IN THE SUPREME COURT OF ALABAMA

SHENTEL HAWKINS, ASHLEE LINDSEY, JIMMIE GEORGE AND CHRISTINA FOX APPELLANTS	)	
	)	CASE NO. 1200847
V.	)	
	)	APPEALED FROM:
KAY IVEY, GOVERNOR, AND FITZGERALD WASHINGTON, SECRETARY OF THE ALABAMA DEPARTMENT OF LABOR, APPELLEES	)	CIRCUIT COURT OF MONTOMERY COUNTY CV-2021-900863

ON APPEAL FROM THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

BRIEF OF APPELLANT

Michael Forton
Ford King
Lawrence Gardella
Legal Services Alabama
2567 Fairlane Drive, Suite 200
Montgomery, Alabama 20787
(256) 551-2671
mforton@alsp.org

Attorneys for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Although this case involves questions of great legal and social importance, the Plaintiffs do not request oral argument due to the time sensitive nature of the relief requested.

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CONTENTS ii

STATEMENT OF JURISDICTION iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF THE ISSUES 3

STATEMENT OF THE FACTS 4

STATEMENT OF THE STANDARD OF REVIEW 7

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

CONCLUSION 34

CERTIFICATE OF COMPLIANCE 35

CERTIFICATE OF SERVICE 36

STATEMENT OF JURISDICTION

Pursuant to Alabama Code §12-2-7 this Court has jurisdiction over this appeal from Montgomery County Circuit Court. Because plaintiffs filed their appeal the same day that the circuit court entered its order, the appeal is timely.

TABLE OF AUTHORITIES

Alabama Cases

Alabama Dep't of Transp. v. Harbert Int'l, Inc., 990 So. 2d 831, 845 (Ala. 2008) 11

Alabama Ed. Ass'n v. Bd. of Trustees of Univ. of Alabama, 374 So. 2d 258, 262 (Ala. 1979) 25

Armstrong v. Hutchison, case no. CV-2021-4507 (Cir. Ct. of Pulaski Co., Ark., Jul. 28, 2021) 26

Arrow Co. v. State Dep't of Indus. Relations, 370 So. 2d 1013, 1015 (Ala. Civ. App. 1979) 13, 15

Benetton Services Corp. v. Benedot, Inc., 551 So. 2d 295 (Ala. 1989)..... 25

Ex parte Doty, 564 So.2d 443, 446 (Ala. 1989)..... 14

Ex parte Russell, 31 So.3d 694, 697 (Ala. Civ. App. 2009) 8, 10

Ex parte Terry, 957 So. 2d 455 (Ala. 2006) 7

Ex parte USC Corp., 881 So. 2d 437, 442 (Ala. 2003)..... 14

General Motors Corp. v. Stokes Chevrolet, 885 So.2d 119, 124 (Ala. 2004) 8

Holiday Isle, L.L.C. v. Adkins, 12 So.3d 1173, 1175-1176 (Ala. 2008)..... 7

Horton v. Kimbrell, 819 So. 2d 601, 606 (Ala. 2001) 20

L.B. Whitfield, III Fam. LLC v. Whitfield, 150 So. 3d 171, 180 (Ala. 2014)..... 20

Miller v. Riley, 37 So.3d 768, 772 (Ala. 2009)..... 7

Oak Grove Res., LLC v. White, 86 So. 3d 963, 971 (Ala. 2011)..... 21

Ormco Corp. v. Johns, 869 So. 2d 1109 (Ala. 2003)..... 25

Rogers v. Burch Corp., 313 So. 3d 555, 560 (Ala. 2020) 18
Searle v. Vinson, 42 So. 3d 767, 772 (Ala. Civ. App. 2010) 28
Spinks v. Automation Personnel Services, Inc.. 49 So.3d 186, 190 (Ala. 2010)..... 34
State Department of Industrial Relations v. Bryant, 697 So.2d 469 (Ala. Civ. App. 1997) 14
State ex rel. Marshall v. TY Green's Massage Therapy, Inc., 2021 Case WL 524492 (Feb. 12, 2021)..... 24
State of Ala. Highway Dep't v. Milton Const. Co...... 11
Triple J Cattle, Inc. v. Chambers, 551 So. 2d 280, 283 (Ala. 1989)..... 29
Veitch v. Vowell, 266 So. 3d 678, 683 (Ala. 2018) 22
Wilbert of Birmingham, L.L.C. v. Jefferson County, L.L.C., 2021 W.L. 1803638 (Ala. 2021) 7

Cases from Other Jurisdictions

Armstrong v. Hutchison, case no. CV-2021-4507 (Cir.Ct. of Pulaski Co., Ark., Jul. 28, 2021) 16
Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 781 F.3d 1271, 1285 (11th Cir. 2015) 21
Bowling v. Dewine, 2021 WL 3733205 (Ct. of Appeals of Ohio, 10th District, Franklin County) 16
D.A. v. Hogan, case no 24-C-21-02988 (Cir.Ct. for Baltimore City) 13, 26, 30
Harp v. Hogan, case no 24-C-21-02999 (Cir.Ct. for Baltimore City) 13, 26, 30

Kason Indus., Inc. v. Component Hardware Grp., Inc., 120 F.3d 1199, 1206 (11th Cir. 1997) 20
Owens v, Zumwalt, case no. CV-21-1703 (Dist. Ct. of Oklahoma Co., Okl., Aug. 9, 2021) 15, 26
State ex rel. Bowling v. Dewine, case no. 21-CVH07-4469 (Franklin Co. Ct. of Common Pleas, Ohio, July 29, 2021) 26, 28
Thomas v. Heckler, 598 F.Supp. 492 (M.D. Ala. 1984) 27

