

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
DEBORAH MIHAL, and the AMERICAN) FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL LIBERTIES UNION)
FOUNDATION OF SOUTH CAROLINA,) Case No.:
Plaintiffs,)
vs.)
GOVERNOR HENRY D. MCMASTER, in)
His Official Capacity; and MARCIA S.)
ADAMS, Executive Director of the South)
Carolina Department of Administration, in)
Her Official Capacity,)
Defendants.)

COME NOW the Plaintiffs, Deborah Mihal, and the American Civil Liberties Union of South Carolina, by and through their undersigned counsel, and complaining of the above-named Defendants, would respectfully show unto this Honorable Court as follows:

INTRODUCTION & NATURE OF THE ACTION

1. On March 5, 2021, South Carolina Governor Henry McMaster ordered state agencies to “immediately expedite” the return of non-essential state employees to in-person work. This was a complete course reversal from the Governor’s order that non-essential state employees work remotely, which they had been doing effectively for a year.

2. Crucially, the Governor’s executive order, EO-2021-12, and the South Carolina Department of Administration’s memorandum implementing it, require employees with

disabilities and employees with caretaking responsibilities to return to work in person, regardless of their health or ability to find appropriate care coverage. As a result, EO-2021-12's provision requiring non-essential state employees to return to work in person will harm numerous state employees, their families, and their communities—including the approximately 24,000 state employees who have been working remotely during the pandemic. It also discriminates against employees based on sex and disability.

3. When Governor McMaster first declared a public health emergency on March 13, 2020, there were 21 recorded cases of COVID-19 in South Carolina total,¹ and a 7-day moving average of 2 cases per day.² And when Governor McMaster first ordered that non-essential state employees work remotely on March 19, 2020, there were 165 recorded cases of COVID-19 in South Carolina total,³ and a 7-day moving average of 14 cases per day.⁴

4. By contrast, on March 5, 2021, when Governor McMaster ordered state agencies to return state non-essential employees to the office, there were 776 new cases on that day alone,⁵ and a 7-day moving average of 1,244 cases per day.⁶

5. Requiring non-essential state employees to return to work contravenes the Occupational Safety and Health Administration's *Guidance on Mitigating and Preventing the*

¹ SC Testing Data & Projections (COVID-19), S.C. Dep't of Health & Env't Control, <https://scdhec.gov/covid19/sc-testing-data-projections-covid-19> (cumulative cases).

² Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailystatescases (South Carolina).

³ SC Testing Data & Projections (COVID-19), S.C. Dep't of Health & Env't Control, <https://scdhec.gov/covid19/sc-testing-data-projections-covid-19> (cumulative cases).

⁴ Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailystatescases (South Carolina).

⁵ SC Testing Data & Projections (COVID-19), S.C. Dep't of Health & Env't Control, <https://scdhec.gov/covid19/sc-testing-data-projections-covid-19> (new cases per day).

⁶ Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory, Ctrs. for Disease Control & Prevention, https://covid.cdc.gov/covid-data-tracker/#trends_dailystatescases (South Carolina).

Spread of COVID-19 in the Workplace, which includes limiting the number of people in one place at any given time, including by permitting telework and delivering services remotely.⁷ The requirement even contravenes South Carolina’s Department of Health and Environmental Control’s own guidance for reopening businesses, which explicitly states that employers should “[c]ontinue to encourage telework when feasible with business operations.”⁸

6. At the same time, EO 2021-12 also rescinded EO 2021-11, which had required individuals to wear face coverings in state government offices, buildings, and facilities, and instead merely “encourage[d]” individuals to wear face coverings. Combined with the EO’s rescission of the order that restaurants require employees and customers to wear face coverings, the EO is highly likely to contribute to increased rates of infection in South Carolina overall.⁹

