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Honorable Julia Jordan Weller
Clerk of the Court

No. 1200847

IN THE SUPREME COURT OF ALABAMA

SHENTEL HAWKINS, ASHLEE LINDSEY,
JIMMIE GEORGE, and CHRISTINA FOX,
Plaintiffs-Appellants,

v.

KAY IVEY, in her official capacity as Governor of the State of Alabama;
FITZGERALD WASHINGTON, in his official capacity as Secretary of
the Alabama Department of Labor,
Defendants-Appellees.

On Appeal from the Circuit Court of Montgomery County
(CV-2021-900863)

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STATEMENT REGARDING ORAL ARGUMENT

Defendants agree with Plaintiffs that oral argument is not needed. *See* Appellants' Br. at i. The facts and legal arguments are adequately presented in the briefs. *See* ALA. R. APP. P. 34(a)(3).

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 2

STATEMENT OF THE FACTS 3

STATEMENT OF THE STANDARDS OF REVIEW 6

SUMMARY OF THE ARGUMENT 8

ARGUMENT 12

- I. This Court lacks subject-matter jurisdiction over Plaintiffs' claims. 12
  - A. Plaintiffs' claims are moot. 13
  - B. Sovereign immunity bars Plaintiffs' claims. 19
- II. Plaintiffs fail to state a claim because Alabama Code § 25-4-118 does not require participation in the programs. 32
- III. Laches warrants dismissal of Plaintiffs' claims. 33
- IV. Plaintiffs are not entitled to a preliminary injunction. 35
  - A. Plaintiffs have not shown that they are likely to prevail on the merits. 37
  - B. Plaintiffs have not shown irreparable harm or that they have no adequate remedy at law. 38
  - C. Plaintiffs cannot show that a preliminary injunction would benefit them more than it would burden the State. 40

CONCLUSION 44

CERTIFICATE OF COMPLIANCE 46

CERTIFICATE OF SERVICE 47

STATEMENT OF JURISDICTION

Defendants do not dispute that Plaintiffs timely filed their notice of appeal or that this Court has appellate jurisdiction pursuant to Alabama Code § 12-2-7. However, this Court should dismiss this appeal for lack of subject-matter jurisdiction as explained in Defendants' separate Motion to Dismiss Appeal and Motion for Leave to File Reply to Plaintiffs-Appellants' Response to Order to Show Cause (each adopted and incorporated by reference) and in Part I of this brief below.

TABLE OF AUTHORITIES

<u>Cases</u>

Ala. A&M Univ. v. Jones,
895 So. 2d 867 (Ala. 2004) 19, 20

Ala. Dep't of Corrs. v. Montgomery Cnty. Comm'n,
11 So. 3d 189 (Ala. 2008) 12, 19

Aland v. Graham,
287 Ala. 226 (1971) 21

Andrews v. Merritt Oil Co., Inc.,
612 So. 2d 409 (Ala. 1992) 39

Armstrong v. Hutchinson,
No. CV 2021-4507 (Ark. Cir. Ct., Pulaski Cnty. July 28, 2021) 30

Avis Rent A Car Sys., Inc. v. Heilman,
876 So. 2d 1111 (Ala. 2003) 22

Baldwin County v. James,
494 So. 2d 584 (Ala. 1986) 27

Barber v. Cornerstone Cmty. Outreach, Inc.,
42 So. 3d 65 (Ala. 2009) 35, 36

Bay Lines, Inc. v. Stoughton Trailers, Inc.,
838 So. 2d 1013 (Ala. 2002) 6

Bd. of Water & Sewer Comm'rs of Mobile v. Merriwether Constr. Co.,
165 So. 2d 739 (Ala. 1964) 36, 37

Borey v. Nat'l Union Fire Ins. Co. of Pittsburgh,
932 F.2d 30 (2d Cir. 1991) 38

Burgoon v. Ala. State Dep't of Human Res.,
835 So. 2d 131 (Ala. 2002) 19

Butler v. Parks,
No. 1190043, 2021 WL 221859 (Ala. Jan. 22, 2021) 15, 40

Chapman v. Gooden,
974 So. 2d 972 (Ala. 2007) 11, 12, 13

Crawford v. State,
153 S.W.3d 497 (Tex. App. 2004) 13

D.A. v. Hogan, No. 24-C-21-002988 and *Harp v. Hogan*, No. 24-C-21-002999 (combined) (Md. Cir. Ct., Baltimore City July 13, 2021) 30

Dear v. Peek,
73 So. 2d 358 (Ala. 1954) 33

DuBose v. Weaver,
68 So. 3d 814 (Ala. 2011) 6

Elliott v. Navistar, Inc.,
65 So. 3d 379 (Ala. 2010) 33

Ex parte Ala. Dep't of Transp.,
978 So. 2d 17 (Ala. 2007) 7

Ex parte Ala. Educ. Television Comm'n,
151 So. 3d 283 (Ala. 2013) 29

Ex parte Ala. State Bd. of Educ.,
810 So. 2d 773 (Ala. 2001) 21

Ex parte Gilland,
274 So. 3d 976 (Ala. 2018) 7

Ex parte Jackson,
614 So. 3d 405 (Ala. 1993) 26

Ex parte Moulton,
116 So. 3d 1119 (Ala. 2013) 21

Ex parte Safeway Ins. Co. of Ala., Inc.,
990 So. 2d 344 (Ala. 2008) 4, 7

Ex parte Safeway Ins. Co. of Alabama, Inc.,
990 So. 2d 344 (Ala. 2008) 7

Ex parte USC Corp.,
881 So. 2d 437 (Ala. 2003) 25

Ex parte Wilcox Cnty. Bd. of Educ.,
285 So. 3d 765 (Ala. 2019) 20

General Motors Corp. v. Stokes Chevrolet, Inc.,
885 So. 2d 119 (Ala. 2003) 8

Holiday Isle, LLC v. Adkins,
12 So. 3d 1173 (Ala. 2008) 8

Horton v. Kimbrell,
819 So. 2d 601 (Ala. 2001) 33

Jacobs Broad. Group, Inc. v. Jeff Beck Broad. Group, LLC,
160 So. 3d 345 (Ala. 2014) 11

Liberty Nat'l Life Ins. Co. v. Univ. of Ala. Health Servs. Found., P.C.,
881 So. 2d 1013 (Ala. 2003) 8

Lloyd Noland Found., Inc. v. HealthSouth Corp.,
979 So. 2d 784 (Ala. 2007) 7

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992).. 29

Martin v. City of Linden,
667 So. 2d 732 (Ala. 1995) 38

Monte Sano Research Corp. v. Kratos Def. & Sec. Solutions, Inc.,
99 So. 3d 855 (Ala. 2012) 38, 39

Muhammad v. Ford,
986 So. 2d 1158 (Ala. 2007) 22

Nance v. Matthews,
622 So. 2d 297 (Ala.1993) 7

Newson v. Protective Indus. Ins. Co. of Ala.,
890 So. 2d 81 (Ala. 2003) 4

Oak Grove Res., LLC v. White,
86 So. 3d 963 (Ala. 2011) 33

Owens v. Zumwalt,
No. CV-21-1703 (Okla. Dist. Ct., Oklahoma Cnty. Aug. 9, 2021).....30