Alabama Statutes

Ala. Code §§12-11-30 10
Ala. Code 25-4-1 13
Ala. Code 25-4-110 17
Ala. Code 25-4-118 ..... passim
Ala. Code 36-13-8 ..... passim

Statutes from Other Jurisdictions

15 U.S.C. §9023(d) 29
15 U.S.C. §9025 29
40 Okl.Stat. § 4-313 ..... 14, 15
42 U.S.C. §§1101(a) 29
42 U.S.C. §1104(a) 29
42 U.S.C. §1105(a) 29
Ark. Code. Ann'd § 11-10-102 15
Ark. Code. Ann'd § 11-10-312 15
Maryland Code § 8-310 12

Other Authorities

11A *Fed. Prac. & Proc.* §2954 34

STATEMENT OF THE CASE

Plaintiffs seek to have Alabama officials to rescind their decision to cease participate in the federal pandemic unemployment compensation benefits program and reinstate those programs retroactive to the date of termination. This case was filed against Kay Ivey, in her official capacity as Governor of Alabama, and Fitzgerald Washington, in his official capacity of Secretary of the Alabama Department of Labor based on statutes that require cooperation with federal officials that includes participation in programs that bring federal funds to Alabama. Plaintiffs have demonstrated the hardship experienced by them as a result of the State's decision.

A complaint, a Motion for a Preliminary Injunction, and a supporting memorandum of law was filed on August 10, 2021. App. 1-97. On August 19, 2021, the circuit court entered an order setting a status conference. App. 101. On August 23, 2021, Plaintiffs filed a motion seeking to have the hearing on the preliminary injunction motion either at or before the status conference. App. 103. On August 24, 2021, Plaintiffs filed a supplemental statement in further support of their prior motions. App. 110-166.

After a status conference on August 31, 2021, the circuit court set a hearing on Defendants' Motion to Dismiss for September 8, 2021; Defendants had yet to file a motion to dismiss at that time. App. 167. Plaintiffs moved for a simultaneous hearing of their Motion for a Preliminary Injunction. App. 169. Defendants moved to dismiss on September 3, 2021. App. 172. Plaintiffs replied to the motions and filed a submission in support of their reply on September 7, 2021. App. 286.

On September 8, 2021, the court heard arguments on the motion to dismiss and the Motion for a Preliminary Injunction. On September 10, 2021, Plaintiffs filed a submission showing that their case was not moot. App. 320-325. On September 13, 2021, the court entered an order denying the Motion for a Preliminary Injunction and dismissing Plaintiffs' case. App. 326.

Plaintiffs appealed to this Court on September 13, 2021.

STATEMENT OF THE ISSUES

1. When read together, do Ala. Code 25-4-118 and Ala. Code 36-13-8 create a duty in Governor Ivey (as chief executive of the State) and Secretary Washington to fully participate in unemployment compensation programs offered by the federal government?

2. Are the Defendants protected from being required to exercise the duty created by 25-4-118 and 36-13-8 by sovereign immunity?

3. Are the Plaintiffs claims barred by laches based on their delay of several months in filing this action?

4. Are the Plaintiffs claims moot because relief is no longer available?

5. Are the Plaintiffs entitled to a preliminary injunction requiring Defendants to rescind their termination of participation in the federal pandemic unemployment compensation programs?

STATEMENT OF THE FACTS

Shentel Hawkins worked as a customer service representative at MetroPCS until she had a miscarriage and was hospitalized. App. 17. Ms. Hawkins was off work for a total of two weeks, during which time she kept in touch with her supervisor and requested leave. When she was physically able to return to work, MetroPCS told her that she was no longer needed and no longer had a job. Ms. Hawkins applied for unemployment compensation and was approved for regular unemployment compensation benefits and pandemic unemployment compensation in 2020 and renewed in 2021. She received $135 per week in regular benefits and $600 and then $300 a week in pandemic benefits. Although she remained eligible for benefits, Defendants discontinued the program in June 2021. She has applied for numerous jobs without success. She needs more reliable transportation to work, but the loss of pandemic unemployment benefits placed that out of reach.

Ashlee Lindsey was a full-time substitute teacher in Montgomery until COVID shut the schools down. App. 19. She applied for regular and pandemic unemployment. The Department of Labor approved her application, paid pandemic benefits, and extended her eligibility. These

benefits ended when Defendants discontinued pandemic unemployment programs in June 2021. Her attempts at finding employment have been unsuccessful, with many potential employers refusing to hire her for being "overqualified". She has exhausted all her savings and is at risk of losing her vehicle and her housing.

Jimmie George worked approximately six years for a pizza restaurant in Gulf Shores that stayed open during COVID. App. 21. Mr. George's employer was aware of his health problems, which caused pneumonia twice and multiple respiratory infections and put him at risk of severe complications from COVID. The employer filed an unemployment compensation claim for Mr. George, which the Alabama Department of Labor approved and later extended. At the time that Defendants opted out of pandemic benefits, Mr. George was still entitled to $700 in potential pandemic unemployment compensation. Mr. George sold some of his belongings to pay rent and other bills. He obtained loans from several people. He is just about out of things to sell and just about out of people from whom to try to borrow money.

