STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2021-CP-40-03774

S.B., S.S., T.S. and B.B.,

Plaintiffs,

v.

HENRY DARGAN MCMASTER, in his official capacity as Governor of the State of South Carolina; and G. DANIEL ELLZEY, in his official capacity as the Director of the South Carolina Department of Employment and Workforce,

Defendants.

[Proposed]
Order Granting Motion to Dismiss, Denying Motion for Preliminary Injunction, and Denying as Moot Motion to Require Plaintiffs to Identify Themselves

S.B., S.S., T.S., and B.B. filed this lawsuit challenging Governor Henry McMaster's decision to instruct S.C. Department of Employment and Workforce Executive Director G. Daniel Ellzey to terminate South Carolina's participation in three federal COVID-19-related unemployment-benefits programs: Pandemic Unemployment Assistance, Pandemic Emergency Unemployment Compensation, and Federal Pandemic Unemployment Compensation. Plaintiffs seek a preliminary injunction to require South Carolina to reenroll in these three programs. Defendants, meanwhile, have moved to dismiss and to require Plaintiffs to identify themselves.

Ultimately, this case is not about whether you agree with the Governor's decision and whether South Carolina should be participating in these three programs. Rather, it is a case concerning whether Defendants have the discretion to opt in—and, conversely, opt out—of these

programs. For the reasons explained in this Order, the Court **GRANTS** the Motion to Dismiss, **DENIES** the Motion for Preliminary Injunction, and **DENIES AS MOOT** the Motion to Require Plaintiffs to Identify Themselves.

Background

When COVID-19 disrupted life in this country, Congress quickly enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020), for the laudable purpose of providing safeguards to the unemployed. Among the many things Congress did in the CARES Act was enact three new benefits.

First, there was Pandemic Unemployment Assistance ("PUA"). *See* 15 U.S.C. § 9021. This provided unemployment benefits to people who were ineligible for them under existing state and federal unemployment programs, including the self-employed, the underemployed, and independent contractors.

Second, there was Pandemic Emergency Unemployment Compensation ("PEUC"). *See id.* § 9025. This provision provided up to 51 weeks of federal unemployment benefits for claimants who exhausted the traditional 20 weeks they can receive under state law. Thus, it allowed claimants to extend their time on unemployment by almost an entire year.

Third, there was Federal Pandemic Unemployment Compensation ("FPUC"). Here, Congress created a program to pay an additional $600 per week to claimants receiving benefits under state or federal law. *See* 15 U.S.C. § 9023. Congress initially allowed this benefit to lapse, before reinstating it at $300 per week starting December 27, 2020. *See* Consolidated Appropriations Act, 2021, Pub. L. 116-260, § 203, 134 Stat 1182, 1953 (Dec. 27, 2020); American Rescue Plan Act of 2021 ("ARPA"), Pub. L. 117-2, § 9013, 135 Stat. 4, 119 (Mar. 11, 2021).

Like every other state in the country, South Carolina agreed to participate in these programs when they were first enacted, and Governor McMaster delegated to Director Ellzey his authority to enter into the necessary agreement with the U.S. Secretary of Labor. More than a year later, on May 6, 2021, Governor McMaster directed Director Ellzey and DEW to terminate South Carolina's participation in PUA, PEUC, and FPUC effective June 30, 2021. That termination took place as scheduled and consistent with the 30-day prior-notice requirement in the CARES Act.

Plaintiffs are four anonymous individuals who allege that they are South Carolina residents and that they began receiving unemployment, including the new federal benefits, after the COVID-19 pandemic began. Each also allege that they received notice in June 2021 that the extra federal unemployment benefits would not be continuing. On July 28, 2021, Plaintiffs sued Governor McMaster and Director Ellzey and challenged the decision to stop participating in PUA, PEUC, and FPUC.

Legal Standard

A motion to dismiss should be granted whenever a plaintiff fails "to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. A circuit court's "ruling on a 12(b)(6) motion must be based solely upon the allegations set forth on the face of a complaint." *Stiles v. Oranato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." *Brown v. Theos*, 338 S.C. 305, 309–10, 526 S.E.2d 232, 235 (Ct. App. 1999).

A plaintiff "must establish three elements" to obtain a preliminary injunction: (1) irreparable harm, (2) likelihood of success on the merits, and (3) no adequate remedy at law. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). Whether to grant

a preliminary injunction is in a trial court's discretion. *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). A preliminary injunction "is a drastic remedy," *id.*, that should "preserve the status quo," *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586, 694 S.E.2d 15, 17 (2010). It is more drastic when, like here, the movant seeks a mandatory injunction that changes the status quo. *See Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980); *Gantt v. Clemson Agr. Coll. of S.C.*, 208 F. Supp. 416, 418 (W.D.S.C. 1962) ("at the preliminary stage of proceedings," a mandatory injunction should be granted only "in rare instances in which the facts and law are clearly in favor of the moving party").