Oxford Asset Mgmt., Ltd. v. Jaharis,
297 F.3d 1182 (11th Cir. 2002)...7

Patterson v. Gladwin Corp.,
835 So. 2d 891 (Ala. 2008) 19

Perly v. Tapscan, Inc.,
646 So. 2d 585 (Ala. 1994) 38

Rogers v. Burch Corp.,
313 So. 3d 555 (Ala. 2020) 13, 16, 18

S. Ala. Gas Dist. v. Knight,
138 So. 3d 971 (Ala. 2013) 13

S.B. v. McMaster,
No. 2021-CP-40-03774 (S.C. Ct. C.P., Richland Cnty. Aug. 13,
2021)..30

Siegelman v. Ala. Ass'n of School Bds.,
819 So. 2d 568 (Ala. 2001) 25

Slamen v. Slamen,
254 So. 3d 172 (Ala. 2017) 8

State Dep't of Transp. v. Reid,
74 So. 3d 465 (Ala. 2011) 22

State ex rel. Bowling v. DeWine,
No. 21 CVH07-4469 (Ohio Ct. C.P., Franklin Cnty. July 29,
2021)..30

State v. Prop. at 2018 Rainbow Drive,
740 So. 2d 1025 (Ala. 1999) 12

Steele v. Rosenfeld, LLC,
936 So. 2d 488 (Ala. 2005) 17

Steffel v. Thompson,
415 U.S. 452 (1974)...13

Surtees v. VFJ Ventures, Inc.,
8 So. 3d 950 (Ala. 2008) 28

T.L. v. Holcomb,
No. 49D11-2106-PL-020140 (Ind. Sup. Ct., Marion Cnty.
June 25, 2021)..30

TitleMax of Ala., Inc. v. Falligant ex rel. McElroy,
No. 1190670, 2020 WL 7089719 (Ala. Dec. 4, 2020) 17

Town of Elmore v. Town of Coosada,
957 So.2d 1096 (Ala. 2006) 12

Tyson v. Jones,
60 So. 3d 831 (Ala. 2010) 22

Wallace v. Hardee's of Oxford, Inc.,
874 F. Supp. 374 (M.D. Ala. 1995) 33

White v. John,
164 So. 3d 1106 (Ala. 2014) 35, 40

Williams v. Hank's Ambulance Serv., Inc.,
699 So. 2d 1230 (Ala. 1997) 20

Woodfin v. Bender,
238 So. 3d 24 (Ala. 2017) 20

Wreal, LLC v. Amazon.com, Inc.,
840 F.3d 1244 (11th Cir. 2016)...39

Ziade v. Koch,
952 So. 2d 1072 (Ala. 2019) 17

Constitutional Provisions

ALA. CONST. § 113 21

Statutes

ALA. CODE § 25-2-6 30

ALA. CODE § 25-4-110 29

ALA. CODE § 25-4-115 28

ALA. CODE § 25-4-118 .... *passim*

ALA. CODE § 25-4-145(c)(1) 44

ALA. CODE § 36-13-8 .... *passim*

ARK. CODE § 11-10-312 31

Rules

ALA. R. APP. P. 34(a)(3) i

Regulations

20 C.F.R. § 625.14 44

STATEMENT OF THE CASE

Plaintiffs bring a novel claim, asserting that the Governor and Secretary of the Alabama Department of Labor each have a mandatory duty to enroll the State in optional federal unemployment programs (the "Programs"). No such duty exists, which means the claim fails both on its merits and because it is barred by sovereign immunity. But the Court need not even reach those issues, for the claim is also moot, as the Programs Plaintiffs wish to force the State to join have now expired. And Plaintiffs' inexcusable delay in bringing this claim also dooms their effort.

Thus, riddled with jurisdictional, substantive, and equitable problems, Plaintiffs' suit must fail. The circuit court properly dismissed their claims and accordingly denied their motion for preliminary injunction. Regardless, Plaintiffs were never entitled to a preliminary injunction having failed to show a likelihood of success on the merits, anything more than a mere risk of irreparable harm, or that the few thousands of dollars of relief they each might expect could ever outweigh the financial and administrative burden to the State. In fact, Plaintiffs' requested relief would hinder Alabama's economic recovery at a crucial time, over the objection of the Governor and the Secretary of Labor who

have the expertise and inherent discretion to make such determinations. Plaintiffs cannot prevail. Thus, this Court should either dismiss this appeal or affirm the circuit court's judgment below granting Defendants' motion to dismiss and denying Plaintiffs' motion for preliminary injunction.

STATEMENT OF THE ISSUES

1. Is Plaintiffs' case moot when the State did not rejoin the Programs before the last payable week of benefits began on August 29, 2021 and the Programs have now expired by their own terms?
2. Does Governor Ivey have a mandatory duty to rejoin the expired Programs when Alabama Code § 36-13-8 grants her discretion to participate in federal grants or advances?
3. Does Alabama Code § 25-4-118(a)'s language that Secretary Washington cooperate with the United States Secretary of Labor to file reports create a mandatory duty to rejoin the expired Programs when § 25-4-118(c) provides that he "may afford reasonable cooperation" as to unemployment programs?

4. Have Plaintiffs stated a claim when Alabama Code § 25-4-118 does not mandate participation in expired Programs and Governor Ivey has discretion about whether to participate in them?
5. Does laches bar Plaintiffs' claim when their inexcusable delay in filing this suit for three months imposes severe administrative costs on Defendants?
6. Are Plaintiffs entitled to a preliminary injunction when they are unlikely to succeed on the merits, both the harm they allege and relief they request are monetary in nature, and the administrative burden on Defendants far outweighs the relief that the four Plaintiffs could obtain?

STATEMENT OF THE FACTS

As part of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act and later amending acts, Congress established four optional unemployment assistance programs in which the States could choose to participate. C. 11. Federal Pandemic Unemployment Compensation ("FPUC") provided an additional $300 per week to those already receiving unemployment compensation. C. 12. Pandemic Emergency Unemployment Compensation ("PEUC") extended

unemployment benefits once regular benefits have been exhausted. C. 13. Mixed Earner Unemployment Compensation ("MEUC") provided an additional $100 benefit to certain mixed earners. C. 13. Lastly, Pandemic Unemployment Assistance ("PUA") provided benefits for people who would not usually qualify for traditional benefits. C. 13. The benefits expired on September 6, 2021. C. 194, 196 (U.S. Department of Labor, Unemployment Insurance Program Letter No. 14-21, Change 1 (July 12, 2021)).[1]

The State entered all four programs.[2] C. 12. After participating in the Programs for over a year—throughout the peak of the pandemic—

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[1] Because Plaintiffs relied on the U.S. Department of Labor's guidance in the complaint, C. 14 ¶ 24, it may be considered even when reviewing a Rule 12(b) motion, *Newson v. Protective Indus. Ins. Co. of Ala.*, 890 So. 2d 81, 83–84 (Ala. 2003) ("[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss."). Regardless, consideration of the guidance in connection with the State's Rule 12(b)(1) motion would be proper. *Ex parte Safeway Ins. Co. of Ala., Inc.*, 990 So. 2d 344, 349 (Ala. 2008) ("A court ruling on a Rule 12(b)(1) motion to dismiss may consider documents outside the pleadings to assure itself that it has jurisdiction.").

[2] These four programs collectively are hereinafter referred to as the "Programs."

Governor Ivey saw the writing on the wall. *See* C. 13. Alabama's economy was recovering, job openings were plentiful, childcare facilities were open, and vaccines were available to all adults. C. 13. After careful consideration of the state of the pandemic and Alabama's economy, Governor Ivey announced on May 10, 2021, that Alabama would end its participation in the Programs. C. 12. This termination became effective on June 19, 2021. C. 12.