Christina Fox has worked at Jimmy John's for eight years, but COVID caused her to be limited to part-time for approximately nine

hours per week at a rate of thirteen dollars per hour. App. 23. Ms. Fox applied for unemployment compensation and was approved for regular and pandemic benefits in 2020 and renewed in 2021. She received $275 per week in regular benefits and $600 and then $300 a week in pandemic benefits. Both stopped in June 2021 even though she remained eligible. Ms. Fox used up almost all her savings even as she relied on credit cards to help cover expenses after the federal benefits stopped in Alabama. Without pandemic unemployment compensation benefits, she does not know how she will be able to pay rent and utility bills, pay for the cell phone she needs to look for work, make car payments, pay for car insurance, and buy food and medicines going forward.

All four plaintiffs are suffering irreparable damage because of Defendants' decision to terminate Alabama's participation in federal pandemic unemployment compensation benefits.

STATEMENT OF THE STANDARD OF REVIEW

The question before this Court is whether the circuit court had subject-matter jurisdiction over plaintiffs' action against Governor Ivey and one of her agents, which presents a question of law. *Wilbert of Birmingham, L.L.C. v. Jefferson County, L.L.C.*, 2021 W.L. 1803638 (Ala. 2021); *Ex parte Terry*, 957 So. 2d 455 (Ala. 2006). Therefore, the Court reviews the dismissal de novo. *Wilbert*; *BT Sec. Corp. v. W.R. Huff Asset Mgmt. Co.*, 891 So. 2d 310, 312 (Ala. 2004). Since the trial court denied the motion for preliminary injunction on a question of law without considering any disputed facts, this Court reviews the denial de novo. *Miller v. Riley*, 37 So.3d 768, 772 (Ala. 2009); *Holiday Isle, L.L.C. v. Adkins*, 12 So.3d 1173, 1175-1176 (Ala. 2008) (citations omitted).

SUMMARY OF THE ARGUMENT

The single operative question in this case is: When read together, do Ala. Code 25-4-118 and Ala. Code 36-13-8 create a duty in Governor Ivey (as chief executive of the State) and Secretary Washington to fully participate in unemployment compensation programs offered by the federal government? Although the circuit court dismissed this lawsuit on the basis of sovereign immunity, its reason was its belief that Defendants were under no legal duty to continue participating in the federal pandemic unemployment compensation programs. See *Ex parte Russell*, 31 So.3d 694 (Ala. Civ. App. 2009). While this Court has the power to affirm the trial court's decision if it can be sustained under any legal theory, *General Motors Corp. v. Stokes Chevrolet*, 885 So.2d 119, 124 (Ala. 2004), the Plaintiff's believe that if the court determines there is such a duty, this Court should not affirm on any ground because of the social and economic impact of the Defendants failing to comply with that duty.

The Defendants argue, in their Motion to Dismiss, that the Plaintiffs lack standing to proceed in this case on three grounds: mootness, sovereign immunity, and lack of standing to sue Director Washington. The Defendants further argue that Plaintiffs fail to state a

claim for which relief can be granted. Finally, the Defendants argue that the Plaintiffs' suit is barred by laches.

These defenses can all be summed up in two broad arguments – First, that there is no duty to participate in the federal unemployment programs and thus no legal action that can avoid sovereign immunity. Second, that if the Court were to order them to comply, that they would be unable to do so because of the delay in the issuance of the Court's order.

Similarly, the Defendants, in their response to the Motion for Preliminary Injunction, argue that the Plaintiffs' motion should be denied since they are unlikely to prevail because there is no duty on Defendants to participate in the programs. In the Defendants' opposition, they further argue that the burden on the Defendants will be greater that the harm that foregoing the benefits will have on 500,000 unemployed Alabamians. It is the Plaintiffs' position that this position is unsustainable, and this Court is once again brought back to the question of whether or not create a duty.

ARGUMENT

I. THE COMPLAINT REQUESTS RELIEF THAT IS WITHIN THE POWER OF THE TRIAL COURT TO GRANT AND IS NOT BARRED BY SOVEREIGN IMMUNITY OR ANY OTHER LEGAL DEFENSE.

A. When read together, Ala. Code 25-4-118 and Ala. Code 36-13-8 create a duty in the governor and Secretary Washington to fully participate in unemployment compensation programs offered by the federal government. Since this is a mandatory legal duty, the Plaintiffs' request fits within a defined exception to the Defendants' sovereign immunity.

This Court has the power to grant the relief the plaintiffs seek. The Court has jurisdiction over this matter under Ala. Code §§12-11-30 et seq. As recognized as recently as 2009 in *Ex parte Russell*, 31 So.3d 694, 697 (Ala. Civ. App. 2009), claims such as those against Defendants are not barred by section 14 of the Alabama Constitution, because plaintiffs seek "to compel State officials to perform their legal duties. *Dep't of Indus. Relations v. West Boylston Mfg. Co.,* 253 Ala. 67, 42 So.2d 787 [(1949)]; *Metcalf v. Dep't of Indus. Relations,* 245 Ala. 299, 16 So.2d 787 [(1944)]." As the Secretary of Labor, Defendant Washington has duties to cooperate with the U.S. Secretary of Labor and to administer all unemployment compensation programs in the State of Alabama. As Governor,

Defendant Ivey is the chief executive and has the overall responsibilities set out in Ala. Code 36-13-8 and must ensure that her agents, including Defendant Washington, comply with the Legislature's mandates.

