

TO: Chief Justice Beatty
FROM: Stephen Foster
DATE: August 18, 2021
REC: Grant

RE: 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 the Director of the South Carolina Department of Employment and Workforce, Respondents.

Appellate Case No. 2021-000883

Motion for Emergency Review and Expedited Certification

As part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act¹ enacted in March 2020, Congress created numerous temporary economic benefits, including a number of new unemployment insurance programs. Three of those programs are at issue in the present case: (1) Pandemic Unemployment Assistance (PUA);² (2) Pandemic Emergency Unemployment Compensation (PEUC);³ and (3) Federal Pandemic Unemployment Compensation (FPUC)⁴ (collectively, programs).

¹ 15 U.S.C. §§ 9001–9141.

² *See* 15 U.S.C. § 9021.

³ *See* 15 U.S.C. § 9025.

⁴ *See* 15 U.S.C. § 9023.

Following the enactment of these programs, the state agreed to participate and accept federal funds available pursuant to the programs. However, on May 6, 2021, Governor McMaster ordered the director of the South Carolina Department of Employment and Workforce (DEW) to terminate the state's participation in the programs effective June 30, 2021. The termination occurred as scheduled and in conformity with the 30-day notice requirement of the CARES Act. In June 2021, Appellants each received notice they would no longer receive benefits under the programs.

Appellants filed a motion for preliminary injunction challenging Governor McMaster's decision to order DEW to terminate the state's participation in the programs. Appellants requested DEW be required to reenroll in these programs, as reenrollment is allowed until the expiration of the programs on September 6, 2021. Reenrollment will allow DEW to retroactively receive all available funds under these programs and disperse them to those individuals qualified under the programs.

In this action, Appellants argued Governor McMaster did not have the authority to order the director of DEW to end participation in the programs because S.C. Code Ann. § 41-29-230(1) (2021) provides that DEW shall cooperate with the United States Secretary of Labor in a manner that requires the state to accept and

disperse funds from the programs until the programs expire on September 6, 2021.

Section 41-29- 230(1) provides:

In the administration of Chapters 27 through 41 of this title, [DEW] 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.

(emphasis added). Appellants argued that PUA, PEUC, and FPUC are advantages under the Social Security Act and, therefore, DEW was required to accept the funds available under the programs on behalf of the citizens of the state.

The circuit court dismissed Appellants' complaint pursuant to 12(b)(6), SCRPC, on two grounds. First, the circuit court found Appellants did not have statutory standing to bring the present cause of action against either the director of DEW or the Governor. Second, the circuit court found the programs are not part of the Social Security Act, as required by section 41-29-230(1). The circuit court found, instead, that the programs are actually provisions under the CARES Act, and, therefore, section 41-29- 230(1) has no relevance to the programs.

Appellants appealed the order of dismissal to the court of appeals, and the court of appeals transferred the case to this Court without making the proper request for certification. Therefore, Appellants' motion is being treated as petition for certification and a motion to expedite briefing. Respondents oppose the requests.

In any case pending before the court of appeals, this Court may, on motion of any party to the case, certify the case for review before it has been determined by the court of appeals. Rule 204(b), SCACR. Certification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance. *Id.*

In my opinion, this appeal involves an issue of significant public interest. It is also my opinion that due to the necessity for reaching a resolution to this issue prior to the September 6, 2021, deadline, you should grant the petition to certify and the motion to expedite briefing and set forth an expedited briefing schedule. I have prepared an order for your consideration.