Three months after Governor Ivey announced the impending termination, Plaintiffs filed this suit on August 10, 2021. *See* C. 6. The circuit court set the matter for status conference, C. 103, denying Plaintiffs' repeated requests for an emergency hearing. *See* C. 101, 105. At the status conference on August 30, 2021, the parties agreed to a schedule. Defendants filed a motion to dismiss and a separate opposition to Plaintiffs' motion for preliminary injunction on September 3, 2021. *See* C. 177, 203. The circuit court held a hearing on the pending motions on September 8, 2021, *see* C.167, at which the circuit court informed the parties that it intended to dismiss the case on sovereign immunity grounds and requested proposed orders, R. 26. The circuit court dismissed Plaintiffs' case for lack of subject-matter jurisdiction on

sovereign immunity grounds on September 13, 2021 and accordingly denied Plaintiffs' preliminary injunction motion. C. 326.

Plaintiffs filed notices of appeal on September 13 and 14, 2021. C. 328. They then filed a motion for expedited relief on September 16, 2021, which this Court denied on September 22, 2021. Defendants filed a motion to dismiss the appeal as moot and a motion to suspend briefing on September 22, 2021. On September 27, 2021, this Court ordered Plaintiffs to show cause why this appeal should not be dismissed for lack of jurisdiction as moot. Plaintiffs responded to this order on October 4, 2021, and Defendants moved for leave to file a reply to that response on October 6, 2021. This Court denied the motion to suspend briefing on October 20, 2021. Defendants' motion to dismiss and motion for leave to file a reply remain pending.

STATEMENT OF THE STANDARDS OF REVIEW

A trial court's dismissal is reviewed *de novo* whether arising under Rule 12(b)(1) for lack of subject-matter jurisdiction or under Rule 12(b)(6) for failure to state a claim. *See DuBose v. Weaver*, 68 So. 3d 814, 821 (Ala. 2011) (subject-matter jurisdiction); *Bay Lines, Inc. v. Stoughton Trailers, Inc.*, 838 So. 2d 1013, 1017–18 (Ala. 2002) (failure to state a claim). "A

court ruling on a Rule 12(b)(1) motion to dismiss may consider documents outside the pleadings to assure itself that it has jurisdiction." *Ex parte Safeway Ins. Co. of Alabama, Inc.*, 990 So. 2d 344, 349 (Ala. 2008) (quotation marks omitted). And when ruling on a Rule 12(b)(6) motion, the court must accept the allegations of the complaint as true. *Ex parte Ala. Dep't of Transp.*, 978 So. 2d 17, 21 (Ala. 2007). "The appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle her to relief." *Lloyd Noland Found., Inc. v. HealthSouth Corp.*, 979 So. 2d 784, 791 (Ala. 2007) (quoting *Nance v. Matthews*, 622 So. 2d 297, 299 (Ala.1993)).

But the Court is "not required to accept [the pleader's] *conclusory* allegations." *Ex parte Gilland*, 274 So. 3d 976, 985 n.3 (Ala. 2018). "Rather, . . . [the pleader is] required to plead facts that would support those conclusory allegations." *Id.* "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Id.* (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

And as to a trial court's denial of a motion for preliminary injunction, this Court reviews the trial court's "legal rulings *de novo* and its ultimate decision to issue the preliminary injunction for [an excess] of discretion." *Slamen v. Slamen*, 254 So. 3d 172, 174 (Ala. 2017) (quoting *Holiday Isle, LLC v. Adkins*, 12 So. 3d 1173, 1176 (Ala. 2008)) (alteration in original).

Lastly, "[t]his Court may affirm a trial court's judgment on 'any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected by the trial court.'" *General Motors Corp. v. Stokes Chevrolet, Inc.*, 885 So. 2d 119, 124 (Ala. 2003) (quoting *Liberty Nat'l Life Ins. Co. v. Univ. of Ala. Health Servs. Found., P.C.*, 881 So. 2d 1013, 1020 (Ala. 2003)).

SUMMARY OF THE ARGUMENT

The circuit court properly granted Defendants' motion to dismiss and denied Plaintiffs' motion for preliminary injunction. Beginning with the motion to dismiss, the district court's dismissal is proper for four reasons. *First*, Plaintiffs' case is moot. It became moot when the State did not rejoin the Programs before the last payable week of benefits began on August 29, 2021. Further, the Programs expired by their own terms on

September 6, 2021. Plaintiffs introduced untimely evidence that the case became moot on October 6, 2021 before eventually changing their tune in response to this Court's order to show cause to argue that the case is perhaps never moot. Beyond this argument being inconsistent with their prior arguments and raised for the first time on appeal, it's incorrect. Plaintiffs ignore that their own (dubious) evidence requires states to reach out to the U.S. Department of Labor by October 6, 2021—which has come and gone.

Second, Governor Ivey and Secretary Washington enjoy sovereign immunity. Plaintiffs argue that Defendants have a legal duty to reenter the already expired Programs, but the statutes that they cite create no such duty. Section 36-13-8 grants Governor Ivey purely discretionary authority to participate in federal programs while § 25-4-118 and other surrounding statutes make clear that Secretary Washington's duty to cooperate does not involve affirmatively rejoining already expired unemployment programs. Nor does § 25-4-118 involve contradicting Governor Ivey's sole authority to participate in government grants under § 36-13-8 and supreme executive authority under § 113 of the Alabama Constitution.

Third, laches bars Plaintiffs' complaint. Governor Ivey announced her intention to withdraw the State from the Programs in May 2021, yet Plaintiffs waited three months to challenge that decision. Plaintiffs offer no compelling reason as to why this delay was excusable. And this delay severely prejudices the State in that the Department of Labor will incur massive administrative costs in scrambling to reinstitute the Programs long after they expired (assuming it were even possible to rejoin at this late date).

And *fourth*, Plaintiffs have failed to state a claim. Their only claim is that the State violated § 25-4-118 by withdrawing from the Programs. Putting aside that Governor Ivey cannot violate a statute that does not apply to her, that statute does not impose the duty that Plaintiffs claim. Thus, ample reasons warrant that this Court affirm the trial court's dismissal of Plaintiffs' complaint.

The trial court also properly denied Plaintiffs' motion for preliminary injunction. The State maintains that this action should be dismissed in its entirety. But even if this Court reaches the substance of Plaintiffs' motion for preliminary injunction, it should reject such extraordinary relief.

Plaintiffs' requested relief does not advance the purpose of a preliminary injunction. The purpose of a preliminary injunction is "to maintain the status quo pending the resolution of the action on its merits." *Jacobs Broad. Group, Inc. v. Jeff Beck Broad. Group, LLC*, 160 So. 3d 345, 349 n.3 (Ala. 2014). But that's not what Plaintiffs ask for. Plaintiffs ask for extraordinary relief. They ask that the Alabama Department of Labor ("ADOL") suffer an incredible administrative burden to rejoin the Programs, which the State withdrew from four months ago. The status quo is not rebuilding administrative infrastructure so that the State can issue more long-terminated expanded unemployment benefits to the four named Plaintiffs. The status quo is a growing economy and a healthy job market. Further, Plaintiffs are not likely to prevail on the merits and they cannot establish that their alleged harm is irreparable or otherwise lacks an adequate remedy at law.

For all these reasons, this Court should either dismiss this appeal or affirm the circuit court's judgment.