In granting relief against the governor, this Court states that there is an exception to sovereign immunity when the relief requested is a "ministerial act that State officers do not have the discretion to avoid." *Alabama Dep't of Transp. v. Harbert Int'l, Inc.*, 990 So. 2d 831, 845 (Ala. 2008), abrogated on other grounds by *Ex parte Moulton*, 116 So. 3d 1119 (Ala. 2013). In another case, *State of Ala. Highway Dep't v. Milton Const. Co.*, this Court discussed the State's statutory duty to maintain the roads of this state and the fact that failure to comply with a legal duty is another exception to the doctrine of sovereign immunity. 586 So. 2d 872, 875 (Ala. 1991). In that case this Court also went on to state, "When construing a statute, the duty of the Court is to ascertain the legislative intent from the language used in the statute, and, thus, when the statutory pronouncement is clear and not susceptible to different interpretations, it is the paramount judicial duty of the Court to abide by the clear pronouncement, not to amend or repeal the statute under the guise of judicial interpretation." *Id.* at 876.

Defendants' early termination of all forms of pandemic unemployment compensation benefits violates Ala. Code 25-4-118, which requires Defendant Washington to "cooperate to the fullest extent possible" with the U.S. Department of Labor. No Alabama case has examined what this "fullest" cooperation requires of Defendant. In several other states with similar statutes, courts have found that the cooperation includes continued operation of the federal pandemic unemployment compensation programs.

The language of the Maryland statute is almost identical to Ala. Code 25-4-118. Maryland Code § 8-310(a) reads:

> (1) In the administration of this Title, the [Maryland] Secrtary [of Labor] shall cooperate with the United States Secretary of Labor to the fullest extent that this statute allows;
>
> (2) The Secretary shall:
>
> (i) make each report in the form and containing the information that the Secretary of Labor requires;
> (ii) comply with each provision that the Secretary of Labor considers necessary to ensure the accuracy of a report; and
> (iii) comply with each regulation that the Secretary of Labor adopts to govern the expenditure of any money that may be allotted and paid to the State under Chapter 7, Subchapter III of the Social Security Act to assist in the administration of this title.

In *D.A. v. Hogan*, case no 24-C-21-02988 (Cir.Ct. for Baltimore City), and *Harp v. Hogan*, case no 24-C-21-02999 (Cir.Ct. for Baltimore City), a Maryland trial court issued a joint opinion, a copy of which is attached to Plaintiffs' memorandum in support of their motion for a preliminary injunction, finding that:

> Plaintiffs are likely to establish that this provision in this context operates as a mandate requiring the Maryland Secretary of Labor to cooperate in accessing any federal benefits that are available to Marylanders within the bounds of Title 8.

The court reached this conclusion by looking at dictionary definitions of "cooperate" showing that it entails working together for a common end. In Maryland, statutory language showed the common end to involve protection against "economic insecurity" caused by unemployment. In Alabama, the same common end is set forth even more clearly. Alabama passed the Unemployment Compensation Act, Ala. Code 25-4-1 et seq., to "provide a worker with funds to avoid a period of destitution after having involuntarily lost his employment and thus his income. It aids in sustaining him while he looks for other employment." See *Arrow Co. v. State Dep't of Indus. Relations,* 370 So. 2d 1013, 1015 (Ala. Civ. App. 1979). The Alabama Supreme Court has

stated that the purpose of the Act is "beneficent" and that Alabama's unemployment-compensation law "should be construed liberally to effectuate its purpose." *Ex parte Doty*, 564 So.2d 443, 446 (Ala. 1989).

In *Ex parte USC Corp.*, 881 So. 2d 437, 442 (Ala. 2003), the Supreme Court interpreted a workers compensation statute to find that the lowest burden of proof applied, noting that its interpretation was in line with its duty to ensure that "the Act is ... liberally construed to effectuate the Act's intended purpose, i.e., to protect workers, using the proper burden of proof." 881 So.2d at 443. Similarly, as stated in *State Department of Industrial Relations v. Bryant*, 697 So.2d 469 (Ala. Civ. App. 1997), "[t]he Unemployment Compensation Act is insurance for the unemployed worker and is intended to be a remedial measure for his benefit[; i]t should be liberally construed in the claimant's favor." 697 So.2d at 470 (citations and internal quotation marks omitted). Therefore, in Alabama cooperation to the fullest extent possible entails accepting the federal pandemic unemployment benefits for as long as they are available.

In Oklahoma, a court relied on the language of a statute much like Ala. Code 25-4-118, 40 Okl.Stat. § 4-313 requiring its labor department

to "cooperate to the fullest extent consistent with the provisions of this Act . . .", and to secure "all advantages available", as well as 40 Okl.Stat. §1-103, regarding payment of "unemployment reserves . . . for the benefit of persons unemployed through no fault of their own" to find a reasonable probability of success on the merits and to enjoin the Oklahoma governor and secretary from withdrawing from pandemic unemployment compensation programs. *Owens v, Zumwalt*, case no. CV-21-1703 (Dist. Ct. of Oklahoma Co., Okl., Aug. 9, 2021). The court noted that the legislature set the policy on unemployment compensation benefits, and that the primary role of the governor and his agents was the "faithful execution of the law". This is also Defendant Ivey's primary role pursuant to Section 120 of the Alabama Constitution. The purpose of the Alabama Unemployment Compensation Act also requires payment to persons unemployed through no fault of their own, *Arrow Co. v. State Dep't of Indus. Relations,* 370 So. 2d 1013, 1015 (Ala. Civ. App. 1979)., so plaintiffs are entitled to the relief they seek.

