal government related to newly enacted legislation.

Appellants try to drive home their lack-of-discretion argument, noting that section 41-29-230(1) uses mandatory language ("must"). *See* Appellants' Br. 17–18. And so section 41-29-

230(1) does. But that does not matter. The statute still uses "advantages," so Director Ellzey and DEW necessarily have to determine what is an advantage and what actions, if any, to take to secure such an advantage.

To make that determination, we must consider what "advantage" means: a "superiority of position or condition." *Advantage*, Merriam-Webster (2021), https://tinyurl.com/9a2ph5cy (last visited Aug. 18, 2021). That necessarily requires some weighing of factors and discretionary judgment. DEW's missions include not only providing unemployment benefits to people who are out of work but also "reduc[ing] and prevent[ing] unemployment," S.C. Code Ann. § 41-29-120(A)(1)(a), and "promot[ing] the reemployment of unemployed workers throughout the State in every other way that is feasible." *id.* § 41-29-120(A)(1)(d).

In weighing these various considerations, choosing not to continue participating in federal unemployment-benefits programs—which provided many people more income than their old paychecks at a time when the State had more than 81,000 open jobs—is not unreasonable. *See* (R. p. 257); *cf. supra* n.3 (citing cases about the discretion to determine what is an "advantage"). By the time the State ceased its participation in PUA, PEUC, and FPUC, South Carolina was no longer in a state of emergency, *see* Exec. Order 2021-25 (May 22, 2021) (declaring a state of emergency that expired by its terms); the State had a better understanding of COVID-19; vaccinations were readily available; the economy was growing again; unemployment had dropped from 12.1 percent to 4.6 percent, *see* (R. p. 256); and employers across the State were hiring, *see* (R. p. 257). The Governor's policy decision therefore easily passes rational basis review. *See Lee v. S.C. Dep't of Nat. Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000) (plaintiffs challenging an action under the rational basis test "have the burden to negate every conceivable basis which might support it").

Appellants try to stretch the authority to determine what an "advantage" is to an absurd extreme, contending that the Governor or the Director could decide nothing under the Social Security Act was an advantage. *See* Appellants' Br. 18–19. Given the almost century's worth of the State having an unemployment-benefits program, the Court can easily reject this parade of horribles and affirm the logical decision here to terminate the State's participation in PUA, PEUC, and FPUC.[6]

CONCLUSION

For the foregoing reasons, the circuit court's order should be affirmed.

Respectfully submitted,

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[6] A final note: In circuit court, Appellants made a big deal that four States had ruled in their favor (Indiana, Oklahoma, Arkansas, and Maryland), while only one (Ohio) had ruled in Governor McMaster and Directory Ellzey's favor. Counting cases, of course, is not a substitute for legal reasoning. But it is worth noting the landscape across the country has changed dramatically. Louisiana, Texas, and West Virginia trial courts have now all ruled for state officials. State officials in Arkansas and Oklahoma were granted stays pending appeal. And Indiana state officials prevailed on the merits of their appeal. Thus, the Indiana trial court decision Appellants trumpet in their brief, *see* Appellants' Br. 8 n.9, is no longer in place.

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August 27, 2021
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-000883

Case No. 2021-CP-40-03774

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 Workforce and Employment, ... Respondents.

CERTIFICATE OF COMPLIANCE

I certify that this BRIEF OF RESPONDENTS complies with Rule 211(b), SCACR, as modified by the Court's August 19, 2021 Order.

s/Wm. Grayson Lambert
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OFFICE OF THE GOVERNOR