7. Plaintiff Deborah Mihal is a state employee deemed non-essential and permitted to work remotely during the COVID-19 pandemic. Plaintiff ACLU of South Carolina has members who are non-essential state employees and were also permitted to work remotely during the COVID-19 pandemic. Plaintiffs seek declaratory and injunctive relief, both immediate and permanent, against Defendants for exceeding their emergency authority by *requiring* non-essential state employees return to the workplace in person. Without such relief, Plaintiffs and their members will be harmed, as EO-2021-12 leaves many employees with caregiving responsibilities and/or disabilities in an impossible predicament: They lack options for adequate, safe care for their children and adult dependents—jeopardizing the wellbeing of those they care for, and putting them

⁷ *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, Occupational Safety & Health Admin., <https://www.osha.gov/coronavirus/safework#implement-physical-distancing> (last visited Apr. 5, 2021).

⁸ *COVID-19 Reopening Guidance for Businesses*, S.C. Dep’t of Health & Env’t Control (July 27, 2020), https://scdhec.gov/sites/default/files/media/document/DHEC-Employer-Return-to-Work-Guidance_7.27.20.pdf.

⁹ Gery P. Guy Jr. et al., *Association of State-Issued Mask Mandates and Allowing On-Premises Restaurant Dining with County-Level COVID-19 Case and Death Growth Rates — United States, March 1–December 31, 2020*, MMWR 2021 (Mar. 12, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7010e3-H.pdf>.

at risk of prosecution for neglect. But not returning to work in person could result in employees losing their jobs. Further, returning to work in person means increased exposure to COVID-19, and can actually negatively impact employees' ability to fulfill their job responsibilities.

8. Time is of the essence. Non-essential state employees with caretaking responsibilities are required to return to the workplace on April 5, 2021, at many state agencies—regardless of whether they have secured adequate care. Unless the conduct herein alleged is immediately enjoined, employees will be subject to discriminatory policies that could result in loss of their jobs, unnecessary exposure to COVID-19, disruption to their children's education, and other dangers to their own safety and welfare and the safety and welfare of those they care for.

PARTIES, JURISDICTION & VENUE

9. Plaintiff Deborah Mihal ("Mihal") is a citizen of the United States and a resident of Charleston, South Carolina. Mihal is an employee at the College of Charleston. The College of Charleston is a public university operated by the state of South Carolina, and thus a state agency.

10. Plaintiff the ACLU of South Carolina ("ACLU of SC") is a nonpartisan, nonprofit organization dedicated to defending the principles embodied in our Constitution and our nation's civil rights laws. The ACLU of SC has over 8,000 members throughout the state, including many members who are employed by state agencies.

11. Defendant the Honorable Henry D. McMaster ("McMaster") is the Governor of South Carolina. As Governor, the South Carolina Constitution vests in him the "supreme executive authority" of the State. S.C. Const. Art. IV, § 1.

12. Defendant Marcia S. Adams ("Adams") is the Executive Director of the South Carolina Department of Administration and is sued in her official capacity. The Department of Administration was directed to review and approve agencies' plans for non-essential employees

to return to the workplace in-person, as well as to provide additional guidance and clarification regarding that provision of EO-2021-12.

13. This Court is vested with subject matter jurisdiction with regard to the matters raised in this pleading by virtue of Article V, § 11, of the South Carolina Constitution, as enabled by South Carolina Code § 14-5-350.

14. This Court has personal jurisdiction with regard to each Defendant.

15. Venue is proper in the Court of Common Pleas of Richland County, South Carolina, by virtue of South Carolina Code § 15-7-20.

FACTS

Background on Executive Actions

16. On March 13, 2020, Governor McMaster first declared a public health emergency due to the 2019 novel coronavirus (“COVID-19”). In his Executive Order (“EO”) 2020-08, issued on that date, Governor McMaster explained that he had “determined that it is necessary and prudent to declare that an emergency exists, or that the threat thereof is imminent, due to the evolving nature and scope of the public health threat or other risks posed by COVID-19 and the actual and anticipated impacts associated with the same.” Accordingly, pursuant to S.C. Code Ann. § 1-3-420 and § 25-1-440, the Governor declared a public health emergency as “COVID-19 poses an actual or imminent public health emergency for the State of South Carolina.”