Arkansas has a statute that is virtually identical to the Okl.Stat. § 4-313, Ark. Code. Ann'd § 11-10-312, and another much like Oklahoma's section 1-103, Ark. Code. Ann'd § 11-10-102. An Arkansas court relied

on this statutory language to find a reasonable probability of success on the merits and to issue a preliminary injunction. *Armstrong v. Hutchison*, case no. CV-2021-4507 (Cir.Ct. of Pulaski Co., Ark., Jul. 28, 2021).

In Ohio, a circuit court did not find a high enough likelihood of success on the merits to meet Ohio's stringent standards for issuance of a preliminary injunction, saying "The wording chosen by the Ohio General Assembly clearly does not include the CARES Act." The unemployment claimants appealed, and the appellate court reversed the denial, saying that the Ohio statute's reference to the Social Security Act covered federal pandemic unemployment compensation, as well as state-funded unemployment benefits. *Bowling v. Dewine*, 2021 WL 3733205 (Ct. of Appeals of Ohio, 10th District, Franklin County). When the governor of Ohio sought relief from the stay, the Ohio Supreme Court denied it. *Bowling v. Dewine*, 164 Ohio St.3d 1423 (Aug. 31, 2021). Like Ohio, Maryland and Indiana, Alabama's statute requires fullest cooperation in meeting the goals of unemployment compensation programs, and so it requires Defendants' participation in the federal pandemic unemployment compensation programs.

Contrary to Defendant's assertion in their Motion to Dismiss, Plaintiffs' reading of section 25-4-118(a) does not render subsection (c) superfluous. Since the statute began with a requirement for "cooperation to the fullest extent" with the Secretary of Labor, that subsection, which reads "The secretary may afford reasonable cooperation with any agency of the United States charged with the administration of any unemployment insurance law," appears to address the possibility that some unemployment insurance program could be administered by an agency other than the U.S. Department of Labor, and that Defendants would have to cooperate reasonably with any other such agency. The language does not undo the "fullest extent" duty imposed at the beginning of the statute.

Similarly, the duty under Ala. Code 25-4-110 to "make every proper effort within his means to oppose and prevent . . . substantial federalization of state unemployment compensation funds or the state employment security program" does not authorize Defendants to decide that remaining or reentering the federal pandemic programs would improperly "entrench the State in federal unemployment programs." The language of 25-4-110 is clearly designed to protect Alabama's decisions

on how to operate its state-funded unemployment compensation funding, and it in no way applies to a separate temporary federal unemployment program.

B. As demonstrated by correspondence recently sent by the federal Department of Labor, this suit is not moot.

"Put simply, a case becomes moot where even a favorable decision from the court "would accomplish nothing." *Rogers v. Burch Corp.*, 313 So. 3d 555, 560 (Ala. 2020)." Plaintiffs agree that this is the standard. This case is not moot, however, because it is not too late for Defendants to get from the U.S. Department of Labor federal pandemic unemployment compensation benefits for Plaintiffs and other Alabamians for all or part of the period from June 19 to September 4, 2021.

Any confusion that might arise from the wording of the U.S. Department of Labor's directive Unemployment Insurance Program Letter No. 16-20, Change 6, was removed by an email that the U.S. Secretary of Labor's agents sent Defendants on September 3, 2020. That email, a copy of which is at Appendix 323-326, reads:

> Some states have reached out to the Department because they are re-considering termination of one or more of the CARES Act UI programs, either voluntarily or in response to a court order. If your state is re-considering its termination of one or more CARES Act programs, please reach out to the Department as soon as possible to discuss the options that may be available to ensure that any changes are made prior to October 6, which is 30 days after the CARES Act programs expire and the last day on which claimants may submit new PUA applications (with limited exceptions as per Section 4.c. and Attachment II to UIPL No. 16-20, Change 6). The Department will consider a request to rescind that is submitted in writing and signed by the Governor or their appointed designee. Should the Department agree to having a termination notice be rescinded, the state will need to continue to accept applications and issue payments as if there had been no effective termination. Further, following an accepted rescission, all weeks of unemployment after the earlier termination will be covered under the state's previously signed implementing agreement and all administrative and benefit costs will be federally funded.

This email makes clear that Defendants can still obtain the federal pandemic unemployment benefits for any eligible Alabamian who files an application by October 6, 2021. This deadline has not passed, so this case is not moot.

Furthermore, Plaintiffs would argue that the simplest resolution this issue would be for this Court to order the Defendants to use any and all efforts to seek payment for the past due amounts. If the federal Department of Labor were then to refuse such payments, the State's responsibilities would be met.

C. This suit is not barred by laches.

The defense of laches does not arise from mere delay but instead requires a showing of prejudice or harm caused by the delay, and the applicability of the doctrine of laches is "dependent upon the particular facts and circumstances" of each case. *Horton v. Kimbrell*, 819 So. 2d 601, 606 (Ala. 2001). A party asserting the defense of laches must show "(1) that the claimant delayed in asserting his or her right, (2) that the delay was inexcusable, and (3) that the delay caused the person asserting the defense undue prejudice." *L.B. Whitfield, III Fam. LLC v. Whitfield*, 150 So. 3d 171, 180 (Ala. 2014).

