No. CL-2024-0710

IN THE COURT OF CIVIL APPEALS OF ALABAMA

Traveka Stanley, *et al.*,

Plaintiffs-Appellants,

v.

Kay Ivey, *et al.*,

Defendants-Appellees.

On appeal from the Circuit Court of Montgomery County, Circuit Judge James H. Anderson (CV-2024-900649)

REPLY BRIEF OF THE APPELLANTS

ORAL ARGUMENT REQUESTED

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiffs have met their burden to show that the Circuit Court of Montgomery County possessed subject matter jurisdiction over their three claims that portions of Executive Order ("EO") 725, Alabama Department of Corrections ("ADOC") Administrative Regulation ("AR") 403, and Section 14-9-41 of the Alabama Code violate Article I, Section 32 of the Alabama Constitution of 2022 ("Section 32"), and that the lower court's dismissal for lack of subject matter jurisdiction was therefore erroneous. As explained below and in their Opening Brief, (1) Plaintiffs' claims for injunctive and declaratory relief are not barred by sovereign immunity because they do not directly affect the State's contract or property rights and they fall into three well-settled circumstances in which sovereign immunity does not apply; and (2) Plaintiffs suffer specific ongoing injury due to Defendants Alabama Governor Kay Ivey and ADOC Commissioner John Hamm's (collectively, "Defendants") enforcement of the challenged laws, which Plaintiffs' requested relief can remedy.

In response, once again forgetting the generous pleading standard, Defendants parrot the same misplaced arguments that they previously

offered: the lower court lacks subject matter jurisdiction because Defendants are entitled to sovereign immunity because, among other reasons, Plaintiffs' relief will affect Alabama's work release contracts, and Plaintiffs lack standing to challenge EO 725 and Section 14-9-41 as to both Defendants and AR 403 as to Defendant Ivey. And while not properly raised in this appeal, Defendants argue that Plaintiffs fail to state a claim for relief under Alabama Rules of Civil Procedure 12(b)(6) because there is no slavery or involuntary servitude in ADOC.

As detailed below, each of Defendants' arguments either is informed by misunderstandings of well-established legal precedent on sovereign immunity and standing; is based on Defendants' impermissible introduction of new factual allegations and mischaracterization of Plaintiffs' allegations about their experiences of involuntary servitude and slavery in Alabama prisons and the relief they seek, i.e., Plaintiffs "challenge the entire incentive structure of Alabama's prison system"; or argues an issue not properly before this Court. But in keeping with the applicable standard of review for Rule 12 motions, which requires this Court to accept as true the allegations in the Complaint and consider the

factual allegations of the Complaint in the light most favorable to the non-moving party, none of Defendants' points on appeal can prevail.

First, as to sovereign immunity, Defendants provide no explanation as to how Plaintiffs' claims, as pleaded within the four corners of the Complaint, will directly interfere with the State of Alabama's contract rights beyond mere conclusory assertions. And contrary to Defendants' arguments that the *Moulton* circumstances where sovereign immunity does not apply exclude the enforcement of administrative regulations, Alabama precedent clearly shows that ADOC administrative regulations can come within these circumstances.

Defendants also fail to show that Plaintiffs' other claims are barred by sovereign immunity. Indeed, Defendants never explicitly mention the *Moulton* circumstances in connection with EO 725 and Section 14-9-41, cabining their sovereign immunity argument to AR 403. *See* Defs.Br.26-35. Thus, for reasons set forth below and in Plaintiffs' Opening Brief, Defendants are not immune from Plaintiffs' Section 32 claims for declaratory and injunctive relief.

Second, all Plaintiffs have standing to challenge AR 403 as to Defendant Hamm—which Defendants expressly concede. Defs.Br.18 n3.

Therefore, the circuit court's dismissal of the claim against Defendant Hamm for enforcement of AR 403 was improper. And Defendants' claim that Plaintiffs' injury from the enforcement of AR 403 is not traceable to Defendant Ivey fails because Governor Ivey has ultimate statutory authority over ADOC and the enforcement of EO 725, which prescribes revisions to, and mandates enforcement of, AR 403 and its varied punishments.

Moreover, Defendants have offered no adequate authority for their assertion that Plaintiffs lack sufficient injury and thus, standing to challenge EO 725 and Section 14-9-41–the enforcement of which they assert can only lead to the loss of good-time credit ("GTC") or good-time earning status as a cognizable injury. As Plaintiffs show in their Complaint and Opening Brief, however, all Plaintiffs have standing to challenge EO 725 because they suffer injuries due to *both* Defendants' enforcement of these laws, which provide for punishments beyond loss of GTC.