17. When an emergency is declared, the Governor “is responsible for the safety, security, and welfare of the State,” and “empowered” with additional authority—but only so far as it is needed to “adequately discharge this responsibility.” S.C. Code Ann. § 25-1-440(a).

18. This additional authority includes, among other provisions, the ability to “issue emergency proclamations and regulations and amend or rescind them.” S.C. Code Ann. § 25-1-440(a)(1).

19. Within a week of declaring a public health emergency, Governor McMaster issued EO 2020-11 on March 19, 2020, directing all non-essential state employees not to report to work in person. The order “direct[ed] that all non-essential employees and staff of the State of South Carolina . . . shall not report to work, physically or in-person, effective Friday, March 20, 2020, and until further notice,” and mandated that state agencies and departments “utilize, to the maximum extent possible, telecommuting or work-from-home options for nonessential employees and staff.” EO 2020-11 (Mar. 19, 2020). The order was intended “[t]o ensure the proper function and continuity of state government operations and the uninterrupted performance and provision of emergency, essential, or otherwise mission-critical state government services, while simultaneously undertaking additional proactive measures to safeguard the health and safety of state employees, pursuant to the cited authorities and other applicable law.” *Id.*

20. Prior to issuing the EO at issue in this litigation, Governor McMaster issued a new declaration that a state of emergency exists in South Carolina on February 21, 2021. EO 2021-10 (Feb. 21, 2021). The order noted that “as part of the ongoing process of facilitating economic recovery and revitalization in a safe, strategic, and incremental manner, the State of South Carolina must also continue to encourage effective ‘social distancing’ practices and implement additional targeted and narrowly tailored emergency measures to combat and control the spread of COVID-19.” *Id.*

21. Notwithstanding these previous directives, on March 5, 2021, the Governor issued EO 2021-12, which directed state agencies to “immediately expedite” the return of non-essential

state employees to their offices in person. EO 2021-12 required agencies to “submit to the Department of Administration, for review and approval, a plan to expeditiously return all non-essential employees and staff to the workplace on a full-time basis.” EO 2021-12 at 12 (“Return In Person Order”). The Return In Person Order also directed the Department to continue to provide supplemental guidance as needed to the agencies. *Id.*

22. The Return In Person Order did not merely rescind EO 2020-11’s provision directing non-essential employees and staff to work remotely—it created an affirmative requirement that non-essential state employees return to work in-person, full time.

23. On March 5, 2021, the same day the Governor issued EO 2021-12, the South Carolina Department of Administration issued a memorandum to Agency Directors of all state agencies and institutions of higher education entitled “State Government Staffing – Return to Normal Operations.” (The “Memorandum”). The Memorandum required state agencies to submit their return-to-the-office plans to the Department of Administration by March 10 at noon, and provided that if an agency or institution does not have an approved plan by the close of business on March 12, the agency or institution is required to return *all staff* to the workplace on March 15.

24. The Memorandum offered guidance to state agencies and institutions in the form of “Frequently Asked Questions.” The Memorandum set the expectation that *all* agencies and institutions would return *all* employees to the workplace by March 15, permitting only “a limited amount of time” for agencies to modify their workplace to mitigate the risk of exposure to COVID-19. The example given by the Memorandum of a plan likely to be approved is one in which an agency would have 60% of its workforce in the workplace on March 15, 75% on March 22, and the remainder in early April—including employees “who work in close environments such as cubicles or shared offices.”

25. The Memorandum states that “only those employees who were working from home before the COVID-19 health emergency for unrelated Covid-19 reasons are to remain teleworking.” Some state agencies and institutions have interpreted that to mean that, even where they have policies in place to allow employees to request to work remotely, no new requests can be approved—regardless of the reasons for the request, whether the individual request would merit approval, or the disruption caused to the employee’s health or productivity by being required to return to work in person.