The first question in analyzing the defense of laches in this case is whether Plaintiffs' two-month delay was unreasonable and inexcusable. As demonstrated by the sheer number of pages filed in this case, it is not a common or simple case. In applying the defense of laches to a case, the Court must recognize the time to analyze and prepare such a suit. Plaintiffs acted properly by not to deciding to "sue first and ask questions later." *Kason Indus., Inc. v. Component Hardware Grp., Inc.*, 120 F.3d 1199, 1206 (11th Cir. 1997) (where the Eleventh Circuit rejects this

analysis). This Court should instead recognize that "a Plaintiff's reasonable need to fully investigate its claims" may excuse a delay in filing suit, and that to hold otherwise "would create a powerful and perverse incentive for Plaintiffs to file premature and even frivolous suits to avoid the invocation of laches." *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1285 (11th Cir. 2015).

In deciding whether delay in filing causes undue prejudice, one consideration is whether "some change in conditions has occurred that would make belated enforcement of the claim unjust." *Oak Grove Res., LLC v. White*, 86 So. 3d 963, 971 (Ala. 2011). In *Oak Grove*, a community sued a coal processing plant and as part of the settlement the plant purchased property and set up testing equipment in a particular location. In that case the Supreme Court ruled that the community's decision to wait a year and a half to enforce their rights was barred due to the prejudice to the plant. Unlike *Oak Grove*, in the case before this Court the relief will actually be more convenient for the Defendants to provide than if the program had continued uninterrupted because it will allow the Defendants to process all applications one single time and issue on payment rather than millions of separate transactions.

In moving to dismiss, Defendants argued that granting the Preliminary Injunction would mean rebuilding the "now-deconstructed infrastructure for the Programs (hiring new employees again, recreating software, etc.)" and "notify[ing] all eligible recipients." Based on the Affidavit of Thomas Daniel offered by the Defendants, there is no indication that the Defendants have dismantled any of the infrastructure created during the pandemic to increase processing capacity. According to Mr. Daniel, the relief requested by the Plaintiffs would require the Department of Labor to work with their software vendor to re-install program software but otherwise do nothing more than if the program had continued all along. The sole "hardship" the Defendants raise that is based in fact is that each claimant would need to be mailed a notice regarding the additional assistance, which would have been necessary regardless of when Plaintiffs instituted their suit as long as even one week of benefits went unpaid before a court granted relief. Although the Defendants' administrative issues, such as mailing notices, should be taken into consideration they are not the end of the analysis. *See, e.g., Veitch v. Vowell*, 266 So. 3d 678, 683 (Ala. 2018) (where election officials

failed to successfully assert the defense of laches based on the fact that ballots had already been printed and re-printing would be an imposition).

The simple truth is that instituting the relief requested by the Plaintiffs will be substantially simpler than it would have been if the Department of Labor had been required to track and manage the same 100,000 to 500,000 claims since June. Instead of being required to actively monitor them over the course of two and a half months, the Defendants will be able to review all claims and issue a single payment instead of reviewing millions of individual claims and cutting many additional individual payments. For this reason, even if the Plaintiffs should have been able to present their grievances earlier, the defense of laches simply does not apply.

II. THE PLAINTIFFS DID ESTABLISH THE CRITERIA REQUIRING ISSUANCE OF A PRELIMINARY INJUNCTION AND ARE ENTITLED TO RELIEF.

A. As shown above, Plaintiffs have demonstrated a strong likelihood that they will prevail on the merits of this case and the Court must therefore turn to the issue of harm. If the Defendants fail to reinstitute the program within a short time, however, this assistance will become permanently unavailable and Plaintiffs will suffer irreparable injury.

A preliminary injunction should be issued only when the party seeking an injunction demonstrates: (1) that without the injunction the party would suffer irreparable injury; (2) that the party has no adequate remedy at law; (3) that the party has at least a reasonable chance of success on the merits of his case; and (4) that the hardship imposed on the party opposing the preliminary injunction by the injunction would not unreasonably outweigh the benefit accruing to the party seeking the injunction.' *State ex rel. Marshall v. TY Green's Massage Therapy, Inc.*, 2021 Case WL 524492 (Feb. 12, 2021). Application of these factors to the facts and law of Plaintiffs' claims requires that a preliminary injunction be issued requiring Defendants to reinstitute the federal pandemic unemployment compensation benefits retroactive to the date it terminated them.

As outlined in Subsection I above, the Plaintiffs believe the Court will find that reading Ala. Code 25-4-118 and Ala. Code 36-13-8 *in pari materia*, the legislature has created a duty in Governor Ivey and Secretary Washington regarding participation in the federal pandemic unemployment compensation programs. However, it is not necessary for the Court to find that the party seeking a preliminary injunction will

certainly prevail on the merits in order to grant the injunction. *Alabama Ed. Ass'n v. Bd. of Trustees of Univ. of Alabama*, 374 So. 2d 258, 262 (Ala. 1979) (where the Alabama Supreme Court upheld the Montgomery county Circuit Court's preliminary injunction of a statute enacted by the legislature related to education funding). The burden on the complainant is simply to satisfy the trial court that there is at least a reasonable probability of ultimate success on the merits of the case. *Martin v. First Fed. Sav. & Loan Ass'n of Andalusia*, 559 So. 2d 1075, 1078 (Ala. 1990).

The Plaintiffs concede that courts may not use the extraordinary power of injunctive relief merely to allay an apprehension of a possible injury; the injury must be imminent and irreparable in a court at law. The "irreparable injury" which a plaintiff must show to obtain a preliminary injunction is an injury that is not redressable in a court of law through an award of money damages. *Ormco Corp. v. Johns*, 869 So. 2d 1109 (Ala. 2003). Preliminary injunction can be issued only upon showing of threat of imminent irreparable injury; "irreparable injury" is injury that cannot be adequately compensated for by damages at law. *Benetton Services Corp. v. Benedot, Inc.*, 551 So. 2d 295 (Ala. 1989).

In the present case, the damage to Plaintiffs and to hundreds of thousands of other Alabamians could not be more acute. Plaintiffs by their affidavits show that they have exhausted savings and are at risk of loss of housing and other basic necessities. Other courts around the country have reviewed similar decisions by state officials. All the other courts that have issued decisions in challenges to termination of a state's participation in federal pandemic unemployment compensation programs have found that claimants, such as Plaintiffs, who had been eligible for the pandemic benefits and were now at risk of loss of essentials are at risk of irreparable harm. *Armstrong v. Hutchison*, case no. CV-2021-4507 (Cir. Ct. of Pulaski Co., Ark., Jul. 28, 2021); *D.A. v. Hogan*, case no 24-C-21-02988 (Cir. Ct. for Baltimore City, Maryland, July 13, 2021) and *Harp v. Hogan*, case no 24-C-21-02999 (Cir. Ct. for Baltimore City, Maryland, July 13, 2021); *State ex rel. Bowling v. Dewine*, case no. 21-CVH07-4469 (Franklin Co. Ct. of Common Pleas, Ohio, July 29, 2021); *Owens v, Zunwalt*, case no. CV-21-1703 (Dist. Ct. of Oklahoma Co., Oklahoma, Aug. 9, 2021) (copy of all cited cases attached as an appendix).

Similarly, in granting a preliminary injunction, the court in *Thomas v. Heckler*, 598 F.Supp. 492 (M.D. Ala. 1984), found that people improperly terminated from Supplemental Security Income and Social Security benefits that they relied upon for their basic needs were irreparably harmed. The court said:

> The evidence before this court reflected that the plaintiffs and members of the class are now unable to pay for medicines, clothing, shelter, food, and transportation because of the termination of their benefits. As a result, many have lost or are in danger of losing major possessions, many now suffer from anxiety, depression and a substantial decline in health, and some have even died. Retroactive restoration of benefits would obviously be inadequate to remedy these hardships. *See Lopez v. Heckler*, 725 F.2d 1489, 1497 (9th Cir.1984) ("[S]ome class plaintiffs have already died or suffered further illness as a result of the Secretary's action"); *Hyatts v. Heckler*, 579 F.Supp. 985, 995 (D.N.C.1984) ("The termination and the unjustified denial of Social Security disability benefits cause irreparable harm to eligible persons.")

598 F.Supp. at 497. Plaintiffs were relying on the pandemic unemployment compensation benefits just as the Plaintiffs in *Thomas* were relying on their benefits, and their harm is just as irreparable.

As explained in more detail above, if a preliminary injunction is not issued in this case, no other remedy will correct this wrong once the time

to enter agreements with the federal government has passed. As the Ohio appellate court said in *Bowling*, *supra*:

> a party's possible award of future monetary damages may not amount to a "meaningful or effective remedy" . . . where an injunction seeks access to a finite amount of government-appropriated funds.

B. If this Court fails to issue this preliminary injunction there will be no adequate remedy at law for the Plaintiffs. Because of the effects of the pandemic on hundreds of thousands of Alabama the damage caused by refusing to issue the injunction will greatly outweigh the inconvenience to the Defendants.

The Alabama Supreme Court has stated on numerous occasions that in order to receive a preliminary injunction a party must have no adequate remedy at law. See *Searle v. Vinson*, 42 So. 3d 767, 772 (Ala. Civ. App. 2010) (where the court stated that a party seeking to erect a fence had no other avenue to secure the safety of their animals). In the current case, as explained above, the federal funds available to pay the claims of hundreds of thousand of Alabamians will no longer available within the span of a month. Because this money will no longer available should the court order the money paid in the future there is clearly no adequate remedy at law.

C. Any harm to Defendants from reinstating the pandemic unemployment compensation programs is far outweighed by the benefits accruing to the Plaintiffs and other unemployment claimants.

The respective hardship of the parties may be considered in preliminary injunction actions. See *Triple J Cattle, Inc. v. Chambers*, 551 So. 2d 280, 283 (Ala. 1989). In the current case, the Defendants propose in their opposition that the burden on the Defendants will be greater that the harm that foregoing the benefits will have on 500,000 unemployed Alabamians. It is unclear how the burden will fall greater on highly-skilled career employees employed by the Defendants rather than hundreds of thousands of unemployed (and often low-skilled and undereducated citizens).

As noted above, the harm to Plaintiffs is extreme and irreparable. Defendants will get funding from the federal government both for the benefits paid to Alabamians and the costs of administering the program. 42 U.S.C. §§1101(a), 1104(a), and 1105(a); 15 U.S.C. §§9025(d) and 9023(d). Plaintiffs concede that Defendants may encounter some administrative hurdles in getting the system reinstated, but the burden is outweighed by the harm to Plaintiffs. Recognizing the same kind of hurdles and expenses for the Secretary of Maryland's Secretary of Labor,

the Maryland court found that the balance of hardship tipped strongly in plaintiffs' favor. *D.A. v. Hogan*, case no 24-C-21-02988 (Cir.Ct. for Baltimore City, Md.), and *Harp v. Hogan*, case no 24-C-21-02999 (Cir.Ct. for Baltimore City. Md.), pp. 18-20. This Court should make the same finding. Without belaboring the issue, it is clear that this factor weighs in favor of the Plaintiffs.

