No. 2021-000883

The Supreme Court of the State of South Carolina

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.

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
HON. R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

BRIEF OF SOUTH CAROLINA CHAMBER OF COMMERCE, SOUTH CAROLINA RESTAURANT AND LODGING ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTRODUCTION

South Carolina businesses face an unprecedented crisis. An ongoing pandemic squelched consumer demand, disrupted supply chains, and interrupted work arrangements for much of the past 18 months. Now, as consumers return to the marketplace in droves, businesses have confronted drastic labor shortages. In large part, these shortages can be traced to expanded federal payments that make it more lucrative for many workers to remain unemployed than to return to the workforce. These federal payments, originally intended to provide short-term help to the vulnerable, now threaten the economic well-being of all South Carolinians. Consumers are hurt when businesses cannot timely supply critical goods and services, from building materials to food. Workers are hurt by the loss of skills, training, and initiative that attends extended periods out of the workforce. Businesses up and down the supply chain are hurt by labor shortages and the concomitant disruption to operations. Many businesses have been forced to close. All suffer—businesses, consumers, workers, and communities.

Recognizing these threats to the State's economic recovery, Governor McMaster took appropriate action by terminating the State's participation in the expanded federal benefit programs. Governors in twenty-five other states from Alaska to Louisiana took similar actions. The unemployment rate in South Carolina and other states that stopped participating in the federal programs has fallen, along with jobless claims. Labor market participation, on the other hand, has risen. Though labor shortages remain an issue, ending disincentives to work has already played a positive role in the State's economic recovery.

More than three months after the Governor's announcement, the appellants now seek to undo all this positive momentum in stabilizing the State's labor market. Based on *amici*'s analysis, unemployment insurance benefits from the CARES Act result in one in four recipients taking home *more* in unemployment than they could earn working. In South Carolina, combined pandemic-era unemployment benefits amount to 79% of the average weekly private sector pay. In the leisure and hospitality industries, that number rises to 123%. When jobless South Carolinians make through unemployment benefits most of (or more than) what they earn by working, it is no surprise that they stay home instead of filling one of the more than 95,000 job openings in the State that existed as of August 2021. Governor McMaster's action corrects these disincentives to work, helping the State's economy and lowering unemployment. An injunction requiring the State to continue these benefits, on the other hand, would hurt small and large businesses by worsening the labor shortage in South Carolina and impeding the State's economic recovery.

Not only are the appellants' claims contrary to the public interest, they lack legal merit. *First*, as the decision below correctly held, the statute that they invoke does not provide a private right of action. It protects the general public and not any specific individuals, as it gives discretion to the executive branch to determine the best way to help "this State and its citizens." S.C. Code Ann. § 41-29-230(1). The appellants do not identify—and *amici* could not find—any other lawsuit based on this statutory provision. This is unsurprising as the provision does not give individuals any right to sue.

Second, even if the statute provided a private right, it confers complete discretion on the executive branch to determine what "advantages" particular programs provide the State's citizens, *id.*, and the courts do not have any judicially manageable standard to second-guess that determination. Put another way, this lawsuit presents a classic political question, appropriately left to resolution by the elected branches, not the courts.

Third, even if the Court were to somehow adjudicate whether the expanded payments here "advantage[]" the State, it would have to defer to Governor McMaster's reasonable (and correct) explanation that the payments cause the State significant economic problems—problems that far outweigh the temporary promise of federal dollars. Nothing in the law requires the State to pursue supposed short-term gain that would lead to long-term harm.

This Court should affirm.

INTEREST OF *AMICI*

The South Carolina Chamber of Commerce is the State's largest business trade and commerce organization. It represents businesses, industries, professions, and associations of all sizes and types with a unified voice, and promotes the development and expansion of new and existing businesses and industries in the State. Its efforts, in turn, benefit the public, raising the standard of living for South Carolina's citizens. The S.C. Chamber aims to protect the interests of South Carolina's business community by identifying and addressing issues that may impair economic development. It routinely participates in state litigation as an *amicus*. *See, e.g.*, *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 414 S.C. 33, 89 (2015); *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 318 n.3 (2010).

Formed in 2012, the South Carolina Restaurant and Lodging Association is a statewide, non-partisan trade organization whose mission is to promote, protect, and educate the foodservice and lodging industries of the State and to ensure positive business growth for its members. The SCRLA represents over 1,300 restaurant and lodging companies and industry-related services providers. It strives to advance the best interests of its members on small business issues, on hospitality and tourism concerns, and towards the protection of South Carolina's quality of life.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents about 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every geographic region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The National Federation of Independent Business is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. The National Federation of Independent Business Small Business Legal Center is a nonprofit, public interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

STATEMENT OF ISSUES

Amici adopt the respondents' statement of issues.

STATEMENT OF THE CASE

Amici adopt the respondents' statement of the case.