ARGUMENT

I. This Court lacks subject-matter jurisdiction over Plaintiffs' claims.

"A court without subject-matter jurisdiction 'may take no action other than to exercise its power to dismiss the action.'" *Chapman v. Gooden*, 974 So. 2d 972, 984 (Ala. 2007) (quoting *State v. Prop. at 2018 Rainbow Drive*, 740 So. 2d 1025, 1029 (Ala. 1999)). "Any other action" would be "null and void." *Id.* A suit that "fails to trigger the subject-matter jurisdiction of the circuit court" is "a nullity" that may not be cured even by amendment. *Ala. Dep't of Corrs. v. Montgomery Cnty. Comm'n*, 11 So. 3d 189, 193 (Ala. 2008) ("The purported amendment of a nullity is also a nullity.").

Mootness and sovereign immunity deprive courts of subject-matter jurisdiction. "A moot case lacks justiciability[,]" and thus, a court lacks subject-matter jurisdiction for want of a justiciable controversy. *Chapman*, 974 So. 2d at 983–84. And sovereign immunity under § 14 of the Alabama Constitution acts as a "jurisdictional bar" that requires dismissal for lack of subject-matter jurisdiction. *Ala. Dep't of Corrs.*, 11 So. 3d at 191. As explained further below, this Court lacks subject-matter

jurisdiction because Plaintiffs' claims are moot and sovereign immunity bars them.

A. Plaintiffs' claims are moot.

"Because mootness goes to justiciability, this Court will not consider the merits of a claim that is moot." *Town of Elmore v. Town of Coosada*, 957 So. 2d 1096, 1100 (Ala. 2006). Mootness derives from the jurisdictional requirement that "[a]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *S. Ala. Gas Dist. v. Knight*, 138 So. 3d 971, 976 (Ala. 2013) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974)). "The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties." *Chapman*, 974 So. 2d at 983 (quoting *Crawford v. State*, 153 S.W.3d 497, 501 (Tex. App. 2004)). 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' claims became moot when the State did not rejoin the Programs before the last payable week of benefits began on August 29, 2021. Putting another nail in the coffin, the Programs expired by their

own terms on September 6, 2021. And Plaintiffs cannot even receive benefits under the Programs for unemployment weeks that have already passed. For states that terminated the Agreement early—like Alabama—"no payments for the terminated programs may be made with respect to weeks of unemployment ending after the date the state terminates participation in the Agreement." C. 196.[3] In other words, the Programs cannot retroactively provide funds for the unemployment weeks between their initial termination on June 19, 2021 and the date a new agreement would go into effect.

Plaintiffs' ever-changing mootness arguments all fail. They first argued that an untimely email from the United States Department of Labor—produced after the trial court granted Defendants' motion to dismiss from the bench—shows that this case would not be moot until October 6. *See* C. 322. They argued such in their opening brief to this Court and in their emergency motion for expedited relief (which

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[3] The U.S. Department of Labor issued this administrative guidance—Unemployment Insurance Program Letter No. 14-21, Change 1—"[t]o advise states of the operational requirements" that apply "after the temporary programs expire on September 6, 2021, or earlier if a state chooses to end participation before September 6, 2021." C. 194 § 1.

requested a ruling by September 24). But October 6 also came and went—and so too that argument. In their response to this Court's order that they show cause why this appeal should not be dismissed as moot, Plaintiffs argued for the first time that the case is essentially never moot for those like the four Plaintiffs who had previously submitted a claim. *See* Appellants' Resp. to Order to Show Cause at 4–6 [hereinafter Show Cause Resp.].

Plaintiffs' latest mootness argument fares no better than their last. First, their new argument contradicts their previous arguments about mootness and their need for emergency relief. Plaintiffs now argue for the first time that "even after October 6, 2021, it will not be too late for the State to get . . . benefits for the claimants and for all other Alabamians who had applied for benefits before the State stopped taking applications." Show Cause Resp. at 5. Plaintiffs' Show Cause Response chalks up the idea that they believed the case would become moot after October 6 to misreading and logical error. Rather, Plaintiffs' Show Cause Response contends that October 6 was the date at which it would be too late for Plaintiffs to get relief for *other people*—people who are not parties

to this suit.[4] But when requesting expedited relief from this Court, Plaintiffs never mentioned that they personally had no need for such expedited relief.

Plaintiffs' previous filings undermine their Show Cause Response. For example, in their opening brief Plaintiffs argue that "[i]f the Defendants fail to reinstitute the program within a short time, however, this assistance will become permanently unavailable and Plaintiffs will suffer irreparable injury." Appellants' Br. at 23. But how could the four Plaintiffs suffer such irreparable injury if their case does not become moot on October 6? They couldn't. Nor would they have needed to move for emergency relief.

Plaintiffs' filings clearly contemplate that time was running out. *See id.* at 27–28 ("[I]f 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.); *see also id.* at 18–19; Mot. for

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[4] Plaintiffs have never sought class certification to represent these other people and would lack standing to seek expedited relief on their behalf, *see, e.g.*, *Butler v. Parks*, No. 1190043, 2021 WL 221859 (Ala. Jan. 22, 2021) (holding that the plaintiff-lawyers lacked third-party standing to assert claims of unidentified indigent defendants).

Expedited Relief at 2 ¶ 1. Plaintiffs should be held to their previous representations that this case would become moot on October 6. Because this date has long passed, this Court's decision "would accomplish nothing" and thus this case is moot. *Rogers v. Burch Corp.*, 313 So. 3d 555, 560 (Ala. 2020).

Second, this Court should not consider Plaintiffs' new argument from their Show Cause Response anyway because it was not asserted in their opening brief. See *Ziade v. Koch*, 952 So. 2d 1072, 1081 n.2 (Ala. 2019) (quoting *Steele v. Rosenfeld, LLC*, 936 So. 2d 488, 493 (Ala. 2005)). A "more in-depth argument relying upon numerous additional authorities" made on reply "is essentially a new argument and, thus, will not be considered on appeal." *TitleMax of Ala., Inc. v. Falligant ex rel. McElroy*, No. 1190670, 2020 WL 7089719, at *4 n.1 (Ala. Dec. 4, 2020). Although Plaintiffs identified mootness as an issue in their opening brief, nowhere did they assert the argument that they raised in their Show Cause Response. In fact, they initially asserted quite the opposite. *See, e.g.*, Appellants' Br. at 3, 18–19, 23, 27–28. If Plaintiffs assert this new argument in their reply brief, Defendants could move to strike it or this Court could choose not to consider it *ex mero motu*. Whether in relation

to their Show Cause Response or primary briefing, this Court should not permit Plaintiffs to rely on this new argument.

Lastly, Plaintiffs' new argument does not hold water even if this Court considers it. The email from the United States Department of Labor makes clear that two events must occur for Plaintiffs to obtain relief. *See* C. 325. First, applicants must submit their claims and certify their weeks of unemployment; and second, the State must "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*." C. 325 (emphasis added). Plaintiffs ignore this second requisite event—likely because the State is far past responding "as soon as possible" to USDOL's September 3 email. And that event cannot occur before October 6 because that date has come and gone. No matter how you cut it, this case is moot.

Plaintiffs' attempts to resuscitate this case fail. As discussed above, their new mootness argument should not be considered and lacks merit regardless. And at this point—with the federal programs having expired well over a month ago without the State rejoining—any decision on the merits "would accomplish nothing." *Rogers*, 313 So. 3d at 560. Accordingly, this Court should dismiss Plaintiffs' appeal or affirm the

circuit court's judgment dismissing Plaintiffs' claims for lack of subject-matter jurisdiction.