D. The issuance of a Preliminary Injunction serves the public interest.

The pandemic is not over, and unemployed Alabamians need support while the economy slowly recovers. The public interest in Alabama is served by restoring the available federal pandemic unemployment compensation benefits. Issuance of a preliminary injunction serves the public interest in preventing harm to thousands of unemployed Alabamians who were relying on CARES Act programs to meet their basic needs as they continue their job search, all while stimulating consumer spending and encouraging labor market recovery. Terminating these benefits does not address the real barriers workers face in returning to work: continued health concerns, childcare

availability, and the availability of quality jobs that match their skills. Moreover, prematurely cutting off unemployment benefits does not push people back to work, as claimed by Defendants in their press announcement. As shown by several of Plaintiffs' affidavits, employers do not want to hire overqualified people. App. 17-24.

Unemployed Alabamians still need support as the pandemic continues and the economy slowly recovers. The June 2021 jobs report showed that 9.5 million people remain unemployed nationally, another 4.6 million are only working part-time but want full-time work, and the economy is still down 6.8 million jobs from pre-pandemic February 2020.[1] Pandemic unemployment compensation benefits provide essential income support to unemployed workers while they search for work and re-enter a slowly reopening labor market. In addition, the rapid spread of COVID-19 variants has brought renewed health risks to workers planning to return to work, as well as economic impacts as businesses may again need to scale back operations and reduce their workforce if

[1] 20 U.S. Bureau of Labor Statistics, Employment Situation Summary – June 2021 (July 2021), available at https://www.bls.gov/news.release/empsit.nr0.htm (last visited August 5, 2021).

there are new restrictions. The intensified health risks of new COVID-19 surges and the possibility of new restrictions requires the state to continue availing itself of all resources to support jobless Alabamians.

Despite what the Defendants said on May 10, 2021, prematurely cutting off unemployment insurance benefits does not encourage people to go back to work. As the expert Ethan Daniel Kaplan testified by affidavit, economic research conducted during the pandemic shows that significant changes in unemployment compensation, such as the reduction in FPUC from $600 to $0 and then from $300 to $0 in Alabama and many other states, had minimal impact on job finding rates. App. 305-319. In fact, workers who experienced larger increases in unemployment benefits returned to their previous jobs over a similar timeframe as those with smaller increases. Id. Using recent Census Bureau data, economist Arindrajit Dube found that the percentage of workers employed actually declined by 1.4% in the first round of states that cut off benefits early[2], such as Alabama. While these states saw decreases in the number of individuals receiving benefits, the premature

[2] https://arindube.com/2021/07/18/early-impacts-of-the-expiration-of-pandemic-unemployment-insurance-programs/ (last visited August 5, 2021).

cut-off did not result in individuals getting jobs within two to three weeks after benefits termination.[3] Instead, losing benefits caused hardship.[4] Comparisons between states also suggests that premature cut-offs do not encourage employment. Instead, unemployment insurance programs provide critical support to unemployed workers to meet their basic needs as they continue their job search, all while stimulating consumer spending and encouraging labor market recovery. If workers are staying out of the workforce, it is likely due to slow jobs recovery, concerns around COVID-19 safety, and childcare and caregiving responsibilities brought on by school closures and COVID-19-related illness.

E. Because of the public interest served and the indigency of the Plaintiffs, this Court should not require any of the Plaintiffs to post more than a nominal bond.

Although Rule 65 of the Alabama Rules of Civil Procedure generally requires a party post a bond to obtain a preliminary injunction, there are exceptions to the bond requirement. Since Plaintiffs are impecunious, and the issue involved is one of "overriding public concern," this Court

[3] *Id.*
[4] *Id.*

should require make a specific finding that Plaintiffs satisfy one or more of the exceptions to the bond requirement and order no more than a nominal security. *Spinks v. Automation Personnel Services, Inc.*. 49 So.3d 186, 190 (Ala. 2010) (which quoted from *Anders v. Fowler*, 423 So.2d 838, 840 (Ala. 1982) (which quoted *from Lightsey v. Kensington Finance and Mortg. Corp.*, 294 Ala. 281, 285, 315 So.2d 432, 434). In finding a nominal bond can be adequate in certain circumstances, the *Lightsey* Court cited by analogy 11A *Fed. Prac. & Proc.* §2954, p. 529. The important public interest underpinning this litigation and the Plaintiffs' lack of funds both dictate that only a nominal bond be ordered.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's dismissal of this case. It should also reverse the court's denial of Plaintiff's motion for a preliminary injunction.

Respectfully Submitted:

/s/ Michael Forton
Michael Forton

/s/ Ford King
Ford King

/s/ Lawrence Gardella
Lawrence Gardella
Legal Services Alabama
Attorneys for the Plaintiffs
2567 Fairlane Drive, Suite 200
Montgomery, Alabama 20787
(256) 551-2671

CERTIFICATE OF COMPLIANCE

I, Michael L. Forton, counsel for Appellants, certify that this brief complies with the font and word limitations of Rule 32 of the Alabama Rules of Appellate Procedure. The brief uses Century Schoolbook font of size 14. It includes 7,470 words.

/s/ Michael L. Forton
Michael L. Forton
Attorney for the Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief of by electronic mail as follows:

Jim Davis at jim.davis@alabamaag.gov
Joseph Ammons at joseph.ammons@labor.alabama.gov

This the15th day of September, 2021. I further certify that I will mail copies to them when I submit hard copies to the Court.

/s/ Michael L. Forton
Michael L. Forton
Attorney for the Appellants