Analysis

I. Motion to Dismiss

A. Plaintiffs do not have a private right of action.

As a threshold issue, Plaintiffs cannot bring any cause of action here. The General Assembly has specifically prohibited such an action against Director Ellzey. *See* S.C. Code Ann. § 41-29-25(D) ("Nothing in this section gives rise to a cause of action against the executive director or any decision made by the executive director concerning departmental operations or development.").

The fact that they also sued Governor McMaster and rely heavily on another provision—section 41-29-230—does not change the result. "In determining whether a statute creates a private cause of action, the main factor is legislative intent." *Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011) (cleaned up). 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, 678 S.E.2d 430, 433 (2009). "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." *Id.* Section 41-29-230(1) focuses on advantages for "this State and its citizens." Such a general command demonstrates that this statute is about society generally, not a particular individual.

Nor is the Uniform Declaratory Judgments Act of any help to Plaintiffs. That act "is not an independent grant of jurisdiction." *Tourism Expenditure Rev. Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013). In other words, the act provides a remedy, not a right.

B. PUA, PEUC, and FPUC are not part of the Social Security Act.

Even if Plaintiffs could bring a private right of action, their claims fail. Section 41-29-230(1) of the South Carolina Code of Laws 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). Plaintiffs insist that PUA, PEUC, and FPUC are advantages under the Social Security Act. Defendants, on the other hand, contend that PUA, PEUC, and FPUC are actually provisions under the CARES Act—not the Social Security Act—and, thus, section 41-29-230(1) has no relevance to PUA, PEUC, or FPUC. The Court agrees with Defendants.

As an initial matter, the historical structure of unemployment insurance supports Defendants' position. The Social Security Act provides federal funds to cover administrative costs for running the State's unemployment-insurance program. *See* 42 U.S.C. § 501; *id.*

§ 1101(c)(1)(A). At its simplest, the Social Security Act incentivizes states to create unemployment-insurance programs with the carrot of federal funding to administer those programs. Importantly, the Social Security Act does not provide any unemployment benefits (*i.e.*, a check) to any individual claimant. Those benefits to individual claimants are established by state law and paid from state-imposed unemployment taxes on employers. *See* S.C. Code Ann. § 41-31-5 *et seq.*

Plaintiffs, however, claim that benefits under the CARES Act—PUA, PEUC, and FPUC—are advantages under the provisions of the Social Security Act that relate to unemployment compensation. The Court disagrees. The benefits provided under the CARES Act are new benefits, never previously available to unemployed workers, and are provided by legislation separate and apart from the Social Security Act. Although the federal government chose to use the funding mechanisms available through the Social Security Administration, that does not mean these new benefits fall under the Social Security Act. It simply shows Congress used an existing mechanism to put PUA, PEUC, and FPCU into place quickly.

Additionally, the way Congress enacted various provisions related to unemployment benefits during the COVID-19 pandemic supports Defendants' position. Congress adopted all three programs in the CARES Act, without amending the Social Security Act. *See* CARES Act, Div. A, Title II, § 2102, 134 Stat. at 313 (PUA, codified at 15 U.S.C. § 9021); *id.* Div. A, Title II, § 2107, 134 Stat. at 323 (PEUC, codified at 15 U.S.C. § 9025); *id.* Div. A, Title II, § 2107, 134 Stat. at 323 (FPUC, codified at 15 U.S.C. § 9023).

In contrast with Congress's decision not to amend the Social Security Act for PUA, PEUC, and FPUC, Congress expressly amended the Social Security Act to make changes regarding unemployment benefits for employees of governmental entities and nonprofits. *See* CARES Act,

Div. A, Title II, § 2103, 134 Stat. at 317. Likewise, Congress amended the Social Security Act regarding funding for administrative costs of running unemployment-insurance programs just days before the CARES Act. These distinctions show Congress knew how to and very well could have amended the Social Security Act to provide that PUA, PEUC, and FPUC were part of the Social Security Act. *See* Families First Coronavirus Response Act, Pub. L. 116-127, § 4102, 134 Stat. 178, 192–93 (Mar. 18, 2020). But Congress decided not to do so.

Because PUA, PEUC, and FPUC are not provisions of the Social Security Act, section 41-29-230(1) does not require Defendants to do anything related to those three programs.

C. Defendants have discretion to determine what is an "advantage."

Even if PUA, PEUC, and FPUC were part of the Social Security Act and section 41-29-230(1) had some application, Plaintiffs' claims nevertheless fail because Governor McMaster[1] and Director Ellzey have discretion in determining whether these programs are an "advantage" for the State and its citizens.