ARGUMENT

I. The appellants cannot succeed on the merits.

A. The statute does not confer a private right of action.

The appellants' action falters from the starting block, for they do not have a right to sue. Their complaint alleges a violation of only one statutory provision, but that provision does not give private litigants a right of action. Revealingly, it appears that South Carolina's provision has never been relied on to provide a cause of action.

The statute 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).

"In determining whether a statute creates a private cause of action, the main factor is legislative intent." *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353 (2011) (cleaned up). "Legislative intent to grant or withhold a private right of action for a violation of the statute is determined primarily from the language of the statute." *Id.*

Here, the statute includes no express right of action. Instead, it merely says that "the department must cooperate with the United States Secretary of Labor to the fullest extent consistent with the provisions of these chapters," "as necessary to secure to this State and its citizens all advantages available under" various provisions of the federal Social Security Act. S.C. Code Ann. § 41-29-230(1). The statute does not explicitly provide for any private party to bring suit.

Where a private right of action is "not expressly provided," it may still "be created by implication"—but 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 (2009); *see also Adkins v. S.C. Dep't of Corr.*, 360 S.C. 413, 418 (2004). "If 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." *Dema*, 383 S.C. at 121.

The statute here is the definition of a statute "to aid society and the public in general." *Id.* It speaks in the broadest of generalities, directing a state department to act "as necessary to secure to this State and its citizens all advantages." S.C. Code Ann. § 41-29-230(1). As the decision below explained, "[s]uch a general command demonstrates that this statute is about society generally, not a particular individual." Order Granting Motion at Dismiss, at 5. Thus, the provision does not give rise to a private cause of action.

Similar cases have refused to find private rights of action. *See, e.g.*, *Dema*, 383 S.C. at 122 (no private right where the statute's language "clearly indicates" an intent "to advance the quality of healthcare provided in this State for all people receiving the care, not for a particular individual"); *Adkins*, 360 S.C. at 418 ("Given that the overall purpose of the prevailing wage statute is to prevent unfair competition, and to aid society and the public in general, we cannot conclude that the statutes in question were enacted for the special benefit of Inmates.").

As the decision below recognized, the appellants' request for a declaratory judgment cannot rescue their complaint. Order Granting Motion at Dismiss, at 5. "The Uniform Declaratory Judgments Act is not an independent grant of jurisdiction." *Tourism Expenditure Rev. Comm'n v. City of Myrtle Beach*, 403 S.C. 76, 81 (2013) (cleaned up). "The Act creates a new remedy, not a new source of legal rights and obligations." 23 S.C. Jur. Declaratory Judgments § 3. Thus, because the appellants have no legal right under the statute, they are not entitled to a declaratory judgment: "Where adjudication of a question would settle no legal rights of the parties, it would be only advisory and, therefore, beyond the intended purpose and scope of a declaratory judgment." *Tourism Expenditure*, 403 S.C. at 81 (cleaned up); *see also Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 170 n.4 (2016) (refusing declaratory judgment where "none of Respondents' legal rights are being or will be abridged"). If the Court "were to recognize a general right to seek a declaratory judgment that the [statute] has been violated, [it] would be creating something the General Assembly did not create and might not create if it considered the issue"—and the Court is "not at liberty to add to the statutory law or subtract from it." *Ballard v. Newberry Cnty.*, 432 S.C. 526, 532 (Ct. App. 2021).

Because "[n]othing in the statute[] indicates a legislative intent to create civil liability for a violation," it does "not give rise to a private right of action." *Adkins*, 360 S.C. at 419. The appellants' suit cannot succeed, so the decision below should be affirmed.

This conclusion is bolstered by the public duty rule, "a rule of statutory construction which aids the court in determining whether the legislature intended to create a private right of action for a statute's breach." *Edwards v. Lexington Cnty. Sheriff's Dep't*, 386 S.C. 285, 292 (2010) (cleaned up). This rule "presumes statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public." *Arthurs ex rel. Est. of Munn v. Aiken Cnty.*, 346 S.C. 97, 104 (2001) (quoting *Summers v. Harrison Const.*, 298 S.C. 451, 455 (Ct. App. 1989)). Such statutes do not create obligations "towards individual members of the general public." *Id.* (cleaned up).

Again, this is a classic public-duty statute, instructing a state agency to act in general ways to help the State and its citizens. The statute does not give rise to a private right of action, and this Court should affirm.

B. The statute does not involve a justiciable question.

Even if the statute created a private cause of action, the appellants' suit faces another justiciability hurdle: The statute creates no judicially administrable standard. "[C]ourts will not rule on questions that are exclusively or predominantly political in nature rather than judicial." *Segars-Andrews v. Jud. Merit Selection Comm'n*, 387 S.C. 109, 122 (2010). The questions in such cases are whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.* (cleaned up). "[T]he appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Id.*

These considerations doom the appellants' claims. No satisfactory criteria exist for judicial resolution of their lawsuit. This Court has no standard by which to determine as a *legal* matter (as opposed to a *policy* matter) whether paying individuals not to work provides "advantages" to the "State and its citizens," much less to determine what state executive actions are "necessary to secure" any such advantages. S.C. Code Ann. § 41-29-230(1). These questions "revolve around policy choices and value determinations," which are "constitutionally committed for resolution to the halls of state legislatures or to the confines of the executive branch"—not the courts. *Segars-Andrews*, 387 S.C. at 123 (cleaned up). Similar actions are routinely dismissed as involving questions beyond the ken of the courts. *See, e.g.*, *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 376–77 (2011) ("Petitioners' argument that the funds appropriated for conducting a 2012 Presidential Preference Primary are insufficient presents a nonjusticiable political question.").

Because the appellants' claims have no "legal foundation," *Segars-Andrews*, 387 S.C. at 130, but instead present forbidden questions of policy, they are not justiciable. Once again, the fact that South Carolina's statute has apparently never been enforced in court confirms that this lawsuit would involve an unprecedented, improper expansion of judicial power over co-equal branches of government.[1]

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[1] This argument is properly before the Court, regardless of whether the parties label this a separate "issue." First, it was raised below. *See* Order Granting Motion at Dismiss, at 8. Second, it "concern[s] a matter of significant public interest" so can be considered even if only raised in an *amicus* brief. *State v. Langford*, 400 S.C. 421, 432 (2012) (cleaned up). Third, it relates to a jurisdictional defect so can be considered *sua sponte*. *See State v. Keenan*, 278 S.C. 361, 364 (1982). Fourth, the Court may affirm for any reason in the record. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420–21 (2000). Fifth, if *amicus* briefs were "confined solely to arguing the parties' *theories* in support of a particular *issue*," they would be placed "in a position of parroting 'me too.'" *Keating v. State ex rel. Ausebel*, 157 So. 2d 567, 569 (Fla. Dist. Ct. App. 1963) (emphases added).

C. Even if the case were justiciable, the Court should defer to the political branches' understanding of "advantages" to the State's citizen.

The appellants' claims also fail on the merits. As the decision below correctly held, the plain text of the statute does not apply to CARES Act funds or to the Governor's actions. Order Granting Motion at Dismiss, at 5–7 & n.1. But if the Court ventures down the path of deciding what policy choices "advantage[]" the State and its citizens, the Court should defer to the Governor's reasonable explanation. *See id.* at 8 ("Director Ellzey (and to the extent the statute applies to him, Governor McMaster as well) has discretion to determine what benefits from the federal government actually ['advantage[]'] the State and its citizens").

Before the government can be enjoined "in the performance of actions or duties provided by statute," a plaintiff must "show[] that the public department . . . has exercised its power in an arbitrary, oppressive or capricious manner." *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310 (2018) (cleaned up). When an executive official "is charged with the execution of a statute" and makes an informed "policy determination[]," "the role of a court reviewing such decisions is very limited." *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 371 (2010). The official's decision is "presumptively correct." *S.C. Energy Users Comm'n v. S.C. Elec. & Gas*, 410 S.C. 348, 354 (2014); *see also Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 33 (2014) ("The construction given to a statute by those charged with the duty of exercising it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." (cleaned up)).

The State's decision here as to which federal benefits are actually "advantages" was, at a minimum, reasonable. As the Governor explained, "What was intended to be short-term financial assistance for the vulnerable and displaced during the height of the pandemic has turned into a dangerous federal entitlement, incentivizing and paying workers to stay at home rather than encouraging them to return to the workplace." Complaint Ex. E. This entitlement created "an unprecedented labor shortage" that "pose[s] a clear and present danger to the health of our State's businesses and to our economy." *Id.*

As shown next, the Governor's explanation was spot-on. The State balanced various factors in coming to this understanding, recognizing that "involuntary unemployment" "is a serious menace to health, morals and welfare of the people of this State," S.C. Code Ann. § 41-27-20, and that "the reemployment of unemployed workers throughout the State" must be encouraged in every "way that is feasible," *id.* § 41-29-120(A)(1)(d). Deference to the Governor and the Department of Employment and Workforce's decision is warranted, "both because they have been entrusted with administering" this law and "because they have unique skill and expertise in administering" it. *Kiawah Dev. Partners, II*, 411 S.C. at 34. And because they provided a reasoned explanation of their decision, the Court's task is at an end. Again, the appellants' claims cannot succeed, and this Court should affirm.

II. Governor McMaster's action serves the public interest.

The evidence shows that Governor McMaster's decision to withdraw South Carolina from the expanded benefits programs will help the State and its citizens by encouraging workforce participation. This evidence is relevant in multiple respects to the issues before the Court. First, as a statutory matter, the evidence makes it clear that the Governor's determination about whether the extra federal benefits would "advantage[]" the State was both reasonable and correct. *See supra* Part I.C. Second, because injunctions—especially mandatory injunctions that alter the status quo—are "drastic" remedies granted in equity, 12 S.C. Jur. Equity § 19, the Court exercises its discretion in evaluating the appellants' demand for immediate relief. *See Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 261 (Ct. App. 2006) (mandatory injunctions subject to "a balancing of the equities"); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 274 (1987). Here, the public interest weighs against injunctive relief. Third, to the extent the appellants seek a writ of mandamus, the public interest is relevant. *See McDowell v. Burnett*, 90 S.C. 400 (1912).

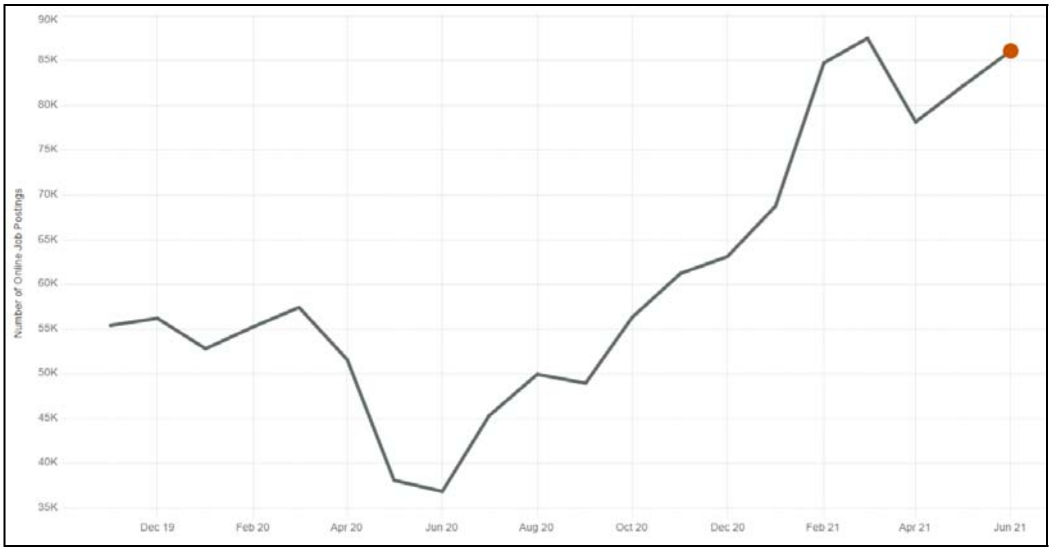
Overwhelming evidence confirms that the expanded federal benefits have generated labor shortages by subsidizing unemployment, which in turn has hurt small and large businesses throughout South Carolina and hindered the State's economic recovery. The Governor appropriately determined—based on data from South Carolina and other states—that scaling back those benefits would best stimulate the economic recovery in South Carolina and thereby advance the public interest. And the data already supports his determination, as the State's unemployment rate has fallen every month since May and total employment is back to where it was before the pandemic. The appellants' requested relief would harm the public interest.

A. Labor shortages are hurting businesses and hindering the State's economic recovery.

Before Governor McMaster took the challenged action, businesses faced severe labor shortages. These labor shortages had cascading effects, often preventing businesses from staying open and thereby worsening unemployment—and depriving consumers of crucial goods and services. Industries important in South Carolina—hospitality, healthcare, agribusiness, and manufacturing—were hit especially hard.

For instance, the workforce shortage has been pronounced in the food and beverage sector, with restaurants across the State facing staffing problems. Even as demand for dining soared, restaurants struggled to find enough employees to stay open. Not only did restaurants face employee shortages, their suppliers faced similar shortages, exacerbating the struggles of these businesses to stay open and serve the public. *See, e.g.*, Hanna Raskin, *Food-and-Beverage Staff Shortage Extends Past Restaurants, Snarling Pickups and Deliveries*, Post and Courier (Apr. 26, 2021), https://bit.ly/3yBTnZS; *see also* Emily Williams, *With Tourism Back, Charleston Hotels and Restaurants Face New Crisis: A Worker Shortage*, Post and Courier (Apr. 18, 2021), https://bit.ly/3lF81f9.

Many industries faced similar labor issues, with a majority of the S.C. Chamber's members identifying labor shortages as the most pressing issue facing their businesses at the start of summer 2021. In the week before South Carolina ceased participation in the expanded federal programs, the Department of Employment and Workforce received 87,000 unemployment claims, despite the 86,000 jobs that were posted in the State at that time. *See* Complaint ¶ 21. The shortages could easily be observed at many local businesses, as reflected by this chart of South Carolina job postings:



Number of Online Job Postings in South Carolina[2]

Nationwide, at the end of May, there were 9.2 million job openings. *See* U.S. Bureau of Lab. Stats., *Job Openings and Labor Turnover – May 2021* (July 7, 2021), https://www.bls.gov/news.release/pdf/jolts.pdf. Despite the high number of open positions, however, jobs are not being filled. One survey estimates that 49% of business owners had job openings that they could not fill, a record high. Nat'l Fed'n of Indep. Bus., *Small Business Labor Shortage Hits New Record in July* (Aug. 2, 2021), https://tinyurl.com/dvnms59a. Another survey found that 61% of small employers were experiencing a staffing shortage. *See* Nat'l Fed'n of Indep. Bus., *Covid-19 Small Business Survey (18): Federal Small Business Programs, the Vaccine, Labor Shortage, and Supply Chain Disruptions* 4, 10 (June 2021),

[2] *Employment Dashboard, Number of Online Job Postings*, accelerateSC, https://accelerate.sc.gov/ (last visited Aug. 18, 2021).

https://assets.nfib.com/nfibcom/Covid-19-18-Questionnaire.pdf (question 20). And the U.S. Chamber found that "the number of workers quitting their jobs reached an all-time high of 2.7%, while layoffs and discharges reached an all-time low of 1%, another indication of the tightness of the labor market." U.S. Chamber of Com., *Number of Open Jobs Jumps by 1 Million—America's Worker Shortage Crisis is Worsening, Urgent Need for National Workforce Solutions* (June 8, 2021), https://tinyurl.com/r44ztved.

Such a tight labor market has consequences. As the Governor observed, the labor shortage "pose[s] a clear and present danger to the health of our State's businesses and to our economy." Complaint Ex. E. More than 90% of state and local chambers of commerce report that worker shortages are hindering local economic recoveries. *See* U.S. Chamber of Com., *The America Works Report: Quantifying the Nation's Workforce Crisis* (June. 1, 2021), https://tinyurl.com/5cp2w79c. As explained by the U.S. Chamber's Executive Vice President and Chief Policy Officer, Neil Bradley, "[w]e are seeing an increasing number of businesses turning down work and only partially reopening because they can't find enough workers." *Number of Open Jobs*, *supra*. The inability of businesses to meet demand is a massive drag on economic growth and threatens the State's ability to recover from the pandemic.

B. Federal benefits are contributing to labor shortages.

The biggest reason for this phenomenon is no mystery. Federal unemployment benefits are suppressing the labor supply by allowing many Americans to make more money by not working. As Governor McMaster explained, benefits available under the CARES Act are "incentivizing and paying workers to stay at home rather than encouraging them to return to the workplace." Complaint Ex. E.

The data supports the Governor's conclusion. By most accounts, only a small percentage of unemployed Americans is actively looking for work. According to a recent poll, 49% of Americans who became unemployed during the pandemic are not actively looking for work. *See* U.S. Chamber of Com., *Poll: The COVID-19 Unemployed* (June 3, 2021), https://tinyurl.com/w7h443ew. A separate survey found that about 30% of unemployed job applicants was passively looking for work while another 30% was not looking at all. Nick Bunker, *Indeed Job Search Seeker Survey June 2021: COVID Concerns and Financial Cushions Make Job Search Less Urgent*, Indeed Hiring Lab (June 29, 2021), https://tinyurl.com/xjymasck.

The availability of unemployment insurance benefits is a significant factor behind these statistics. *See id.* Sixteen percent of those who are not actively seeking employment admit that the amount of money they are receiving through government programs makes it "not worth looking" for work. *See* Chamber, *Poll*, *su-*

pra. And 28% believe "[t]here are a lot of people who are not looking for work because they can do almost or just as well collecting unemployment benefits." *Id.* Another recent survey found that 1.8 million unemployed Americans have refused to return to work because of generous unemployment insurance benefits. *See* Sam Ro, *Poll: 1.8 million Americans have turned down jobs due to unemployment benefits*, Axios (July 14, 2021), https://tinyurl.com/8bdj6ute. The data thus confirm that many Americans believe they can make more money by not working—because of the availability of federal pandemic unemployment insurance benefits.

This belief is well-founded. Key voices have been warning that pandemic-related unemployment insurance benefits would often exceed earnings in many places. For example, when Congress was considering whether to extend the $600-per-week benefit amount in June 2020, the Congressional Budget Office estimated that "[r]oughly five of every six recipients would receive benefits that exceeded the weekly amounts they could expect to earn from work during those six months." Letter from Cong. Budget Off. to Senator Charles Grassley, Chairman of the Senate Comm. on Fin. (June 4, 2020), https://tinyurl.com/ezznz96w. The CBO predicted that "[i]n calendar year 2021, both output and employment would be lower than they would be if the increase in unemployment benefits was not extended." *Id.* A researcher affiliated with the Bipartisan Policy Center likewise recognized that many people "may be disincentivized from returning if the additional $600 in weekly benefits remains in place." G. William Hoagland et al., *It Doesn't Have to Be All or Nothing: How Unemployment Insurance Could Support Work and Continue to Provide Financial Relief*, Bipartisan Pol'y Ctr. (July 8, 2020), https://tinyurl.com/wparnsyj. Others described the benefits program as a "trap" and a "hindrance to getting people back to work with businesses now competing with unemployment benefits." Joe Horvath & Jonathan Ingram, *Refusing to Work: Handling Employee Work Rejections in Light of Expanded Unemployment Benefits*, FGA (June 24, 2020), https://tinyurl.com/d5w8p8vt.[3]

The data in the chart below[4] validate these predictions:

[3] The Federal Reserve economist quoted by the appellants' *amici* (Br. 8–9) agreed that ending the expanded benefits could "motivate people to invest more energy in finding a job" and said that "I think it will move the needle." Chase Karacostas, *What's Happening? SC Loses Jobs in April even as Businesses Decry Worker Shortage*, Myrtle Beach Sun News (May 24, 2021), https://bit.ly/3Bga5iw.

[4] Source: Ronald Bird, Senior Economist, U.S. Chamber of Com. (April 2021) (data from Dep't of Lab. Off. of Unemployment Ins., *UI Replacement Rates Report*, https://oui.doleta.gov/unemploy/ui_replacement_rates.asp, and U.S. Bureau of Lab. Stats., *Quarterly Census of Employment and Wages*, https://data.bls.gov/PDQWeb/en).

State	Average Weekly Private Service Earnings	Average UI Benefit Service Positions W/ $300 Federal	UI Benefits as % of Average Service Wage	Average Weekly Earnings Leisure and Hospitality	Average UI Benefit Leisure and Hospitality Positions W/ $300 Federal	UI Benefits as % of Average Leisure and Hospitality Wage
Alabama	$885	$696	79%	$360	$461	128%
Alaska	$1,003	$620	62%	$509	$462	91%
Arizona	$944	$647	69%	$480	$477	99%
Arkansas	$804	$617	77%	$378	$449	119%
California	$1,203	$787	65%	$576	$533	93%
Colorado	$988	$760	77%	$512	$539	105%
Connecticut	$1,101	$737	67%	$478	$490	102%
Delaware	$927	$663	72%	$417	$464	111%
Florida	$914	$670	73%	$481	$495	103%
Georgia	$905	$702	78%	$392	$474	121%
Hawaii	$1,002	$921	92%	$598	$671	112%
Idaho	$862	$728	85%	$352	$475	135%
Illinois	$1,019	$692	68%	$453	$474	105%
Indiana	$888	$613	69%	$375	$432	115%
Iowa	$864	$751	87%	$350	$483	138%
Kansas	$872	$720	82%	$346	$466	135%
Kentucky	$808	$654	81%	$372	$463	124%
Louisiana	$864	$586	68%	$369	$422	114%
Maine	$909	$729	80%	$477	$525	110%
Maryland	$1,127	$845	75%	$470	$528	112%
Massachusetts	$1,201	$826	69%	$539	$536	99%
Michigan	$904	$706	78%	$385	$473	123%
Minnesota	$1,071	$830	78%	$381	$489	128%
Mississippi	$714	$567	79%	$369	$438	119%
Missouri	$876	$651	74%	$412	$465	113%
Montana	$811	$701	86%	$367	$481	131%
Nebraska	$885	$712	80%	$361	$468	130%
Nevada	$836	$752	90%	$553	$599	108%
New Hampshire	$1,000	$721	72%	$467	$497	106%
New Jersey	$1,102	$877	80%	$494	$558	113%
New Mexico	$796	$720	90%	$388	$505	130%
New York	$1,137	$775	68%	$560	$534	95%
North Carolina	$928	$651	70%	$396	$450	114%
North Dakota	$869	$766	88%	$358	$492	137%
Ohio	$859	$699	81%	$360	$467	130%
Oklahoma	$812	$725	89%	$374	$495	133%
Oregon	$932	$751	81%	$454	$520	115%
Pennsylvania	$907	$757	83%	$372	$487	131%
Rhode Island	$948	$700	74%	$453	$491	108%
South Carolina	$860	$679	79%	$381	$468	123%
South Dakota	$818	$706	86%	$347	$472	136%
Tennessee	$885	$635	72%	$426	$462	108%
Texas	$957	$787	82%	$434	$521	120%
Utah	$947	$743	78%	$394	$485	123%
Vermont	$913	$835	91%	$469	$575	123%
Virginia	$1,028	$718	70%	$410	$467	114%
Washington	$1,133	$864	76%	$537	$567	106%
West Virginia	$835	$627	75%	$345	$435	126%
Wisconsin	$850	$654	77%	$350	$446	127%
Wyoming	$803	$701	87%	$408	$504	123%
District of Columbia	$1,844	$1,098	60%	$651	$582	89%
Average	$948	$727	77%	$430	$494	117%
Max	$1,844	$1,098	92%	$651	$671	138%
Min	$714	$567	60%	$345	$422	89%

This data demonstrates that unemployment benefits cover a substantial portion of—and, at times, more than—workers' wages. A University of Chicago study found that at least "42% of those on benefits receive more than they did [at] their prior jobs." *See* Eric Morath, *Millions Are Unemployed. Why Can't Companies Find Workers?*, Wall St. J. (May 6, 2021), https://on.wsj.com/2U27kBn (discussing the study). For service positions, combined state and federal unemployment benefits are 77% of the average weekly earnings. And for leisure and hospitality jobs, that number rises to 117%.

South Carolina's situation is similar to the national experience. The State offered an average of $679 in combined (state and federal) weekly unemployment benefits, which is 79% of the average weekly private sector pay ($860). South Carolina's hospitality industry epitomizes the problem. In that industry, unemployment benefits exceeded average weekly earnings by 23%. In other words, the average S.C. hospitality employee would have lost money by taking a job. As a University of South Carolina economist explained, "If you're an employer in the service sector you are in a sense competing with those unemployment benefits." Katherine Phillips, *Economist: Stopping Extra $300 Jobless Benefits Will Partially Solve S.C. Worker Shortage*, WMBF News (June 7, 2021), https://bit.ly/3fIRPWr.

These perverse incentives and labor shortages persist despite rapidly growing wages and employer-driven incentive programs. From March to April 2021, wages across the economy grew 0.7%—a surprising increase for just one month. *See* Sam Ro, *Employers are paying up to address labor shortages*, Axios (July 6, 2021), https://tinyurl.com/5et2bhm6. In some sectors, wages for entry-level jobs have risen by as much as 25% since the beginning of 2020. *See* Eric Morath, *New Jobless Claims Hold Near Pandemic Low, as Number on Benefits Falls*, Wall St. J. (July 8, 2021), https://tinyurl.com/5z77cvvj; *see also* Eric Morath, *Lower-Wage Workers See Biggest Gains From Easing of Covid-19 Pandemic*, Wall St. J. (July 4, 2021), https://tinyurl.com/2zv5ky57 (documenting wage increases across various sectors). The upshot is clear: as the State subsidizes joblessness, employees can delay job-seeking, and employers will struggle to fill open positions—all of which is contributing to the number of unfilled jobs in the State.

C. Ending the State's reliance on federal benefits will address the labor shortage and stimulate economic recovery.

Recognizing all these problems, the State ended its participation in the expanded federal payment programs at the end of June. Even since then, the labor market situation has improved dramatically. Following the Governor's announcement in early May that the extra unemployment benefits would end on June 30, 2021, South Carolina's unemployment rate dropped from 5% in April to 4.6% in May to 4.5% in June to 4.3% in July, even as the nationwide unemployment rate increased from May to June. *See* Patrick Gleason, *Vindication for Governors Who Ended Enhanced Unemployment Payments*, Forbes (July 28, 2021), https://bit.ly/3fKmnHk; *Employment and Workforce Executive Director Dan Ellzey's Statement July 2021 Employment Situation* (Aug. 20, 2021), https://bit.ly/3k5C6SO. Total employment is now back to where it was before the pandemic. *Id.* Just in May 2021, South Carolina's hospitality industry added 9,000 jobs. *See* Katherine Phillips, *Despite Drop in Unemployment Levels, Some Grand Strand Restaurants Still Feel Staffing Shortages*, WMBF News (June 24, 2021), https://bit.ly/3xvlZ5Q. And the industry added over 9,000 more jobs between June and July. S.C. Department of Employment and Workforce, *South Carolina's Employment Situation July 2021* (Aug. 20, 2021), https://bit.ly/3ghNdqC.

As the unemployment rate has improved following Governor McMaster's decision to opt out of the extra benefits, so too has the number of people working in South Carolina. Between April 2021 and June 2021, the number of people working in the State has improved about 2.3%. *See Employment Dashboard, Number of Individuals Working*, accelerateSC, https://accelerate.sc.gov (last visited Aug. 18, 2021). Just a few days before the decision below, South Carolina reported the lowest number of first-time unemployment claims since the pandemic began—the fourth consecutive drop in weekly claims. *See* Patrick Phillips, *SC Reports Lowest Number of First-Time Unemployment Claims Since Pandemic Began*, Live 5 News (Aug. 5, 2021), https://bit.ly/3fKoWZY.

Data from other States that have ended the extra unemployment benefits show that these States' economies have likewise benefitted. When States began announcing that they were opting out of the extra benefits, those states saw four consecutive weeks of decreases in initial unemployment claims. *See FGA Statement on the U.S. Department of Labor Unemployment Insurance Trends*, Found. for Gov't Accountability (July 8, 2021), https://bit.ly/3fJFcul. Initial claims dropped ten percent in the states that had ended the extra unemployment benefits. *Id.* In the first week of July 2021 alone, while States with "continuing unemployment bonuses experienced" a "4.9 percent increase in claims," States that had "ended unemployment bonuses saw a 3.2 percent decrease in initial unemployment claims." *Id.*

Between June 5 and July 17, the unemployment level rose 16% in the States that kept the extra unemployment benefits. Jonathan Ingram et al., *Three Key Signs Opting Out of the Unemployment Bonus is Working* 5 (July 22, 2021), https://thefga.org/wp-content/uploads/2021/07/opting-out-unemployment-bonus-is-working.pdf. By contrast, between May 8 and July 17, unemployment levels in States that opted out of the extra benefits decreased 30%, reaching these States' lowest levels since the pandemic began. *Id.* at 6. As Winthrop economist Louis Pantuosco explained, "Those states have recovered really fast because the workers in that case they really don't have the incentives to stay home." *York County Busi-*

ness Leaders See Change in Worker Shortage After S.C. Federal Unemployment Benefits End, CN2 News, https://bit.ly/37sEJrS (last visited Aug. 18, 2021).

Internet searches for job openings increased 68% in May and June 2021 in States that opted out of the extra benefits than in the States that maintained the extra benefits. Ingram et al., *supra*, at 5. In Florida, for example, companies have reported a surge in job applications since the State opted out of the expanded federal payments. Kurt Alexander, CFO for Omni Hotels & Resorts, reported that the company received an immediate 500% increase in job applications for its Florida hotels, and explained that the extra unemployment benefits were "absolutely a factor" in curtailing the labor market. Odd Lots, *The Labor Episode: How the Omni Hotel Chain is Dealing with Hiring Right Now*, Bloomberg, at 28:55 (July 12, 2021), https://bloom.bg/3lQnSYq.

The appellants' *amici* do not address this evidence. They assert that "the reduction in [benefits] . . . had minimal impact on job finding rates." Br. 16. But the only study they cite did not examine States that ended the expanded payments early. Instead, that study compared data from March 22 through May 3, long before South Carolina (or other States) ended their participation in the expanded federal benefits. *See* Joseph Altonji et al., *Employment Effects of Unemployment Insurance Generosity During the Pandemic*, at 3 (July 14, 2020), https://bit.ly/38gJYLM; *see also* Br. 18 & n.43 (relying on a study with data from April 2021). Indeed, the appellants' *amici* rely on early analysis that has since been superseded by the evidence above—as later acknowledged by the very authors whose earlier works the appellants' *amici* rely on.[5]

*   *   *

The appellants' action threatens the progress in South Carolina. The extra federal payments were supposed to provide temporary assistance at the height of the pandemic, not a disincentive to remain unemployed. And the continued operation of these benefits in the State would discourage work and hurt both businesses and consumers. The Governor's decision to opt out of the extra benefits serves the public interest by promoting economic policies that foster full workforce participation. This will help ensure that South Carolina does not fall behind the growing number of States with similar hospitality industries whose economies have started to roar back after they opted out of the extra federal payments. The Governor's ac-

[5] For instance, the appellants' *amici* focus on an early July blog post by Professor Dube finding that "the percentage of workers employed actually declined by 1.4% in the first round of states that cut off benefits early." Br. 17. But by August, Professor Dube found that States that had terminated their participation in expanded payments had a "roughly 25 percent increase in the job finding rate" compared to States that continued their participation. Arindrajit Dube, *Early Withdrawal of Pandemic UI: Impact on Job Finding in July using Current Population Survey* (Aug. 20, 2021), https://bit.ly/3jlTHqC. The petitionters' *amici* omit this and related evidence. *See, e.g.*, Kyle Coombs et al., *Early Withdrawal of Pandemic Unemployment Insurance: Effects on Earnings, Employment and Consumption* (Aug. 20, 2021), https://bit.ly/2WmNC42 (finding "that ending pandemic UI increased employment by 4.4 percentage points").

tion will help the Palmetto State—and all its citizens—to return to and surpass pre-pandemic levels of economic prosperity.

CONCLUSION

For these reasons, this Court should affirm.

Respectfully submitted,

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AUGUST 27, 2021

CERTIFICATE OF SERVICE

I, Christopher E. Mills, an attorney, certify that on this day the foregoing Brief was served electronically on all parties via electronic mail.

Dated: August 27, 2021

s/ Christopher Mills
Christopher E. Mills

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211, SCAR, I, Christopher E. Mills, an attorney, certify that the foregoing complies with the length and formatting requirements of Rules 211 and 267, SCAR.

Dated: August 27, 2021

s/ Christopher Mills
Christopher E. Mills