B. Sovereign immunity bars Plaintiffs' claims.

Article I, Section 14 of the Alabama Constitution of 1901 states "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity." "The wall of immunity erected by § 14 is nearly impregnable." *Patterson v. Gladwin Corp.*, 835 So. 2d 891, 895 (Ala. 2008). Sovereign immunity is not merely an affirmative defense; rather, it is a "jurisdictional bar" that requires dismissal for lack of subject-matter jurisdiction. See *Ala. Dep't of Corrs.*, 11 So. 3d at 191. And sovereign immunity bars suits not just against the State and State agencies but also those against State agents in their official capacities. *Burgoon v. Ala. State Dep't of Human Res.*, 835 So. 2d 131, 133 (Ala. 2002). When sovereign immunity applies, a court must dismiss such suits "at the earliest opportunity." *Id.*

As an initial matter, sovereign immunity bars the relief Plaintiffs seek—even if framed as equitable relief—because it "would directly affect a contract or property right of the State, or would result in the plaintiff's recovery of money from the [S]tate." *Ala. A&M Univ. v. Jones*, 895 So. 2d

867, 873 (Ala. 2004) (applying that principle to hold sovereign immunity barred claims for backpay); *Ex parte Wilcox Cnty. Bd. of Educ.*, 285 So. 3d 765, 777 (Ala. 2019). The only exception to this bar is for some statutorily or contractually required sums-certain—i.e., where it is undisputed both that an amount is owed and how much that amount is. *See Woodfin v. Bender*, 238 So. 3d 24, 31–32 (Ala. 2017); *Williams v. Hank's Ambulance Serv., Inc.*, 699 So. 2d 1230, 1237–38 (Ala. 1997).

Plaintiffs conceded at argument below that sovereign immunity would bar retroactive benefit payments if federal funding were not available. R. 25. But even if federal funding were still available, Plaintiffs' attempt to force the State to contract with the federal government "affect[s] a contract or property right of the State," *Jones*, 895 So. 2d at 873, and seeks uncertain sums of payment. Thus, sovereign immunity bars Plaintiffs' requested relief regardless of their framing.

Independently, sovereign immunity bars Plaintiffs' claims because no duty exists to participate in the Programs. Plaintiffs here sue Governor Ivey and Secretary Washington in their respective official capacities as Governor of Alabama and Secretary of the Alabama Department of Labor—State agents. C. 6. Accordingly, Governor Ivey

and Secretary Washington are entitled to sovereign immunity. Admittedly, there are some "limited circumstances" where sovereign immunity does not apply. See *Ex parte Moulton*, 116 So. 3d 1119, 1131 (Ala. 2013) (listing the six so-called "exceptions" to sovereign immunity). One such exception is: "actions brought to compel State officials to perform their legal duties." *Id.* (quoting *Aland v. Graham*, 287 Ala. 226, 250 (1971)). Plaintiffs rely only on this exception to escape sovereign immunity. See C. 9; Appellants' Br. at 10. But when an official has discretion to take a certain action, he or she does not have a legal duty. *See Ex parte Ala. State Bd. of Educ.*, 810 So. 2d 773, 776 (Ala. 2001). Sovereign immunity bars Plaintiffs' claims because no such legal duty to participate in the Programs exists.

1. <u>Governor Ivey has no duty to participate in the Programs.</u>

As an initial matter, Governor Ivey has the sole authority to choose whether to participate in the Programs. She is the "chief magistrate" who possesses the "supreme executive power" of the State. ALA. CONST. § 113. Plaintiffs acknowledge that Alabama Code § 36-13-8 grants Governor Ivey the authority to participate in "grants and advances" from the federal government. *See* C. 6. This authorization further confirms that

her authority exceeds Secretary Washington's. See *Tyson v. Jones*, 60 So. 3d 831, 849 (Ala. 2010) ("[W]here the governor is authorized to act he or she is not subject to any other executive officer.").

Irrespective of her authority, Governor Ivey does not have a legal duty to participate in the Programs. Though arguing below that Alabama Code § 36-13-8 imposed a legal duty, Plaintiffs have abandoned that argument by making only passing mentions unsupported by argument in their opening brief before this Court, *see* Appellants' Br. at 10–11, because "[a]n argument not made on appeal is abandoned or waived," *see Muhammad v. Ford*, 986 So. 2d 1158, 1165 (Ala. 2007) (quoting *Avis Rent A Car Sys., Inc. v. Heilman*, 876 So. 2d 1111, 1124 n.8 (Ala. 2003)); *see also State Dep't of Transp. v. Reid*, 74 So. 3d 465, 469 (Ala. 2011) (finding that the petitioner abandoned any argument challenging a basis of the trial court's judgment because it "ha[d] not provided any argument").

Even assuming *arguendo* that Plaintiffs did not abandon their argument, they must point to a statute that imposes a legal duty on Governor Ivey to overcome sovereign immunity. They cannot. They state in the complaint that Alabama Code § 36-13-8 requires Governor Ivey to

"participate fully in grants and advances made available to it by the federal government." C. 6. It doesn't. The statute in full reads:

> The Governor is hereby *authorized and empowered* to accept from the federal government or any agency or instrumentality thereof, in the name of and for the State of Alabama, grants and advances of funds and real or other personal property for any purpose of the state government not contrary to the Constitution of Alabama.
>
> The Governor is further authorized and empowered, insofar as is not specifically prohibited by the constitution and the then existing statutes, to meet and to require, by his executive order, any other agency or instrumentality of the state government to meet the terms and conditions imposed on such grants and advances in acts of the Congress of the United States, executive orders of the President of the United States or any rule, regulation or order of any other agency or instrumentality of the federal government, it being the intent of this section to permit the State of Alabama to participate fully in grants and advances made available to it by the federal government.
>
> The Governor may delegate such of his powers and authorities herein provided for, as he deems necessary, to any other agency or instrumentality of the state government.

ALA. CODE § 36-13-8 (emphasis added). A cursory glance shows that this statute contains no legal duty. Plaintiffs fail to include in their quoted language that the section "*permit[s]* the State of Alabama to participate

fully," and they ignore broader language that the Governor is "authorized" and "empowered" to do so. *Compare id.* (emphasis added), *with* C. 6. Being permitted, empowered, or authorized to participate is a far cry from being required to do so. The discretion that § 36-13-8 affords Governor Ivey defeats any argument that she had a duty to participate in the Programs. Thus, sovereign immunity bars Plaintiffs' claim against her.

2. <u>Secretary Washington has no duty to participate in the Programs.</u>

Plaintiffs similarly fail to cite a statute that imposes a legal duty as to the Programs on Secretary Washington. Plaintiffs, again misinterpreting the statute, state that Alabama Code § 25-4-118 requires Secretary Washington to "cooperate to the fullest extent possible." *Id.* ¶ 2. It doesn't. The relevant subsection reads:

> *In the administration of this chapter*, the secretary shall cooperate to the fullest extent consistent with the provisions of this chapter with the U.S. Secretary of Labor and his successors, and the Federal Internal Revenue Service, and, notwithstanding any other provisions of this chapter, *shall make such reports* in such form and containing such information as either may from time to time require, and *shall comply with such provisions* as the U.S. Secretary of Labor, or his successors, or the Federal Internal Revenue

> Service may from time to time find necessary to insure the correctness and verification of such reports, and *shall comply with the regulations* prescribed by the U.S. Secretary of Labor, and his successors, governing the expenditures of such sums as may be allotted and paid to this state *under Title III of the Social Security Act* for the purpose of assisting in the administration of this chapter. Upon request therefor the secretary shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits and such recipient's rights to further benefits under this chapter.