The General Assembly has given DEW multiple purposes and goals, which require Director Ellzey to balance the competing goals and exercise his discretion. One purpose (and the one on which Plaintiffs focus) is paying unemployment benefits to individuals unemployed through no fault of their own. But other coequal purposes include "reduc[ing] and prevent[ing] unemployment" and "promot[ing] the reemployment of unemployed workers throughout the State in every other way that is feasible." S.C. Code Ann. § 41-29-120(A)(1)(a), (d). Director Ellzey is

[1] Section 41-29-230 actually never refers to the Governor, so the statute cannot possibly limit the Governor's discretion. Contrary to Plaintiffs' contention, the statute still serves a logical purpose because it ensures DEW enacts the necessary rules and regulations for the State to obtain administrative funding under the Social Security Act and other enumerated federal statutes.

charged with acting "in good faith" and "in a manner he reasonably believes to be in the best interests of the department." *Id.* § 41-29-25(A)(1), (3).

All of these statutes must be construed together to produce a harmonious result. *See Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011) (discussing the *in pari materia* doctrine). 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 put the State and its citizens in a "superiority of position or condition." *Advantage*, Merriam-Webster (2021), https://tinyurl.com/9a2ph5cy (last visited Aug. 11, 2021). Plaintiffs 'assertion that the Director and Governor have no discretion under section 41-29-230(1) therefore is misplaced and ignores basic tenets of statutory construction. To the extent Plaintiffs ' claims boil down to a disagreement over whether terminating the State's participation in PUA, PEUC, and FPUC is an advantage for the State and its citizens, that determination is a policy decision that belongs to the executive and legislative branches, not the judiciary.

* * *

Dismissals under Rule 12(b)(6) are typically without prejudice. *See Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). But when an amendment clearly would be futile, allowing such an amendment is not appropriate. *See id.* Here, any amendment would be futile. The defects in the Complaint are legal ones that cannot possibly be cured. Therefore, Plaintiffs shall not be given the opportunity to amend their pleadings. This dismissal is therefore with prejudice.

II. Motion for Preliminary Injunction

Even if dismissal were not appropriate, Plaintiffs are not entitled to a preliminary injunction. The Court finds that Plaintiffs have likely met their burden to show irreparable harm and the lack of an adequate remedy at law, even assuming there is a private right of action. But Plaintiffs have not shown a likelihood of success on the merits. *Cf. Scratch Golf Co.*, 361 S.C. at 121–22, 603 S.E.2d at 908 (stating "an injunction was not appropriate remedy" because "[a]lthough [the plaintiff] may be able to satisfy" two elements, it could not satisfy the third); *Gantt*, 208 F. Supp. at 417 (stating an injunction "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff").

As an additional note, preliminary injunctions generally "should issue only if necessary to preserve the status quo." *Poynter Invs., Inc.*, 387 S.C. at 586, 694 S.E.2d at 17. Plaintiffs here seek a mandatory injunction to change the status quo. South Carolina is no longer participating in PUA, PEUC, and FPUC, and Plaintiffs want the Court to order the State to reenroll in those programs. Plaintiffs' action was not filed until 83 days after Governor McMaster's announcement that South Carolina would terminate its participation in the CARES Act programs and 28 days after that termination took effect. Accordingly, Plaintiffs are not seeking to preserve the status quo, and the Court denies their Motion for Preliminary Injunction.

III. Motion to Require Plaintiffs to Identify Themselves

In light of the Court's decision to grant Defendants' Motion to Dismiss, the Court denies their Motion to Require Plaintiffs to Identify Themselves as moot.

That said, if this case were to proceed, the Court would grant this motion. It is a "rare dispensation" for a plaintiff to be allowed to proceed anonymously. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *see also* S.C. Const. art. I, § 9. ("All courts shall be public"); Rule 10(a), SCRCP (providing that the summons and complaint "shall include the names of all parties").

Plaintiffs bear the burden of showing they warrant such exceptional treatment. *CTH 1 Caregiver v. Owens*, No. CA 8:11-2215-TMC, 2012 WL 2572044, at *3 (D.S.C. July 2, 2012). None of the factors in *Doe v. Howe*, 362 S.C. 212, 217–18, 607 S.E.2d 354, 356–57 (Ct. App. 2004), support Plaintiffs' attempt to proceed anonymously, and the Court finds their identical, generic assertions that they are "concerned that if it becomes public that [they were] part of this lawsuit, [they] could face harassment, retaliation, or the loss of job opportunities" are insufficient to carry their heavy burden.

Conclusion

For the forgoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss, **DENIES** Plaintiffs' Motion for Preliminary Injunction, and **DENIES AS MOOT** Defendants' Motion to Require Plaintiffs to Identify Themselves.

[Electronic signature of the Honorable R. Lawton McIntosh to follow.]

Richland Common Pleas

Case Caption: S B , plaintiff, et al vs Henry Dargan Mcmaster , defendant, et al

Case Number: 2021CP4003774

Type: Order/Dismissal

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH