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

APPELLANT'S AMENDED REPLY BRIEF

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This suit does not affect any property rights of the state. *Ala. A&M Univ. v. Jones*, 895 So. 2d 20 867, 873 (Ala. 2004), and *Ex parte Wilcox Cnty. Bd. of Educ.*, 285 So. 3d 765, 777 (Ala. 2019). The Alabama Unemployment Compensation Act is designed to help people who are involuntarily unemployed, and its provisions must be read broadly in favor of coverage. *State Dep't of Indus. Relations v. Bryant*, 697 So.2d 469 (Ala.Civ.App. 1997). When so read, Alabama Code §25-4-118 requires the Governor and Secretary to cooperate with the U.S. Secretary of Labor to further the aims of the Unemployment Compensation Act by accepting and continuing to accept federal pandemic unemployment compensation funding to pay benefits to plaintiffs and other Alabamians.

B. Plaintiffs' Suit to Enforce a Legislative Mandate Is Not Moot, Because Relief Remains Available

An email from the U.S. Secretary of Labor shows that it is not too late for plaintiffs to obtain the relief that they seek. This truth defeats all the arguments advanced by the Governor and Secretary. *South Alabama Gas Dist. v. Knight*, 138 So.3d 971, 976 (Ala. 2013). The broad preliminary injunctive relief they seek is available, because provided that the relief is necessary to preserve during litigation the status quo that existed before the wrongful termination of participation in the federal pandemic unemployment programs. *Hollon v. Matthis Independent School Dist.*, 491 F.2d 92 (5th Cir. 1974).

C. Plaintiffs Did Not Delay Filing Suit So As to Justify a Dismissal for Laches

The three-month period from the date on which the Governor and Secretary announced the termination of participation in the federal pandemic unemployment programs and the day on which plaintiffs filed suit challenging the termination was justifiable and "commendable" in

light of the need to investigate before filing. *Kason Indus., Inc. v. Component Hardware Grp., Inc.*, 120 F.3d 1199, 1206 (11th Cir. 1997).

II. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S ORDER DENYING PRELIMINARY INJUNCTIVE RELIEF

A. Because the Legislature Has Directed the Secretary to Cooperate with the U.S. Secretary of Labor, Plaintiffs Have a Substantial Chance of Prevailing on the Merits

For the reasons set out in part I of this brief and in the opening brief, this suit should not be dismissed for sovereign immunity, mootness or laches. Plaintiffs' cause of action based primarily on Alabama Code §25-4-118 is likely to succeed on the merits.

B. Plaintiffs Had a Significant and Imminent Risk of Irreparable Harm, Because the Governor and Secretary Acted to Deprive Them of Money They Were Using to Meet Their Basic Needs, and an Award of Monetary Damages Would Not Redress Their Loss

In upholding an injunction in *Triple J Cattle, Inc. v. Chambers*, 551 So.2d 280, 282 (Ala. 1989), this Court explained that the primary reason for a preliminary injunction is to prevent an irreparable injury, equating that to one not redressable with pecuniary damages in a court of law. Since no Alabama case has considered whether the termination of a program upon which people were relying to meet basic needs creates irreparable harm, this Court should look to what courts in other jurisdictions have held. *Maddox v. Maddox*, 276 Ala. 197, 198 (1964). Those courts have correctly found that such action does irreparably harm the people who were depending on such a program. *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).

C. Any Harm to the Governor and Secretary Is Far Outweighed by the Harm to Plaintiffs

An email from the U.S. Secretary of Labor shows that the Governor and Secretary can get the federal government to pay for all the costs of rescinding their termination from the federal pandemic unemployment compensation programs and getting benefits to plaintiffs and other claimants suffering from unemployment caused by the COVID pandemic. The harm that plaintiffs are suffering tips the balance in favor of plaintiffs. *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).

ARGUMENT

I. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S ORDER DISMISSING PLAINTIFFS' SUIT

A. Sovereign Immunity Does Not Bar Plaintiffs' Suit to Enforce a Legislative Mandate

The Governor and the Secretary of the Alabama Department of Labor attempt to broaden their sovereign immunity claim by saying that even if the Unemployment Compensation Act requires them to continue

participating in the federal pandemic unemployment programs, they cannot be sued for failing to do. Response Brief of Defendants-Appellees (hereafter, "Response Brief) at 19-20. They rely on language in cases such as *Ala. A&M Univ. v. Jones*, 895 So. 2d 20 867, 873 (Ala. 2004), and *Ex parte Wilcox Cnty. Bd. of Educ.*, 285 So. 3d 765, 777 (Ala. 2019) about sovereign immunity barring any suit that "affect[s] a contract or property right of the State." They go so far as to cite *Jones* for the proposition that plaintiffs' "attempt to force the State to contract with the federal government 'affect[s] a contract or property right of the State'." Response Brief at 20. Both *Jones* and *Wilcox Cnty.* turned on claims for money damages and not on some affected contract. Neither *Jones* nor any other case holds that whenever the avenue to funds, be they federal pandemic unemployment funds or any of many other federal funds, is through signing a contract with the federal government, requiring Alabama to get the funds "affects a contract" in any manner that violates sovereign immunity. The sole sovereign immunity question is whether the Unemployment Compensation Act required the Governor and his agent, the Secretary, to accept the federal money and not to terminate Alabama's participation. And the answer to that question is yes.

The parties have explained to the Court their interpretations of the principal statutes upon which this case turns. Both sides properly look at the Unemployment Compensation Act broadly for the necessary context of section 25-4-118. Plaintiffs focus on the overall purpose of the Act, which this Court has often said is to provide needed assistance to persons who are unemployed due to no fault of their own, and which commands that provisions of the Act be interpreted broadly in a manner that favors claimants and further commands that disqualifying provisions be interpreted narrowly. As plaintiffs said in the complaint that they filed in circuit court, Alabama passed the Unemployment Compensation Act, Alabama 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). As stated in *State Dep't of Indus. 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 and the disqualifications from benefits should be narrowly construed." *Id.* at 470 (citations and internal quotation marks omitted).

The Governor and the Secretary fail even to mention this primary purpose and the need to interpret the Unemployment Compensation Act broadly in favor of coverage. Instead, the Governor and Secretary focus on a secondary objective, reducing unemployment, and an objective that is at best tertiary, minimizing federal entanglement in the regular unemployment compensation program. Response Brief at 28-29. In another portion of their brief, they go even farther to say that claimants lose interest in taking available jobs when unemployment compensation programs are extended, so that depriving unemployed claimants of available unemployment compensation benefits, when they meet the eligibility conditions for those benefits, increases the pressure on them to take jobs and thereby reduce unemployment. Response Brief at 42. This distorted focus is impeding the Governor's understanding of the statute.

In examining the statute, this Court must think in terms of providing needed help to claimants unemployed through no fault of their own and not on how to limit the statute's coverage to make impoverished people more desperate to find work.

The Governor and Secretary see Ala. Code 25-4-118(a) as limiting the requirement to cooperate to filing reports and to following certain regulations governing unemployment programs funded by Title III of the Social Security Act. Response Brief at 26. They go so far as to say subsection (a) applies only to money allotted under Title III. Response Brief at 26, n.5. They have ignored the structure of the bill, which separately mandates in the administration of the Unemployment Compensation Act ("this chapter") that Secretary Washington cooperation generally "to the fullest extent consistent with the provisions of this chapter with the U.S. Secretary of Labor" and then starts a series of "ands" explaining some other things Secretary Washington must do: make reports in the manner the U.S. Secretary of Labor and the Internal Revenue Service may require; and comply with federal regulations governing the expenditures of funds provided under Title III of the Social Security Act for administration of the Unemployment Compensation Act;

and responding to requests from any U.S. agency for information about any Alabama recipient of unemployment compensation benefits. Alabama Code 25-4-118(a). Had the Legislature wanted to restrict cooperation to the specific areas mentioned, it would have used the word "by" following the phrase on cooperation, and not the word "and". *See, e.g.*, *Southeastern Meats of Pelham v. City of Birmingham*, 895 So.2d 905 (Ala. 2004), in which the Court explained similarly of the use of the word "including" that:

> the word 'including' is *not to be regarded as limitational or restrictive,* but merely as a particular specification of something to be included or to constitute a part of some *other* thing.

895 So.2d at 913 (emphasis in original). Moreover, if the Legislature had wanted to limit cooperation to programs funded under Title III of the Social Security At, it would not have referenced Title III only in the single provision dealing with compliance with regulations, but would have included it in the initial clause.

The Governor and the Secretary also identify subsection (c) as the only portion of section 25-4-118 that relates to the federal pandemic

unemployment compensation programs. Response Brief at 27. Subsection (c) reads

> The director may afford reasonable cooperation with any agency of the United States charged with the administration of any unemployment insurance law.

This subsection makes no reference to federal pandemic benefits, so it requires quite a stretch to say that it was designed to address federal unemployment compensation benefits, if they ever came to exist and to see it as a specific provision overriding the general mandate of subsection (a). Subsection (a) required cooperation with the U.S. Secretary of Labor. Instead of saying that subsection (c), merely authorizing cooperation, also can refer to the U.S. Secretary of Labor does not make sense. The more reasonable explanation is that it would allow cooperation with any other federal agency administering some other unemployment law.

The discretion Alabama Code 25-4-115 affords the Secretary to act to reduce unemployment is necessarily limited by the command to cooperate and by the overarching purpose of the Unemployment Compensation Act. Never paying anyone unemployment compensation might result in fewer people staying out of work, but it would certainly

not be permissible under the language and purpose of the Unemployment Compensation Act. Despite the assertion of the Governor and Secretary that this section gives the Secretary broad discretion to decide a program increases unemployment and unilaterally discontinue it, Response Brief at 28-29, the section must be read in conjunction with the duty to cooperate and the overall purpose of aiding involuntarily unemployed Alabamians. The statute authorizes only "appropriate" steps, not steps that are inappropriate because of other, more paramount, provisions of the Unemployment Compensation Act.

Similarly, the Governor and Secretary claim support from Alabama Code 25-4-110 for a right to "not further entrench the State in federal unemployment programs by reentering into the Programs." Response Brief at 29. However, section 25-4-110 does not mention federal unemployment programs. Its wording shows it to be concerned solely with maintaining a sufficient degree of sovereignty in the operation of the regular state-funded unemployment compensation program.

The Governor and the Secretary rightly note that cases from other states are not binding on this Court. Response Brief at 30. But they are persuasive, and the statutes considered are more similar than the

Governor and Secretary acknowledge. Some of the statutes have clauses such as "seek all available funds" but others do not. The cases also cannot simply be disregarded due to failing to address sovereign immunity squarely. Ohio has pretty much done away with sovereign immunity. *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972). But Maryland and many of the other states have not. In *Jackson v. Millstone,* 369 Md. 575, 588–593, 801 A.2d 1034, 1041–1045 (2002), the Maryland Supreme Court found that sovereign immunity did not bar a lawsuit brought for injunctive relief against state officials whose actions were invalid because of their failure to comply with federal Medicaid law. That, rather than a discussion of sovereign immunity, is what is key. Under Alabama law, an official who violates a statutory imperative is not protected by sovereign immunity. Thus, other courts' analysis on whether a statute creates such a duty is highly relevant.

As plaintiffs explained in their initial brief, Brief of Appellant at 12-13, Maryland has a statute substantially identical to section 25-4-118, including the use of the words "cooperate to the fullest extent" and a series of other duties, each joined by an "and", and 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) used the overall purpose of its unemployment compensation as the key for ascertaining the "'common end or objective' toward which the [Maryland Secretary of Labor] must 'cooperate'." (R. 55-79). It is instructive to read pages 11-18 of the opinion, (R. 65-72), for the analysis that properly leads the court to the conclusion that:

> The Court concludes the Plaintiffs are likely to prevail on the merits not because they necessarily have the better policy position, but because the "fullest extent" language of §8-310(a)(1) should be interpreted in this context to constrain administrative discretion and to require the Maryland Secretary of Labor to maximize use of any available federal unemployment benefits.

Opinion at p. 18. (R. 72).

As plaintiffs explained in their opening brief, the same analysis as conducted by the Maryland court applies in the instant case and leads to the same result: the Governor and Secretary lacked the power to terminate Alabama's participation in the federal unemployment benefits programs, and they must rescind that termination. Brief of Appellant at 12-14.

As a final escape hatch, the Governor and Secretary would like to have this Court believe that each is unaffected by legislative mandates to the other. They say that Governor Ivey is the only one who can rescind the termination of participation in the federal unemployment benefits programs and sign a new agreement with the U.S. Secretary of Labor. Response Brief at 32. The Governor and the Secretary are two separate people, but they are both part of the same administration and are charged with working together to ensure the legal operation of the unemployment compensation programs in Alabama. Governor Ivey is vested with the supreme executive power of Alabama pursuant to Section 113 of the Alabama Constitution, and, pursuant to Alabama Code 36-13-8, Governor Ivey accepts funds from the federal government for any purpose not contrary to the Alabama Constitution. Pursuant to Alabama Code 36-13-9, Governor Ivey is authorized to give existing state agencies, including the Alabama Department of Labor, "such powers and duties . . . as may be required to implement in Alabama any . . . program . . . promulgated by the federal government . . . required, in his judgment, for the welfare of the people of Alabama." Pursuant to Alabama Code 25-4-110, Secretary Washington has primary responsibility for administration

of the unemployment compensation program in Alabama. The statute refers to him as "director" and discusses his need to work closely with the Governor:

> It shall be the duty of the director to administer this chapter. He shall have power and authority to adopt, amend, or rescind such lawful rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as may be necessary or suitable to that end. The director shall determine his own organization and methods of procedure in accordance with the provisions of this chapter and the industrial relations law. Annually, the director shall submit to the Governor a summary report covering the administration and operation of this chapter during the preceding fiscal year, and make such recommendations as he deems proper. Whenever the director believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, he shall at once inform the Governor and the Legislature thereof, and make recommendations accordingly. The director shall fully cooperate with the agencies of other states, and shall make every proper effort within his means to oppose and prevent any action which would in his judgment tend to effect complete or substantial federalization of state unemployment compensation funds or of the state employment security program.

All these provisions have the Governor and Secretary working together as a team.

More distressingly, the Governor and the Secretary say:

> Secretary Washington "hold[s] office at the pleasure of" Governor Ivey. ALA. CODE § 25-2-6. Even if this Court enjoined Secretary Washington to enter the Programs, he has no authority to do so over the Governor's objection.

Response Brief at 29-30, n. 6. To assert that because the Governor has overwhelming Executive power and because the Secretary holds office at her pleasure, the Governor could thwart this Court by stopping the Secretary from obeying its orders is an amazing assertion of authority for the Governor and Secretary to stick in a footnote. It is also inaccurate. Pursuant to Section 120 of the Alabama Constitution, Governor Ivey must "take care that the laws be faithfully executed." She cannot disregard the Legislature, and she cannot disregard the will of this Court.

In *Bowling v. DeWine*, 2021 W.L. 3733205 (Ohio Ct.App., 10th Cir., Franklin Cty.), the Court analyzed the separate powers of its legislature and governor and reversed the denial of a preliminary injunction because of a statute similar to section 25-4-118 (although including a provision regarding accessing the benefits of federal programs). It said:

> But this case . . . involves an executive action that stood in direct contrast to a specific policy mandate

> in a long-standing statute, R.C. 4141.43 [Ohio's statute setting out the duty to cooperate with the Secretary of the U.S. Department of Labor], as well as a violation of the constitutionally delineated check on the executive's ability to "impair or limit" that policy. Ohio Constitution, Article II, Section 34. Based on our de novo review of the applicable statutory and constitutional texts, we conclude that the trial court abused its discretion when it determined that appellants were not likely to succeed on the merits of the claim and denied the preliminary injunction.

Opinion at p. 13.

The Legislature has directed the Governor and the Secretary to accept federal funds that would advance the principal purposes of the Alabama Unemployment Act. By terminating Alabama's participation in the federal pandemic unemployment benefit programs, the Governor and the Secretary have violated this statutory duty, as well as the requirement of section 120 of the Constitution to "take care that the laws be faithfully executed."

B. Plaintiffs' Suit to Enforce a Legislative Mandate Is Not Moot, Because Relief Remains Available

The Governor and Secretary of the Alabama Department of Labor devote six full pages of their brief to rearguing that this case is moot and spend most of that time trying to convince this Court that plaintiffs cannot rely on the email from the U.S. Department of Labor. Response Brief at 13-19. They repeat an argument about the inability of a party to raise new arguments on appeal without even addressing plaintiffs' explanation in their opposition to the motion in this Court to dismiss why such arguments are proper in analyzing whether a case is truly moot. They criticize the lateness of the filing of the email, again apparently not realizing that this Court is concerned not with timing but with truth. *South Alabama Gas Dist. v. Knight*, 138 So.3d 971, 976 (Ala. 2013). Finally, they accuse plaintiffs of shifting their position on mootness and say that plaintiffs should be held to their previous representations that this case would become moot on October 6, again regardless of whether the case is truly moot.

Plaintiffs have explained twice that what matters is whether this case is truly moot, whether it is in fact too late for the Governor and Secretary to rescind their termination of participation and clear the way for plaintiffs to be paid federal pandemic unemployment benefits for

dates following that termination. Although the Governor and Secretary have twisted plaintiffs' words to make them appear more contradictory than they are, plaintiffs readily agree that their motion to expedite and their earlier arguments emphasized the relief available up to October 6 in a way that may have led to confusion.

From the date of filing, plaintiffs have been asking for relief for all people who were adversely affected by Alabama's early termination of participation in the federal pandemic unemployment programs. Their reason was simple. The U.S. Department of Labor in its policy directive and again in its email offered no way for individuals to be allowed to receive pandemic benefits after a state's termination of participation except through the rescission of that termination. Both the policy directive and email speak in terms of a state's need to make the benefits from rescission available to everyone eligible for benefits by soliciting retroactive applications as well as acting on all applications. Plaintiffs have consistently sought action that would effectuate the clear wishes of the U.S. Department of Labor. As it became clear that such broad relief would not be forthcoming, plaintiffs had to pivot and seek what relief was still available.

The Governor and Secretary state "Plaintiffs have never sought class certification to represent these other people and would lack standing to seek expedited relief on their behalf" and cite *Butler v. Parks*, No. 1190043, 2021 WL 221859 (Ala. Jan. 22, 2021), for the proposition that plaintiffs would lack standing to seek relief on behalf for unemployed people who have not filed applications for pandemic unemployment benefits. This shows a misunderstanding of the *Butler* decision and *Kowalski v. Tesmer*, 543 U.S. 125 (2004) concerning third-party standing, a misunderstanding of classwide relief and a misunderstanding of what plaintiffs are seeking. *Butler* and *Kowalski* require that there be a sufficiently "close relationship" between the person suing and any other "individual whose rights have allegedly been violated." In class actions, broad preliminary relief is generally unavailable prior to class certification. *See, e.g., Nat'l Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1371-72 (9th Cir. 1984). Broad preliminary injunctive relief is available in individual actions, however, provided that the relief is "necessary to serve such purpose" as preserving the status quo during litigation, the status quo that existed before the wrongful termination of participation in the federal pandemic unemployment programs. *Hollon*

v. Matthis Independent School Dist., 491 F.2d 92 (5th Cir. 1974). In *Hollon*, a student athlete was challenging enforcement of a school's married student policy. An injunction that would be in effect even after that athlete graduated was not needed to preserve the status quo. Plaintiffs have a close tie to all the people who would have received pandemic unemployment compensation if it had not been for Alabama's early termination from participation. According to the words of the U.S. Department of Labor, preserving one person's right to receive benefits requires a rescission that initially benefited all potential claimants and now one that would benefit all those who have filed applications for a form of pandemic unemployment compensation benefits.

The final pages of mootness argument assert that the email limits rescission to states that seek it on or before October 8 and claim that plaintiffs failed to quote that portion of the email. Response Brief at 18. It is the State that is guilty of trying to argue from a fragment of a sentence in the email. The US Department of Labor implores states that terminated pandemic unemployment benefits early to "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." The

State fails to finish the sentence it is quoting. The US Department of Labor wanted states to act to rescind promptly because after October 6 it would be too late for "claimants [to] file new PUA applications." The US Department wanted all potentially eligible people to benefit from a rescission, including those who had not filed applications. However, the email does not say that if the US Department could not get what it wants that it would deprive those who have already filed applications from obtaining the benefits to be had from rescission.

C. Plaintiffs Did Not Delay Filing Suit So As to Justify a Dismissal for Laches

The Governor and Secretary decry what they consider an "inexcusable" three-month delay from the date on which they announced the termination of participation in the federal pandemic unemployment programs and the day on which plaintiffs filed suit challenging the termination, and they say that plaintiffs have "not seriously argued otherwise." Response Brief at 34. To the contrary, plaintiffs have explained that they investigated first before filing, and that numerous cases have found such "delay" commendable. *See, e.g.*, *Kason Indus., Inc.*

v. Component Hardware Grp., Inc., 120 F.3d 1199, 1206 (11th Cir. 1997). Brief of Appellant at 20-21. The Governor and Secretary question what plaintiffs could have been investigating and pointed out that the suits plaintiffs site from other jurisdictions were filed more promptly. Response Brief at 34.

One of the things that plaintiffs were investigating was these very decisions in other jurisdictions and the statutory language in those other jurisdictions. Before filing, plaintiffs wanted to be sure that they had a reasonable prospect of prevailing, that Alabama's law was substantially the same as the laws of other states in which courts were providing relief to people who had applied for federal pandemic unemployment benefits.

The Governor and Secretary cite no case that finds a failure to sue within three months of learning of an objectionable action as constituting laches. The reason is that no such case exists. The Governor and Secretary would have this Court use this case to make the most drastic ruling on laches in the country.

Plaintiffs acted reasonably and with reasonable promptness. This Court should not dismiss this case for laches.

II. THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S ORDER DENYING PRELIMINARY INJUNCTIVE RELIEF

A. Because the Legislature Has Directed the Secretary to Cooperate with the U.S. Secretary of Labor, Plaintiffs Have a Substantial Chance of Prevailing on the Merits

For the reasons set out in part I of this brief and in the opening brief, this suit should not be dismissed for sovereign immunity, mootness or laches. Plaintiffs' cause of action based primarily on Alabama Code 25-4-118 is likely to succeed on the merits.

B. Plaintiffs Had a Significant and Imminent Risk of Irreparable Harm, Because the Governor and Secretary Acted to Deprive Them of Money They Were Using to Meet Their Basic Needs, and an Award of Monetary Damages Would Not Redress Their Loss

The Governor and Secretary ask this Court to find that plaintiffs did not make sufficient mention of not having an "adequate remedy at law" in circuit court and to disregard anything plaintiffs say on this

necessary component for a preliminary injunction. Response Brief at 39, n. 8.. In the lower court, the plaintiffs emphasized one aspect of the lack of an adequate remedy: the irreparable harm that they would suffer without injunctive relief; whenever people are subjected to irreparable harm, there is, necessarily, no remedy in law that can undo the harm they suffer. (R. 29-30). That suffices. In upholding an injunction in *Triple J Cattle, Inc. v. Chambers*, 551 So.2d 280, 282 (Ala. 1989), this Court stated:

> The primary reason for issuing an injunction is to prevent an irreparable injury, i.e., one not redressable with pecuniary damages in a court of law.

551 So.2d at 282.

The Governor and Secretary also claim that plaintiffs demonstrated a lack of irreparable harm by waiting several months from termination of the participation in the federal pandemic programs, citing *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244 (11th Cir. 2016). Response Brief at 38-39. The situation in *Wreal* was quite different. The Court was measuring the time between filing and the motion for preliminary relief, even noting that the litigants had at the time they filed their complaint all the information they used in their motion. 840 F.2d at 1248-1249.

Plaintiffs filed their preliminary injunction the same day that they filed, so *Wreal* does not provide any support to the Governor and Secretary, who are basically recycling their laches arguments.

The Governor and Secretary say that plaintiffs allege no more than harm that could be remedied by an award of monetary damages, and they berate plaintiffs for citing only non-binding cases in discussing how their imminent risk of irreparable harm makes an award of money damages inadequate. Response Brief at 38-40. Plaintiffs do not know of any Alabama case addressing this question, just as they know of no other Alabama governor who has ever stopped a program upon which people were relying to meet basic needs. In the absence of an Alabama case on point, this Court should look to what courts in other jurisdictions have held. *Maddox v. Maddox*, 276 Ala. 197, 198 (1964). The caselaw supports plaintiffs' position. *See, e.g.*, *See, e.g.*, *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). Appellants' Brief at 29-30. Their situation is quite different from that of a business, which is able recover money for all the damages that flow from a wrongful act. *Triple J Cattle, supra.* First, they suffer injuries that cannot be undone by monetary

awards. Second, sovereign immunity prevents plaintiffs from even trying to recover damages for the losses the Governor and Secretary caused by taking away the programs that plaintiffs were using to meet basic needs.

C. Any Harm to the Governor and Secretary Is Far Outweighed by the Harm to Plaintiffs

The Governor and Secretary see rescinding their termination of participation in the federal pandemic benefits programs as costing millions of dollars, saying that it would involve a lot of restarting what they have already stopped. Response Brief at 40-44. They never mention what systems have been maintained to enable the Alabama Department of Labor to allow claimants who win hearings that have been requested but not yet held to certify to their eligibility for one or more of the federal benefit programs. In any event, any money that the Governor and Secretary spend would be fully reimbursed by the federal government. The email from the U.S. Department of Labor spells out that:

> 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.

(R. 325). The Alabama Department of Labor would have to devote time to effectuate the relief plaintiffs seek. The benefits plaintiffs would be able to recover eventually will enable them to meet basic needs. Thousands of other claimants across the state could also obtain such benefits. The scales tip decidedly in favor of the plaintiffs. *See, e.g.*, *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):

> Balancing these harms, the balance tips in favor of Plaintiffs and issuing a preliminary injunction. The personal magnitude of the harm associated with losing benefits for Plaintiffs and other individuals currently receiving them is greater than the purely fiscal impact on the State of being required to continue to administer these benefits.

(R. 75).

CONCLUSION

Plaintiffs have demonstrated that the Governor and the Secretary had a duty to cooperate with the U.S. Secretary of Labor that includes obtaining the benefits the U.S. Secretary made available to Alabamians suffering from unemployment related to COVID. The Governor and

Secretary breached that duty and thereby subjected plaintiffs to irreparable harm. Thus, this Court should reverse the decision of the circuit court and should direct that court to enter a preliminary injunction requiring the Governor and Secretary to rescind the termination of participation and allow plaintiffs to claim federal pandemic unemployment benefits for time that they were unemployed due to COVID.

Respectfully Submitted:

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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 5,578 words.

/s/ Michael L. Forton
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CERTIFICATE OF SERVICE

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

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This the 9th day of November, 2021. I further certify that I will mail copies to them when I submit hard copies to the Court.

/s/ Michael L. Forton
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