Plaintiff Ranquel Smith also has standing to challenge Section 14-9-41 and EO 725. He is still subject to further injury of continued withholding of GTC under those laws, and Defendants point to no law to

the contrary. Plaintiffs therefore have standing with respect to each of their claims under Section 32.

Finally, Defendants' arguments that Plaintiffs fail to state a claim are likewise meritless. As a threshold matter, because the lower court rendered judgment only on subject matter jurisdiction based on sovereign immunity and standing, failure to state a claim is not on appeal for this Court's review.

But even if the Court considers Defendants' 12(b)(6) argument, Plaintiffs have stated legally cognizable claims for relief. Although Defendants agree with Plaintiffs that this Court must accept the facts alleged in the Complaint as true, they oddly spend nearly ten pages in their Brief recasting the allegations in the Complaint and alleging new facts outside of the pleadings to argue that Plaintiffs have failed to sufficiently plead involuntary servitude. *See* Defs.Br.38-42, 46-50. This re-characterization of Plaintiffs' facts is not permitted at the pleading stage–particularly in this matter of first impression on which no Alabama court has ruled. Bearing in mind this lenient standard of review, this Court should find that Plaintiffs have sufficiently pleaded equitable claims under Section 32 for slavery and involuntary servitude

based on Defendants' enforcement of EO 725, AR 403, and Section 14-9-41.

For these reasons and the reasons in Plaintiffs' Opening Brief, the dismissal of Plaintiffs' Complaint for lack of subject matter jurisdiction should be reversed.

ARGUMENT

I. Sovereign Immunity Does Not Apply to Plaintiffs' Claims.

In their response brief, Defendants fail to overcome Plaintiffs' showing that sovereign immunity does not apply here for three reasons. First, Defendants raise no sovereign immunity challenge to EO 725 or Section 14-9-41, only to AR 403.[1] Second, the relief Plaintiffs seek does not directly affect the State's contract or property rights. *Ex parte Cooper*, 390 So. 3d 1030, 1036 (Ala. 2023), *reh'g denied* (Sept. 22, 2023). Neither Plaintiffs nor their labor is the State's property, and the State has no

[1] Defendants put all of their EO 725 and Section 14-9-41 eggs in the standing basket and fail to make specific sovereign immunity arguments as to Plaintiffs' challenges to those laws. Plaintiffs maintain that the second, fourth, and sixth *Moulton* exceptions apply equally to all three of their claims that challenge these laws. *See* Op.Br. 29-37.

right to enter into contracts dependent on slavery and involuntary servitude. As such, sovereign immunity does not apply.

Third, this case falls within three of the widely recognized *Moulton* categories of claims to which sovereign immunity does not apply: the second category, actions brought to enjoin state officials from enforcing unconstitutional laws; the fourth category, declaratory-judgment actions against state officials "seeking construction of a statute and its application in a given situation"; and the sixth category, "actions for injunction brought against State officials in their representative capacity . . . where it is alleged that they had acted . . . beyond their authority, or in a mistaken interpretation of law." *Ex parte Moulton*, 116 So. 3d 1119, 1131-32 (Ala. 2013).

A. Defendants Have Not Shown that the Relief Plaintiffs Seek Will Affect the State's Property or Contract Interests.

The "touchstone" sovereign immunity inquiry is whether the relief sought would "directly affect a contract or property right of the State." *Ex parte Cooper*, 390 So. 3d at 1036. The injunctive and declaratory relief Plaintiffs seek would not affect the State's contract or property rights, and Defendants have not shown otherwise. Thus, sovereign immunity

does not apply, whether or not this case falls within one of the non-exhaustive *Moulton* circumstances. *Id.* (describing "[t]he categories enumerated in Moulton" as "simply illustrations"); *Ex parte Moulton*, 116 So. 3d at 1131-32 (listing "general categories" of circumstances when Section 14 immunity does not apply) (quotations and citations omitted).

On appeal, Defendants for the first time assert that prohibiting Defendants from punishing incarcerated people who do not work "directly affects the State's contract rights." Defs.Br.28. Notably, no such "contracts" between Defendants and Plaintiffs or Defendants and any of Plaintiffs' employers are in the record. *See generally* Record on Appeal. Thus, such an argument regarding the purported impact of Plaintiffs' requested relief on these contracts–which are entirely outside of the pleadings and not presently in the record–cannot be considered. *See* Op.Br. at 21 (quoting *Ex Parte Safeway Ins. Co. of Ala., Inc.*, 990 So.3d 344, 349 (Ala. 2008)). Nor do Defendants explain how exactly injunctive or declaratory relief from slavery and involuntary servitude would "cripple" these "contracts" even in an indirect way–or much less, "directly affect[]" them, as required by *Ex Parte Cooper*–thus making their argument purely speculative. *See* Defs.Br.28.