ALA. CODE § 25-4-118(a) (emphasis added). The clause that Plaintiffs cite actually reads: "the secretary shall cooperate to the fullest extent *consistent with the provisions of this chapter*." *Id.* (emphasis added). Because Plaintiffs selectively quote only a portion of one clause, it is important to provide the missing context. *See Ex parte USC Corp.*, 881 So. 2d 437, 442 (Ala. 2003) ("When interpreting a statute, a court must read the statute as a whole because statutory language depends on context") (alterations adopted and citation omitted); *Siegelman v. Ala. Ass'n of School Bds.*, 819 So. 2d 568, 582 (Ala. 2001) (holding that courts do not "interpret provisions in isolation, but *consider them in the context* of the entire statutory scheme.").

When considering the language that Plaintiffs quote in the proper context, it is clear that § 25-4-118 does not impose a duty to participate in the Programs. Starting with the most specific, subsection (a) concerns Secretary Washington's cooperation with the U.S. Secretary of Labor regarding filing reports and otherwise complying with provisions and regulations of already existing unemployment programs under Title III of the Social Security Act.[5] These specific provisions inform what the Legislature meant by "cooperate to the fullest extent consistent with this chapter." *See Ex parte Jackson*, 614 So. 3d 405, 406 (Ala. 1993) ("Because the meaning of statutory language depends on context, a statute is to be read as a whole . . . [and s]ubsections of a statute are *in pari materia*."). Secretary Washington is already complying with his legal duty to cooperate with the U.S. Secretary of Labor as required by this subsection.

The statute as a whole also makes clear that subsection (a) imparts no legal duty as to the Programs. If any subsection in § 25-4-118 could be

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[5] Section 25-4-118(a) only applies to "such sums as may be allotted and paid to this state under Title III of the Social Security Act." (emphasis added). Congress created the Programs as part of the CARES Act and subsequent amending legislation, not as part of the Social Security Act.

construed to relate to the Programs, it would be subsection (c). That subsection reads: "The secretary *may* afford *reasonable* cooperation with any agency of the United States charged with the administration of *any* unemployment insurance law." *Id.* (c) (emphasis added). Neither "may" nor "reasonable" create a legal duty. Rather, subsection (c) makes clear that participation in unemployment programs is purely discretionary—fatally undermining Plaintiffs' overarching point that some State policy exists that imposes a duty to always participate in unemployment programs.

Even if the general cooperation language in subsection (a) applied to the Programs, subsection (c) provides a more specific command that controls. *See Baldwin County v. James*, 494 So. 2d 584, 588 (Ala. 1986) ("Specific statutory provisions on specific subjects control general provisions") (citation omitted). However, Plaintiffs argue that subsection (c) "appears to address the possibility" that another agency could administer an unemployment insurance program. Appellants' Br. at 17. By arguing such, they effectively concede that there is not a state policy of mandatory participation in unemployment programs. For if there were, why would it only apply to the U.S. Department of Labor?

Plaintiffs' grasping at straws further confirms that subsection (c) undermines their overarching argument.

Nonetheless, their argument is incorrect. The Legislature could have used the language "any agency of the United States other than the U.S. Department of Labor." But it didn't, and this Court shouldn't construe the statute in such a way. Subsection (c)'s use of the phrase "any agency" confirms its applicability here. To conclude otherwise would render subsection (c) superfluous. *See Surtees v. VFJ Ventures, Inc.*, 8 So. 3d 950, 970 (Ala. 2008) ("There is a presumption that every . . . provision was intended for some useful purpose . . . and also that no superfluous words or provisions were used.").

The statutory scheme also demonstrates that Secretary Washington has no legal duty to participate in the Programs. Section 25-4-115, which Plaintiffs ignore, defines Secretary Washington's legal duties as to the administration of unemployment programs. As relevant here, the Secretary "shall take all appropriate steps within his means to reduce and prevent unemployment." ALA. CODE § 25-4-115. By stating that Secretary Washington shall take "appropriate" steps, the Legislature has granted him the discretion to decide whether continued

participation in the Programs would "reduce and prevent unemployment."

Secretary Washington must also "make every proper effort within his means to oppose and prevent . . . substantial federalization of state unemployment compensation funds or the state employment security program." ALA. CODE § 25-4-110. This duty also supports Secretary Washington's right to not further entrench the State in federal unemployment programs by reentering into the Programs. Nowhere in § 25-4-115 is there an affirmative duty to participate in the Programs. When considering the context of the entirety of the statutory scheme, the entirety of § 25-4-118, and the entirety of subsection (a), it becomes clear that Secretary Washington has no legal duty to participate in the Programs.[6]

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[6] For reasons similar to why Secretary Washington enjoys sovereign immunity, Plaintiffs lack standing to sue him. To establish the redressability element of standing, Plaintiffs must prove that it is "likely, as opposed to merely speculative" that their injuries would "be redressed by a favorable decision" against Secretary Washington. *Ex parte Ala. Educ. Television Comm'n*, 151 So. 3d 283, 287 (Ala. 2013) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)) (internal quotations omitted). As described *supra* Part I.A.1, Governor Ivey is the only official authorized to exercise discretion about whether to participate in the

None of the decisions reached by other state courts affect these arguments. Plaintiffs extensively rely on nonbinding decisions from other state courts that have granted preliminary injunctions enjoining the states' early termination.[7] *See* Doc. 4. These cases are not "almost identical" to the facts here despite Plaintiffs' assertions. Most importantly, none of these cases analyze sovereign immunity, which is dispositive in this case. Next, these cases fail to consider Secretary Washington's lack of authority to reenter the Programs. And lastly, most of these statutes are materially different from § 25-4-118. They impose an affirmative duty to take action to secure all unemployment

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Programs. And 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. Thus, Plaintiffs lack standing to sue Secretary Washington.

[7] *See S.B. v. McMaster*, No. 2021-CP-40-03774, at 5 (S.C. Ct. C.P., Richland Cnty. Aug. 13, 2021); *State ex rel. Bowling v. DeWine*, No. 21 CVH07-4469 (Ohio Ct. C.P., Franklin Cnty. July 29, 2021), *rev'd*, No. 21AP-380 (Ohio Ct. App. Aug. 24, 2021); *Owens v. Zumwalt*, No. CV-21-1703 (Okla. Dist. Ct., Oklahoma Cnty. Aug. 9, 2021); *Armstrong v. Hutchinson*, No. CV 2021-4507 (Ark. Cir. Ct., Pulaski Cnty. July 28, 2021); *D.A. v. Hogan*, No. 24-C-21-002988 and *Harp v. Hogan*, No. 24-C-21-002999 (combined) (Md. Cir. Ct., Baltimore City July 13, 2021); *T.L. v. Holcomb*, No. 49D11-2106-PL-020140 (Ind. Sup. Ct., Marion Cnty. June 25, 2021), *rev'd*, No. 21A-PL-1268 (Ind. Ct. App. Aug. 17, 2021).

advantages. *See, e.g.*, ARK. CODE § 11-10-312 (". . . shall cooperate . . . to the fullest extent . . . to secure to this state and its citizens *all advantages* available") (emphasis added). No such duty exists in § 25-4-118. These nonbinding, unpersuasive cases have no bearing on the jurisdictional bars to Plaintiffs' complaint.

Plaintiffs misinterpret and take § 25-4-118 out of context to manufacture a legal duty that does not exist. Plaintiffs can point to no statute that imposes a legal duty on Secretary Washington to participate in the Programs. Thus, sovereign immunity bars Plaintiffs' claim against him.