26. The Memorandum goes on to explain that even employees with disabilities and employees with caretaking responsibilities must return to work in person, regardless of their health or ability to find appropriate care coverage.

27. The Memorandum provides that, even if a child care center or school for an employee’s child is not available for in-person attendance, employees with caretaking responsibilities must report to the workplace in person. Agencies are permitted to request additional time for employees with caretaking responsibilities to return to work. However, the Memorandum is clear that this is a “short time,” and that a plan that would require such employees to return fulltime to the workplace by April 5 is likely to be approved.

28. For employees with disabilities that the Centers for Disease Control and Prevention (“CDC”) has identified as placing them at higher risk for severe illness from COVID-19, the Memorandum allows only a “temporary reasonable accommodation to work remotely until the individual has had an opportunity to be vaccinated.” The Memorandum does not take into account that the vaccine may be contraindicated for some employees because of their disabilities, or that others may be at higher risk from COVID-19 because of disabilities that are not specifically identified by the CDC.

29. The Memorandum does caution that agencies are still expected to follow the Americans with Disabilities Act and the Family and Medical Leave Act (“FMLA”), and instructs agencies to handle requests for accommodations on a case-by-case basis. However, it also states that “it should be considered an essential job function for employees to be in the workplace”—even though the determination of what constitutes an essential job function is actually a case-by-case, fact-specific inquiry. That statement is completely contrary to the fact that non-essential state employees had been fulfilling many of their job functions remotely. Despite that, the Memorandum does not permit agencies to grant accommodations that would allow employees to work remotely, instead instructing state agencies to “identify accommodations that would enable the employee to report to the workplace.”

30. Publicly available plans for state agencies and institutions to return their employees to the workplace generally follow the guidelines outlined by the Memorandum, with variations. The University of South Carolina, College of Charleston, and Clemson University all require employees who are primary caregivers to return to work on April 5, even if they have pre-school or school-age children whose daycare or school is not operating on a full-time schedule, or are unable to find other coverage for their caretaking responsibilities. The University of South Carolina and Clemson University require employees at high risk of serious illness due to contracting COVID-19 to return to the workplace on April 17 and April 26 respectively, and require employees to be actively pursuing vaccination. All three schools suspended the approval of new requests for remote work agreements in accordance with EO-2021-12. Other state agencies have comparable plans for employees to return to the workplace.

Harms from the Return In Person Order

31. Numerous non-essential state employees are now scrambling to make accommodations for their caretaking responsibilities, and to determine if any workplace accommodations due to disabilities will be provided to allow them to return to the workplace safely.

32. Plaintiff Deborah Mihal is the Director of Disability Services for the College of Charleston, and has been working remotely successfully with her team for the past year. She has been able to hold student meetings via video conferencing, as well as participating in her various committee responsibilities and holding weekly staff meetings. There are even some of her job responsibilities, like reviewing student requests for accommodations, that have become more streamlined by going remote. Mihal has been able to fulfill her responsibilities while acting as primary caretaker for her nine-year-old son, who is enrolled in remote schooling.

33. The order that she return to the workplace by April 5 has left Mihal without options for childcare or workable accommodations. Her husband works full-time out of the house five days a week, except for Friday afternoons. She had to commit her son to virtual schooling for the full semester in January 2021, and has gotten no response from her outreach to the principal to see if she can switch him to in-person learning. Even if she is able to enroll him in-person, that would mean additional disruptions for his education and entail yet another new teacher—his fifth this school year—along with a new cohort of classmates. Mihal was also told there is no availability to enroll her son in his school’s afterschool programs. She cannot afford a nanny, and her older son has his own remote school responsibilities as well as a part-time job.

