THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. 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.

RETURN TO MOTION TO SUPPLEMENT RECORD ON APPEAL

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Under Rule 240(e), SCACR, Governor McMaster and Director Ellzey submit this Return to Appellants' Motion to Supplement the Record on Appeal.

Before getting to the specific legal arguments, it is important to keep the email Appellants offer in perspective. This email is relevant, if at all, only to Respondents' argument that Appellants are not entitled to injunctive and mandamus relief at this late stage. It has no impact on Respondents' arguments that Appellants lack a private right of action and that Appellants are wrong on the merits—two issues on which the circuit court ruled against Appellants. For the reasons that follow, the Court should deny the Motion.

1. To be part of the Record on Appeal, matter must have been "presented to the lower court." Rule 210(c), SCACR. Rule 212(b), SCACR, permits a party to supplement the Record on Appeal, but Rule 212 does not eliminate the requirements of Rule 210. No one disputes that the email Appellants want to add to the Record on Appeal was not submitted to the circuit court. Indeed, this is underscored by the fact that Appellants also want to include a website biography of the email's sender, suggesting they are trying to authenticate the email. *Cf.* Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). On appeal, of course, is not when evidence is authenticated or received by a court.

Rule 210(c) contains no exception for documents created while an appeal is pending. And for good reason. "This is a court of review." *Powers v. City of Aiken*, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970). This Court, when sitting in its appellate capacity, reviews the findings of the court below and the evidence that court had; it does not accept new evidence. An appeal is designed to determine whether the court below erred or abused its discretion, not to retry the case with new evidence. *See id*. ("The purpose of an appeal under our procedure is to determine if the lower court

did something that it should not have done, or omitted doing something it should have done.”). And our appellate rules reflect this design and purpose by prohibiting parties from expanding the record of documents to include those not presented to the lower court.

Importantly, Plaintiffs did not seek to bring this case in the Court’s original jurisdiction. *See* Rule 245, SCACR. Instead, as the masters of their complaint, they filed this action in circuit court. Accordingly, the universe on appeal is limited to what was presented to the circuit court below. *Cf. I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (“Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.”).

2. Rule 208(b)(7), SCACR, does not provide an alternative path for Appellants to inject the email into this appeal. That rule allows a party to notify the Court of “pertinent and significant authorities” after briefing is completed. Rule 208(b)(7), SCACR.

An email, however, is not legal authority. The Department of Labor informed DEW that the email was only a “courtesy” and no formal guidance would follow. *See* Ex. A (Sept. 9, 2021 email from J. Garner to P. Famolari). Legal authority is something with the force of law. *See Black’s Law Dictionary* 153 (9th ed. 2009) (defining “authority” as a “legal writing taken as definite or decisive,” including “decisions of tribunals[, . . .] statutes, ordinances, and administrative rulings”). In the regulatory administrative-law context, that means something that goes through the notice-and-comment rulemaking process, *see* 5 U.S.C. § 553 (setting out the notice-and-comment requirements for agency rulemaking), or at the very least is a formal guidance document (like the Unemployment Insurance Program Letters already in the Record on Appeal, *see* (R. pp. 30, 62, 105, 147)). An informal “courtesy” email is neither of those.

Moreover, this email itself demonstrates its lack of effect. The email does not unequivocally say that States can opt back into PUA, PEUC, and FPUC* after September 6. The email merely says that the Department "will consider" letting States do so. The Department, of course, must consider the law as well.

The Record on Appeal already contains guidance (*i.e.*, more than an informal courtesy email) from the Department of Labor about "[r]einstating participation in the pandemic UI programs." (R. p. 153). That guidance simply says States may opt back into PUA, PEUC, and FPUC by entering into a new agreement with the Secretary of Labor. (*See* R. p. 153). It makes no mention of October 6 for opting back into these CARES Act programs; in fact, the only date referenced is the September 6 statutory end date for these federal programs. (*See* R. p. 153). Moreover, that guidance also established the 30-day period for people to submit new PUA applications after a State terminated its participation in that program (or after the program expired on September 6). (*See* R. p. 149). Thus, there is nothing new about Appellants' assertion that October 6 is the last day anyone could possibly submit a PUA claim, in light of the September 6 deadline that Congress imposed and existing Department guidance. *Compare* Mot. 3, *with* (R. p. 149). The fact that this deadline was reiterated by email is neither a significant legal development nor reason to supplement the Record on Appeal. Finally, as to the additional Unemployment Insurance Program Letter that Appellants also seek to add to the Record on Appeal, it does not

* It is worth noting the Department of Labor's description of PUA, PEUC, and FPUC in the email: "CARES Act" programs. This is telling, particularly given the arguments from plaintiffs across the country that these programs were actually advantages under the Social Security Act. That statement from the Department is yet more confirmation that Governor McMaster and Director Ellzey are correct that these three programs were created under the CARES Act and are not advantages under the Social Security Act. *See* Respondent's Br. 15–21.

change the existing guidance that is already in the Record on Appeal. Indeed, it is not clear what relevance Appellants believe this document, in particular, has to the proceedings here.

The Department of Labor's failure to issue formal guidance is telling. After all, Congress declared these three CARES Act programs ended on September 6, *see* 15 U.S.C. § 9021(c)(1)(A)(ii) (PUA); *id.* § 9023(e)(2) (FPUC); *id.* § 9025(g)(2) (PUEC), and PEUC and FPUC expressly required that States' agreements with the Secretary of Labor be in effect *before* the weekly benefits can be claimed, *id.* § 9025(g) (PEUC); *id.* § 9023(e) (FPUC); (*see also* R. p. 149 ("For states that terminate the Agreement . . . before September 6, 2021, no payments for the terminated programs may be made with respect to weeks of unemployment ending after the date the state terminates participation in the Agreement.")). The Department of Labor does not have the authority to "rewrite clear statutory terms to suit its own sense of how the statute should operate" and allow States to opt back into the programs after they have ended so that people can claim benefits from a period when a State was not participating in the programs. *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 328 (2014).

The Motion should therefore be denied.

Respectfully submitted,

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