* * *

Plaintiffs fail to show that they can overcome sovereign immunity's bar. The relief they request is improper, and neither Governor Ivey nor Secretary Washington have a statutory duty requiring participation in the Programs. Accordingly, this Court should affirm the circuit court's judgment dismissing Plaintiffs' claims for lack of subject-matter jurisdiction.

II. Plaintiffs fail to state a claim because Alabama Code § 25-4-118 does not require participation in the programs.

In the alternative, and for similar reasons as those stated above in Part I.B, Plaintiffs fail to state a claim upon which this Court can grant relief. Plaintiffs' single claim in their complaint states: "Defendants' early termination of all forms of pandemic unemployment compensation benefits violates Alabama Code §25-4-118." C. 14. But a statute that does not apply to the Governor cannot impose an affirmative duty upon her. Also, Plaintiffs presume, without citing any binding authority, that "cooperation" means an affirmative duty to participate in an unemployment program. It doesn't. As described above, the language that Plaintiffs rely on relates to an administrative duty to file reports and comply with federal provisions and regulations.

Section 25-4-118 does not impose any duty to participate in the Programs; it does not even reference Governor Ivey. Only Governor Ivey has the discretion to make this policy determination, and she has. This Court should not grant injunctive relief merely because the Plaintiffs dislike how Governor Ivey has exercised her discretion. Thus, this Court should dismiss Plaintiffs' complaint for failure to state a claim.

III. Laches warrants dismissal of Plaintiffs' claims.

Laches also bars Plaintiffs' claims because they delayed bringing these claims in a manner prejudicial to the State. Laches is an equitable doctrine that "prevent[s] a party that has delayed asserting a claim to assert that claim after 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) (quoting *Elliott v. Navistar, Inc.*, 65 So. 3d 379, 386 (Ala. 2010)).

"A party asserting laches as a defense is generally required to show that the plaintiff has delayed in asserting a claim, that that delay is inexcusable, and that the delay has caused the party asserting the defense undue prejudice." *Id.* Application of these factors is not a rigid inquiry, but rather depends "'upon the particular facts and circumstances' of each case" as determined by the "sound discretion of the trial court." *Horton v. Kimbrell*, 819 So. 2d 601, 606 (Ala. 2001) (first quoting *Dear v. Peek*, 73 So. 2d 358, 361 (Ala. 1954), and then quoting *Wallace v. Hardee's of Oxford, Inc.*, 874 F. Supp. 374, 377 (M.D. Ala. 1995)).

Laches bars Plaintiffs' claims here. First, Plaintiffs delayed in asserting their claims. Although the State announced its intent to terminate its agreement to participate in the Programs on May 10, 2021, Plaintiffs waited three months to bring this suit. Second, Plaintiffs' delay was inexcusable, and they have not seriously argued otherwise. *See* Appellants' Br. at 20–21. Their only argument to that effect is that they needed to investigate their claims, but they offer no explanation as to *what* they spent three months investigating.

Further, the plaintiffs in the six other states with similar suits—upon which Plaintiffs so heavily rely—did not struggle to timely file their suits. So why did Plaintiffs? Over a month passed between the announcement that the State intended to terminate the Programs and the termination itself on June 19, 2021. While Plaintiffs claim that this termination causes them "irreparable" harm, they slept on their rights by waiting three months to seek relief just weeks before the Programs expired by their own terms.

Lastly, Plaintiffs' delay prejudices the State. They do not ask for an injunction to maintain the status quo pending this suit, Plaintiffs ask for the extraordinary remedy of mandatory injunctive relief. That relief

would require the State to reinstitute the already expired Programs for only a brief time. This about-face will cause confusion that is likely to increase the risk of mistaken payments and fraudulent claims that the State will have to recover after the fact, in addition to the expensive logistical nightmare of rebuilding now-deconstructed infrastructure for the Programs (hiring new employees again, reinstalling software, etc.) and notifying all eligible recipients. Plaintiffs minimize these concerns, instead arguing that facing these logistical challenges all at once—as opposed to over a months-long period—would impose less of a burden. That argument defies reason. Plaintiffs' inexcusable delay in bringing this suit would prejudice the State; laches thus bars this suit.

IV. Plaintiffs are not entitled to a preliminary injunction.

A plaintiff seeking a preliminary injunction has the burden of demonstrating four elements. First, "that without the injunction the plaintiff will suffer immediate and irreparable injury." *White v. John*, 164 So. 3d 1106, 1116–17 (Ala. 2014) (quoting *Barber v. Cornerstone Cmty. Outreach, Inc.*, 42 So. 3d 65, 78 (Ala. 2009)). Second, "that the plaintiff has no adequate remedy at law." *Id.* Third, "that the plaintiff is likely to succeed on the merits of the case." *Id.* And lastly, "that the hardship

imposed upon the defendant by the injunction would not unreasonably outweigh the benefit to the plaintiff." *Id.*

To justify granting a preliminary mandatory injunction "the right of complainant must be clear and unmistakable on the law and the facts; and there must exist an urgent and paramount necessity for the [injunction] to prevent extreme or other serious damage which would ensue from withholding it." *Bd. of Water & Sewer Comm'rs of Mobile v. Merriwether Constr. Co.*, 165 So. 2d 739, 741 (Ala. 1964). A preliminary mandatory injunction "should be refused except in very rare cases." *Id.*

Plaintiffs fail to show any of the elements required for a preliminary injunction, let alone show that they meet the higher bar required for a mandatory injunction. As explained *supra* Parts I–III, Plaintiffs are not likely to succeed on the merits because they have brought this suit too late and cannot override the Governor's discretionary policy decision to opt-out of the Programs. Their months-long delay and allegations of a mere risk of harm contradict any assertion that "an urgent and paramount necessity" exists to remedy an imminent and irreparable injury. *See Bd. of Water & Sewer Comm'rs of Mobile*, 165 So. 2d at 741. Additionally, the monetary nature of Plaintiffs' injuries proves that a

remedy at law would provide relief. Lastly, the potential vast administrative costs and disruption associated with requiring the State to reenter the Programs clearly outweighs the meager few weeks of additional federal unemployment compensation that the four Plaintiffs would receive.

A. Plaintiffs have not shown that they are likely to prevail on the merits.

For the reasons stated above, Plaintiffs cannot show that they are likely to prevail on the merits. *See supra* Parts I–III. Plaintiffs' suit is moot, sovereign immunity protects Governor Ivey and Secretary Washington because Plaintiffs fail to cite a legal duty that requires them to rejoin the already expired Programs, and laches bars this suit given Plaintiffs' inexcusable delay. Substantively, Plaintiffs misinterpret Alabama Code §§ 25-4-118 and 36-13-8 to manufacture a duty, which does not exist, to rejoin the Programs. But the State cannot violate § 25-4-118—as Plaintiffs claim, *see* C. 14 ¶ 25—by terminating its participation in the Programs early. Governor Ivey (who § 25-4-118 does not even address) had discretionary authority to withdraw from the Programs. Plaintiffs' so-called rights are far from "clear and unmistakable." *See Bd. of Water & Sewer Comm'rs of Mobile*, 165 So. 2d

at 741. Plaintiffs fail to show that they can prevail on the merits of their claims at all, let alone that they are *likely* to do so.