34. Additionally, both returning to the workplace and all of her available childcare options would increase her and her family’s exposure to COVID-19. Mihal scheduled her

vaccination as soon as she could, and though she has an appointment, she will not be fully vaccinated before she is required to return to the workplace.

35. Meanwhile, the College of Charleston has not provided her with any solutions. The college has suspended approval of new telecommuting agreements. One flexible schedule offered to her would move her hours to 8 am to 4 pm, five days a week, which represents only a small schedule adjustment and would not solve her childcare dilemma. If she tries to rely on leave, she will use it up before the school year is over. Her supervisor suggested that she could come to the office evenings, say, 3 pm to 7 pm on weekdays, and on weekends to cover her 37.5 hours in the office. But that will still leave time each day before her husband returns from work to care for their son, and will not allow her to do many aspects of her job that require her to be available during business hours, such as meeting with students, hiring a new employee, holding weekly staff meetings, participating in regularly-scheduled committee meetings, and numerous other job responsibilities.

36. Mihal fears what will happen to her son if he does not have adequate care; she also fears that she will lose her job if she does not comply with the requirement that she return to work in-person.

37. The challenges Mihal is facing—the risk to her job, her difficulty securing safe childcare, the disruptions to her son’s schooling, and the increased exposure to COVID-19 infection—all are caused by the Governor’s Return in Person Order contained in EO-2021-12 and the implementing Memorandum. Without the order, she would likely continue to be able to work remotely as she has been doing for the past year, or could seek reasonable accommodations from her employer if she was required to return to the workplace. Mihal would like to continue working

remotely, at least until the end of the current school year, but will be required to return to the workplace on April 5.

38. Mihal is not alone in struggling to find childcare. About 20% of public schools in South Carolina are still on a “hybrid” schedule for all students, only open for in-person instruction 2 to 4 days a week, leaving parents or other caretakers to supervise the education of school-age children on the remaining school days. In addition, child care availability in South Carolina, already scarce before the pandemic, decreased even further after the pandemic began. By late June 2020, only about 60% of the roughly 2,400 regulated child care centers in the state remained open. Inadequate child care options can lead to a variety of harms, including job loss for the caregiver and the risk of prosecution for child neglect should the caregiver have to leave her child unsupervised to continue working. In South Carolina, child neglect is a felony that carries a sentence of up to 10 years in prison if convicted. Children, too, may be developmentally harmed.

39. Additionally, several members of the ACLU of SC are also unable to find adequate childcare on such short notice. Two members are being forced to return to the office without alternative childcare arrangements. One member serves as the primary caregiver for her school-age daughter, since her husband is an essential worker who works outside the home. Her daughter goes to remote school, and will not be able to return to in-person school this year. The only even temporary alternative care option she has found so far is an hour’s drive away from her home and does not have adequate internet for her daughter’s virtual school. Another member has two school-age children that she will be able to transition to in-person school, but has not found afterschool care for them. She will have no care for them over the summer and will likely have to take leave or FMLA.

40. Other members of the ACLU of SC are put at risk by the Return In Person Order because they are breastfeeding or have chronic health conditions. One member is breastfeeding her son who was born in late January, and does not want to get the vaccine, given the unknown risks to her and her infant. Although she was told she could request an accommodation to continue working remotely, and submitted all the necessary documentation, her request was denied and she is expected to return to the office today. She used her leave as part of her maternity leave, and the only other option she has been given is FMLA. Her husband is a disabled Veteran who cannot work, so she cannot afford to not make an income. She will have to return to the office, unvaccinated, at great risk to her, her husband, and her infant.

41. Another member has a chronic health condition and a wife who is also medically vulnerable. The member is nonetheless being required to return to the office today, well before he will be fully vaccinated in early May. No accommodations have been offered to him, and FMLA has not even been suggested as an option. Dunn Decl. ¶ 7.

42. And finally, one member of the ACLU of SC supervises state employees that will be affected by the Governor's order. This member is worried that the requirement to return to the office will negatively affect the productivity and mental health of supervisors and employees, and risks good employees choosing to take other positions that allow them to continue to work remotely.

EO-2021-12's Return in Person Order Has a Disparate Impact on Women, Pregnant and Breastfeeding/Lactating People, People of Color, and People with Disabilities, Contravening the South Carolina Human Affairs Law

43. The Return in Person Order contravenes the South Carolina Human Affairs Law, which makes it unlawful for an employer to “discharge from employment, or otherwise discriminate against an individual with respect to the individual’s compensation or terms,

conditions, or privileges of employment because of the individual’s . . . race, . . . color, sex, . . . national origin, or disability.” S.C. Code Ann. § 1-13-80. The harms described in the preceding paragraphs will not be felt equally among all non-essential state employees. Rather, the impacts of EO-2021-12 will disproportionately burden women, people who are pregnant, people of color, and people with disabilities.

44. The Return in Person Order will cause harm to caregivers of school-age children and adult dependents who are now required to return to work, regardless of their ability to find safe and adequate coverage for care. Caregiving responsibilities fall disproportionately on women. During the pandemic, “most mothers report that they are doing all, much more, or somewhat more child care than others.”¹⁰ The result of that imbalance is not surprising: losing full-time child care and remote schooling were associated with a higher likelihood that mothers leave the workforce. Requiring caregivers to return to the workplace without care options in place has a disparate impact on women, who are the ones struggling to find alternative arrangements, paying for costly care, risking placing their children or adult dependents in unsafe conditions, and potentially losing their jobs if they cannot make alternative care arrangements.

45. The Return In Person Order will cause harm to people who are pregnant or breastfeeding/lactating. Although the CDC identifies pregnancy as creating a higher risk for severe illness resulting from COVID-19, the CDC has also made clear that the decision whether to receive vaccination is a personal choice for those who are pregnant, given the “limited data on the safety of COVID-19 vaccines in pregnant people.”¹¹ Yet under the Return In Person Order, state agencies

¹⁰ Lauren Bauer et al., *Ten economic facts on how mothers spend their time*, Brookings Inst. (Mar. 30, 2021), <https://www.brookings.edu/research/ten-economic-facts-on-how-mothers-spend-their-time/>.

¹¹ *Information about COVID-19 Vaccines for People who Are Pregnant or Breastfeeding*, Ctrs. for Disease Control & Prevention (updated Mar. 18, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html>.

may allow pregnant people to continue to work remotely only if they are taking steps to be vaccinated. The same is true for those who are breastfeeding/lactating: “Because the vaccines have not been studied on lactating people, there are no data available on: [t]he safety of COVID-19 vaccines in lactating people[, the] effects of vaccination on the breastfed infant[, or the] effects on milk production or excretion.”¹² By not allowing those who are pregnant or breastfeeding/lactating to continue to work remotely based on evidence (such as a letter from a doctor) that they have been advised or have chosen not to get the vaccine, EO 2021-12 fails to address the uncertainty in this area of research, forcing those who are pregnant or breastfeeding/lactating to get vaccinated or risk losing their jobs or their income.

46. Employees with disabilities are also harmed by the Return In Person Order. For individuals with conditions the CDC deems high-risk, state agencies may grant these individuals a temporary accommodation to continue to work remotely, but only until they have the opportunity to be vaccinated. However, there are some individuals with these conditions for whom the vaccine may be contraindicated for medical reasons. These employees, who will continue to face elevated risk from COVID-19, will not be protected by the limited accommodation authorized by EO 2021-12. Individuals who do not have medical conditions that meet the CDC’s specific criteria may still be at elevated risk of serious consequences from COVID-19 because they have multiple medical conditions that combine to increase their risk, or because their specific conditions and circumstances place them in this higher risk category. EO 2021-12 does not allow for agencies to provide the reasonable accommodation of allowing these individuals to continue to work remotely, even temporarily, and even if these individuals can present evidence (such as a letter from a doctor) of their elevated risk. EO 2021-12 also directs agencies to make the determination that all jobs

¹² *Id.*

require being physically present at the workplace as an essential function, even though what job functions are essential is fact specific, depends on the characteristics of each job, and a number of different types of evidence may be relevant to the determination for each particular job. There is no support in the law for issuing a blanket declaration that all jobs within the state government have any particular essential functions.

47. Finally, the Return In Person Order will have a disparate impact based on race and will exacerbate existing disparities in rates of COVID-19 infection, hospitalization, and death. Black people comprise 26% of the South Carolina population, yet they have accounted for 26% of COVID cases, 36% of COVID hospitalizations and 33% of COVID deaths.¹³ At the same time, Black people represent only 15-17% of those vaccinated, compared to 23% who were white. These disparities in access to the vaccine mean that people of color will be of higher risk of returning to work prior to receiving vaccination, thus putting them at even higher risk of contracting the virus than their white counterparts, simply as a function of returning to work in person. And this compounds existing disparities in rates of infection, hospitalization, and death already faced by communities of color, and particular African Americans, who already are disproportionately represented in jobs deemed essential—and thus who were required to return to work in person—over the course of the pandemic.¹⁴

48. There is simply no emergency need, or business necessity, served by requiring non-essential employees to return to the workplace in person at this time. Non-essential state employees have been working remotely successfully for over a year.

¹³ See Kaiser Family Foundation, Nambi Ndugga et al., *Latest Data on COVID-19 Vaccinations Race/Ethnicity*, Mar. 31, 2021, <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-race-ethnicity/>; Zak Koeske, *Black Latino SC Residents Vaccinated at Much Lower Rates than Whites, Data Show*, The State, Feb. 17, 2021, <https://www.thestate.com/news/politics-government/article249304980.html>.

¹⁴ See Tiana N. Rogers et al., *Racial Disparities in COVID-19 Mortality Among Essential Workers in the United States*, World Med. Health Policy, Aug. 5, 2020, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7436547/pdf/WMH3-9999-na.pdf>.

FOR A FIRST CAUSE OF ACTION
(Violation of Separation of Powers and Non-Delegation Clauses)
South Carolina Constitution, Art. I, § 8, and Art. III, § 1

49. Plaintiffs hereby incorporate each and every of the foregoing allegations of fact set out in this Complaint into this cause of action, to the extent such allegations are not inconsistent with those that follow.

50. Article I, § 8 of the South Carolina Constitution provides: “In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.”

51. The legislative power of the State is vested in the Senate and the House of Representatives—together the General Assembly of the State of South Carolina. S.C. Const. art. III, § 1.

52. The General Assembly has empowered the Governor with additional authority, including the authority to “issue emergency proclamations and regulations” which “have the force and effect of law,” S.C. Code Ann. § 25-1-440(a)(1), when an emergency has been declared—but that authority is limited to adequately discharging the Governor’s responsibility to provide for the “safety, security, and welfare of the State.” S.C. Code Ann. § 25-1-440.

53. The Governor’s Return In Person Order, as implemented by the Memorandum, creates requirements for non-essential state employees that are contrary to the safety, security, and welfare of the State. Both the Governor and the Department of Administration, therefore, have exceeded their statutory authority, usurped the legislative power of the General Assembly, and improperly imposed unlawful burdens on non-essential state employees in violation of Art. I, § 8 of the South Carolina Constitution.

54. These matters present a real and justiciable issue which is presently ripe for decision. Therefore, Plaintiffs respectfully request a declaratory judgment that the provisions of EO-2021-12 requiring non-essential state employees to return to the workplace in person, as implemented by the Memorandum and administered by and through the Department of Administration, are impermissible under the laws of the State of South Carolina, by virtue of the South Carolina Declaratory Judgment Act. S.C. Code § 15-53-10 *et seq.*

FOR A SECOND CAUSE OF ACTION
(*Ultra Vires*)
S.C. Code Ann. § 25-1-440

55. Plaintiffs hereby incorporate each and every of the foregoing allegations of fact set out in this Complaint into this cause of action, to the extent such allegations are not inconsistent with those that follow.

