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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No. 2021-000883

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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.

_____

REPLY IN SUPPORT OF APPELLANTS' MOTION TO SUPPLEMENT THE RECORD ON APPEAL

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Appellants seek to supplement the Record on Appeal with documents which demonstrate that certain representations made by both Appellants and Respondents have been rendered factually inaccurate. Respondents oppose this effort. Though they do not dispute the accuracy or authenticity of the documents Appellants have submitted, Respondents argue that they should not be added to the record because they were not presented to the court below and because they do not constitute "pertinent and significant authorities" under Rule 208(b)(7), SCACR. Resp. Rtn. p. 1-2. Appellants' motion should be granted for the reasons stated therein

and those that follow.[1]

I. This Record Supplement Is Necessary to Correct Representations by Both Parties That Have Been Rendered Factually Inaccurate.

Both Appellants and Respondents have made arguments and representations to this court concerning the availability of relief to Appellants and whether that relief could include Pandemic Unemployment Benefits retroactive to the date that Respondents terminated the State's participation in those programs. Guidance from the United States Department of Labor ("DOL") has previously been unclear on whether PEUC and FPUC benefits could be reinstated retroactively and has indicated that there may be a lapse in those benefits for any period during which a state does not have an agreement with the DOL to administer them. R. p. 153. Appellants sought emergency review based in part on the possibility that these benefits were being permanently lost and that this loss would continue absent this Court's intervention.[2] Mot. Emerg. Rev. and Cert., p. 9. Appellants again flagged this concern in their main brief. Br. App. p. 8. And, in our reply, Appellants again noted the possibility that those benefits would be lost permanently but drew the Court's attention to litigation in Indiana which, in the interim, resulted in the retroactive reinstatement of these benefits. Reply, p. 2.

Similarly, Respondents' lead argument on appeal has been that "[i]t is too late for

[1] In light of Respondents' apparent admission that (a) the September 3rd DOL email is authentic, and (b) officials at DEW, including its Senior Legal Counsel, received and were aware of the September 3rd DOL email at least as early as September 8th, Appellants see no need to include the "Biography of Office of Unemployment Insurance Administrator – Jim Garner" and "Office of Unemployment Insurance Organization" in the Record on Appeal and hereby withdraw that request. Appellants submit that UIPL 16-20, Change 6 contains information on the limited exceptions under which a person may submit a claim for PUA after October 6, 2021 making that document relevant to this litigation and proper for inclusion in the Record.

[2] Appellants also sought emergency review based on the irreparable harm that they were suffering and would continue to suffer because of Respondents' actions. Mot. Emerg. Rev. and Cert., p. 3. Appellants submit that expedited consideration is still justified for that reason and because the recent DOL guidance indicates that any program changes would need to be made by October 6, 2021.

Appellants to obtain the extraordinary relief they seek." Resp. Br. p. 8. Respondents have asserted that the passage of two dates, August 28th and September 6th, would render Appellants claims moot. Resp. Br. p. 8-10. Respondents made these arguments in their main brief which was filed on August 27, 2021. One week later, on September 3, 2021, the Administrator of the Office of Unemployment Insurance within the DOL sent an email to officials in states, like South Carolina, that had prematurely withdrawn from Pandemic Unemployment Benefits. Exhibit A to Resp. Rtn. The DOL email made clear that states could reinstate their participation in these programs after September 6th and perhaps as late as October 6th. DOL further clarified that, after reinstatement, all benefits and administrative costs would be covered retroactive to the state's earlier termination. On September 8th, Respondent DEW's Senior Legal Counsel replied to the DOL email making clear that Respondent DEW was aware of it at least as early as that date. Exh. A to Resp. Rtn.

The documents Appellants seek to incorporate into the Record render each of the above representations factually inaccurate. Retroactive PEUC and FPUC benefits are available and those benefits that would have been paid, but for Respondents' actions, have not been permanently lost. The August 28th and September 6th dates that Respondents point to do not have the preclusive effect they claim.