B. Plaintiffs have not shown irreparable harm or that they have no adequate remedy at law.

"[C]ourts will 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 of law." *Martin v. City of Linden*, 667 So. 2d 732, 736 (Ala. 1995). "Irreparable harm" is "an injury that is not redressable in a court of law through an award of money damages." *Perly v. Tapscan, Inc.*, 646 So. 2d 585, 587 (Ala. 1994). The "mere possibility of irreparable harm is insufficient to justify the drastic remedy of a preliminary injunction." *Monte Sano Research Corp. v. Kratos Def. & Sec. Solutions, Inc.*, 99 So. 3d 855, 862 (Ala. 2012) (quoting *Borey v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 932 F.2d 30, 34 (2d Cir. 1991)). And "[t]he party seeking the injunction has the burden of demonstrating that it lacks an adequate remedy." *Monte Sano Research Corp.*, 99 So. 3d at 862 (citation omitted).

Plaintiffs fail to meet their burden. They have not pleaded an irreparable injury. And even if they had, money damages would redress

that injury.[8] As an initial matter, it has been months since Governor Ivey withdrew from the Programs. Plaintiffs' "failure to act with speed or urgency in moving for a preliminary injunction necessarily undermines a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (citations omitted) ("A delay in seeking a preliminary injunction of even only a few months—though not necessarily fatal—militates against a finding of irreparable harm.").

Even after several months without receiving benefits from the Programs, Plaintiffs have alleged nothing more than a risk of irreparable harm. But mere risk does not carry their burden. *See, e.g.*, *Monte Sano Research Corp.*, 99 So. 3d at 862. Plaintiffs cite no binding authority that proves that they have suffered irreparable harm or that they lack an

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[8] In fact, Plaintiffs' passing mention of whether they have an adequate remedy at law in their briefing before the circuit court arguably waived the issue. *See Andrews v. Merritt Oil Co., Inc.*, 612 So. 2d 409 (Ala. 1992) ("This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by the trial court."). Below, Plaintiffs merely stated in a heading of their motion for preliminary injunction that they had no adequate remedy at law. *See* C. 29. At any rate, such cursory treatment below could not have carried their burden—an award of money damages would redress their purely economic injuries.

adequate remedy at law. Thus, Plaintiffs have not met their burden to show irreparable harm or that they have no adequate remedy at law.

C. Plaintiffs cannot show that a preliminary injunction would benefit them more than it would burden the State.

If all other elements of a preliminary injunction are met, the plaintiff still must show that the "hardship imposed upon the defendant by the injunction would not unreasonably outweigh the benefit to the plaintiff." *White*, 164 So. 3d at 1116–17. As an initial matter, although Plaintiffs contemplate "other unemployment claimants" in addition to themselves, *see* Appellants' Br. at 29, the standard considers only "the benefit to the *plaintiff[s]*," *White*, 164 So. 3d at 1116–17. Plaintiffs have not certified a class—or even purported to bring a class action—and lack standing to assert the claims of third parties not before the Court,[9] so this Court must consider only the benefits to the four named Plaintiffs. Substantively, Plaintiffs concede that the State will face administrative hurdles but cursorily state that "the burden is outweighed by the harm to Plaintiffs." Appellants' Br. at 29.

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[9] *See Butler v. Parks*, No. 1190043, 2021 WL 221859 (Ala. Jan. 22, 2021) (holding that plaintiff-lawyers lacked third-party standing to assert claims of unidentified indigent defendants).

Assuming that Plaintiffs clear every other hurdle, the Court is faced with the following balancing act. On the one hand, without a preliminary injunction the four Plaintiffs will not receive—at most—a few thousand dollars each. On the other hand, with a preliminary injunction the State will face millions of dollars in costs and countless man-hours to process a flood of new documents while simultaneously rebuilding its since-deconstructed internal infrastructure used to process those documents. Specifically, ADOL would have to work with its software vendor to reinstall the federal programs system, mail notification letters to the over 500,000 claimants that filed a pandemic-related claim, notify the media, provide an opportunity for claimants to certify their continuing eligibility for each week after June 19th, and likely mail additional letters to inform all previous claimants of the new maximum and potential weekly benefit amounts. *See* C. 215–16 ¶ 11.

In total, these efforts would likely cost ADOL millions of dollars that could have been diverted to other causes. *See* C. 216 ¶¶ 12–13 (affidavit of ADOL Unemployment Insurance Division Director estimating administrative costs ranging from approximately $3,590,000 to $15,590,000); C. 264 ¶ 6 (affidavit of ADOL Information Systems

Division Director estimating software costs of approximately $50,000). Many of these burdens would not have existed had Plaintiffs not delayed in bringing this suit.

A preliminary injunction would also harm the State in several other ways. First, it would threaten the State's economic recovery in the wake of the pandemic. The evidence submitted below showed that the State's unemployment rate decreased each month since Governor Ivey terminated the State's participation in the Programs, *see* C. 213 ¶ 7, and the increased numbers of job postings and referrals in May through June 2021 confirm that the economy is expanding, *see* C. 270 ¶¶ 6–7 (Affidavit of ADOL Employment Services Division Director). Disruptions to the labor market—like prolonged unemployment benefits—threaten this economic recovery.

History shows that claimants lose interest in job availability when unemployment benefits are extended and, inversely, that more individuals search for work once those benefits come to an end. C. 269–70 ¶ 5. This same pattern appears to be playing out following the June termination of the Programs. C. 269–70 ¶ 5. ADOL's historical experience combined with the rapid increase in unemployment

applications following the initial implementation of the Programs make it likely that unemployment will increase if the State reimplements the Programs.

Reimplementing the Programs well after their expiration is also likely to cause confusion in a way that harms the State. Potential claimants—who may or may not even be eligible—are likely to be confused by the State getting into the Programs and then getting right back out again. The State will have to spend considerable time and resources to help the public understand the details and hopefully to prevent any members of the public from detrimentally relying on the prospect of benefits that may not actually be available to them. Further, fraudulent claims increased over twentyfold when the State first implemented the Programs and similar increases (which would require ADOL to investigate and expend additional resources) can be expected again. *See* C. 213 ¶ 8.

Lastly, should the preliminary injunction be later dissolved (for example, after a full hearing on the merits), ADOL must then classify the amounts already paid to claimants in the interim as overpayments. *See* C. 216–17 ¶ 14. Not only could these abrupt shifts impose hardship on

ADOL in seeking to recover these amounts but also on the claimants who would be forced to repay them as a matter of both State and federal law. *See* C. 216–17 ¶ 14; *see also* ALA. CODE § 25-4-145(c)(1); 20 C.F.R. § 625.14. As explained above, Plaintiffs fail to show that their harms outweigh those the State would face if this Court were to grant a preliminary injunction.

*   *   *

In sum, Plaintiffs cannot demonstrate that the circuit court erred in denying their motion for preliminary injunction. They cannot show a likelihood of success on the merits, they cannot show that they suffer an irreparable injury or lack an adequate remedy at law, and they cannot show that the relief they request would be anything other than an immense administrative and financial burden on the State. Plaintiffs are not entitled to a preliminary injunction.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court either dismiss this appeal or affirm the circuit court's judgment.

Dated: OCTOBER 26, 2021

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limitation set forth in Alabama Rule of Appellate Procedure 28(j)(1). According to the word-count function of Microsoft Word, the brief contains 8,971 words from the Statement of the Case through the Conclusion. I further certify that this brief complies with the font requirements set forth in Alabama Rule of Appellate Procedure 32(a)(7). The brief was prepared in the Century Schoolbook font using 14-point type. *See* Ala. R. App. P. 32(d).

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2021, the foregoing document was filed with the Clerk of this Court using the electronic filing system, and a copy of such filing was served via electronic mail to the following:

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