56. A government actor “commit[s] an *ultra vires* act by exceeding its statutory authority,” as it must “act[] within the legal parameters established by the legislature.” *Baird v. Charleston Cty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Where a statute assigns a government entity particular “duties and powers,” actions that exceed the bounds of those parameters are *ultra vires* and, accordingly, unlawful. *S.C. Pub. Int. Found. v. S.C. Dep’t of Transportation*, 421 S.C. 110, 122-24, 804 S.E.2d 854, 861-62 (2017).

57. The Governor’s authority to act when an emergency has been declared is limited to adequately discharging the Governor’s responsibility to provide for the “safety, security, and welfare of the State.” S.C. Code Ann. § 25-1-440.

58. The Governor’s Return in Person Order, as implemented by the Memorandum, creates requirements for non-essential state employees that are contrary to the safety, security, and welfare of the State. Both the Governor and the Department of Administration, therefore, have

exceeded their statutory authority and improperly imposed unlawful burdens on non-essential state employees in violation of Art. I, § 8 of the South Carolina Constitution.

59. These matters present a real and justiciable issue which is presently ripe for decision. Therefore, Plaintiffs respectfully request a declaratory judgment that the provision of EO-2021-12 requiring non-essential state employees to return to the workplace, as implemented by the Memorandum and administered by and through the Department of Administration, are impermissible under the laws of the State of South Carolina, by virtue of the South Carolina Declaratory Judgment Act. S.C. Code Ann. § 15-53-10 *et seq.*

PRAYER FOR RELIEF

WHEREFORE, having fully stated its claim against Defendants, Plaintiffs respectfully request the entry of an Order which provides for the following relief:

- a. Declaring that the Return in Person Order contained in EO-2021-12, as implemented by the Memorandum and administered by and through the Department of Administration, to the extent it requires non-essential state employees to return to the workplace in person without reasonable accommodations for caregiving, health risk, and disability, is unenforceable because such policies and procedures exceed the scope of authority granted to the Governor and/or the Department of Administration and is *ultra vires*;
- b. Enjoin, both temporarily and permanently, the Governor and/or the Department of Administration, as well as McMaster's and Adam's successors in office, agents, employees, attorneys, and those persons acting in concert with them or at their direction, from using and/or implementing any policy or procedure requiring non-essential employees to return to the workplace in person, including but not limited to

the Return to Work Order contained in EO-2021-12 as implemented by the Memorandum, that is inconsistent with the responsibility to protect the safety, security, or welfare of the State, for the following reasons:

- i. The Governor has instituted policies in derogation of the state emergency authority law that have the natural, probable, and actual consequence of causing irreparable harm to Plaintiffs and those who are similarly situated;
 - ii. the burden on caretakers to find adequate, safe care, and the attendant risks and disruption to dependents, including, for school-aged children, disruption to their education, and dangers from being left alone or without adequate adult supervision;
 - iii. the risk of unnecessary exposure to COVID-19, with attendant and potentially deadly risks to health and safety;
 - iv. the threat of job loss by state employees; and
 - v. There is no adequate legal remedy available that is capable of making Plaintiffs whole.
- c. Order the Governor and/or Adams to permit state agencies to process and grant requests for reasonable accommodations based on disability, without the restrictions on the type and duration of accommodations contained in EO 2021-12 and the Memorandum;
 - d. Retain jurisdiction over this matter until Defendants have complied with all the Orders and Mandates of the Court;
 - e. Award attorney's fees and costs under South Carolina Code § 15-77-300 should this Court deem such an award just and proper; and,
 - f. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

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**Pro hac vice* forthcoming

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Date: April 5, 2021