II. Rule 210(c), SCACR Does Not Preclude Appellants' Record Supplement.

Respondents argue Appellants' motion should be denied because Rule 210(c) requires that the Record on Appeal contain only matter which was presented to the lower court. However, Appellants seek to supplement the Record under Rule 212(b) which contains no such requirement. As Respondents acknowledge, the documents that Appellants seek to have entered in the Record were created after this case had been certified to this Court. Return p. 1. And these

documents are relevant to whether the relief that Appellants seek can still be granted rather than the propriety of that relief, which is what the Circuit Court ruled on. Thus, their inclusion in the record and their consideration does not undermine this Court's role as a court of review. These documents simply demonstrate that should this Court agree with Appellants and order the relief they seek, that relief is, for now, still available. And contrary to Respondents' assertion, Appellants' claims are not moot.

III. The Documents Appellants Seek to Add to the Record Are "Pertinent and Significant Authorities" Under Rule 208(b)(7), SCACR.

Respondents then argue that the documents Appellants seek to include in the Record are not "pertinent and significant authorities" under Rule 208(b)(7). In doing so, they unnaturally cabin the language of that rule. For example, they argue, without citing anything in support, that an email is not legal authority. But nothing in Rule 208(b)(7) requires that supplemental citation be to "legal authority." And Respondents' citation to *Black's Law Dictionary* definition of "authority" is no help to their argument either. That definition includes "writing taken as definite or decisive" and the statements in the DOL email are plainly both.

Instead, the DOL email makes clear that Respondents lead argument is factually inaccurate and that the relief that Appellants seek is still available. This makes the email both pertinent and significant to this litigation and proper to include in the Record on Appeal.

IV. Respondents' Argument that the Department of Labor Lacks Authority to Allow Retroactive Reinstatement of Pandemic Unemployment Benefits is Without Merit.

Finally, in their closing paragraph, Respondents seem to assert that the DOL has decided not to issue a formal guidance letter, or UIPL, containing the information in its September 3rd

email because it lacks the authority to retroactively reinstate Pandemic Unemployment Benefits. This contention is without merit.

Respondents again misstate the significance of September 6, 2021 with respect to Pandemic Unemployment Benefits. As before, Respondents assert that these programs end on September 6, 2021 and, in effect, cease to exist. But as Appellants have previously pointed out, that is simply not the case. *See e.g.* Reply, p. 1. September 6th is merely the end of the eligibility period for Pandemic Unemployment Benefits and there is no language in the CARES Act which prohibits payment of benefits *after* September 6th as long as those benefits are for weeks of unemployment *before* September 6th.

To be sure, as Respondents point out, the CARES Act does provide that PEUC and FPUC benefits are available for weeks for unemployment beginning after the date on which a state enters into an agreement with DOL to administer those benefits. 15 U.S.C. §§ 9023(e) and 9025(g) (FPUC and PEUC, respectively). But South Carolina did enter into an agreement with DOL to administer these benefits when they were first enacted, in March of 2020, like every other state in the country. *See* R. p. 5. While Respondents later terminated that agreement, nothing in the CARES Act prevents its retroactive reinstatement. And the DOL apparently believes that such action is proper, an interpretation of the CARES Act that should be granted significant deference. *C.f. Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 104 S. Ct. 2778 (1984); *Skidmore v. Swift & Co*., 323 U.S. 134, 65 S. Ct. 161 (1944). In fact, the DOL has reinstated Pandemic Unemployment Benefits retroactively in Indiana after a court enjoined that State's early withdrawal from those programs. R. pp. 465, 189.

CONCLUSION

For the reasons above and those contained in Appellants Motion to Supplement the

Record on Appeal, the September 3rd DOL email and UIPL should be included in the Record on Appeal.

Respectfully Submitted,

September 16, 2021

SOUTH CAROLINA APPLESEED
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