Even if such "contracts" actually exist and the Court could consider them at this pleading stage, the State does not have a right to enter into unconstitutional contracts–here, contracts that permit or depend on slavery and involuntary servitude. *Dream, Inc. v. Samuels*, 392 So. 3d 462, 465 (Ala. 2023) ("Alabama courts . . . will not enforce a void or illegal contract."), *reh'g denied* (Oct. 20, 2023). Nor can someone contract oneself into slavery or involuntary servitude. *Bailey v. State of Alabama*, 219 U.S. 219, 242 (1911) (finding that a debtor, who "contracted to perform the labor which is sought to be compelled" is in a "condition of servitude . . . which would be not less involuntary because of the original agreement to work out the indebtedness"); *cf.* Eleventh Cir. Pattern Crim. Jury Instr., 18 U.S.C. §§ 1581, 1584 (Apr. 15, 2024) at 43114 (stating that even if a "person begins work willingly and later wants to stop but is forced to continue" due to the use of, or the threat of the use of coercion or restraint or cause physical injury, "the service becomes involuntary").

Furthermore, a state official is not shielded by sovereign immunity when an unconstitutional contract is implicated. *See Ex parte Cooper*, 390 So. 3d at 1038 ("[Section] 14 does not operate to bar a properly brought action when it is shown that the State contract being challenged is illegal

or unconstitutional."); *Ingle v. Adkins*, 256 So. 3d 62, 68 (Ala. 2017) (holding that, under the sixth *Moulton* category, board of education members in their official capacities were not immune from a lawsuit challenging an unconstitutional employment contract). For these reasons, Defendants' argument that the State's property or contract rights will be infringed by Plaintiffs' relief lacks muster.

B. Plaintiffs' Claims Fall within the Second *Moulton* Circumstance.

Because Plaintiffs' claims in this case fall within the second *Moulton* category of sovereign immunity—"actions brought to enjoin State officials from enforcing an unconstitutional law"—sovereign immunity does not apply. 116 So. 3d at 1131 (quotations and citations omitted). Defendants argue that AR 403 is not a "law" for purposes of the second *Moulton* circumstance. *See generally* Defs.Br.29-32. This is incorrect.

The Alabama Supreme Court has held that internal agency rules can create legal duties for purposes of the first *Moulton* circumstance: actions to *compel* state officials to perform legal duties. *Rodgers v. Hopper*, 768 So. 2d 963, 968 (Ala. 2000). It cannot be that state officials like Defendants Ivey and Hamm are absolutely immune from the

inverse–actions to *enjoin* enforcement of internal agency rules that violate the Alabama Constitution. *See Ex parte Ret. Sys. of Ala.*, 182 So. 3d 527, 540–41 (Ala. 2015) (Parker, J., concurring) ("Given the ever growing power of government through regulations, the people of Alabama must not be barred from challenging State officials seeking to enforce unconstitutional regulations . . . . All the § 14 exceptions must be read to include 'a law, a regulation, or a validly enacted internal rule,' as applicable." (quoting *Rodgers v. Hopper*, 768 So. 2d 963, 968 (Ala. 2000)).[2]

Defendants' attempts to undermine the authority of this Court's opinions in *Thomas v. Merritt*, 167 So. 3d 283 (Ala. 2013), and *Evatt v. Thomas*, 99 So. 3d 886 (Ala. Civ. App. 2012), therefore fail. Defendants contend that in *Thomas*, the Alabama Supreme Court allowed unresolved

[2] The Parties agree that the Alabama Administrative Procedure Act (AAPA) does not apply here, but that is neither here nor there with regard to Section 14 immunity. *See* Defs.Br.29, 31. Defendants are correct that *Ex parte Alabama State Board of Chiropractic Examiners*, 11 So. 3d 221, 226 (Ala. Civ. App. 2007), involved a rule's enforcement under the AAPA. Defs.Br.31. But in holding that sovereign immunity did not apply, this Court still had to determine whether the case fit one or more of the *Moulton* circumstances. 11 So. 3d at 225-26. Nothing in the recent *Ex parte Alabama Medical Cannabis Commission* decision alters that analysis because, there, this Court simply held that the defendant state agency was absolutely immune and the plaintiffs had failed to name individual officers in their official capacities. *CL-2024-0073, 2024 WL 3077225, at *3-4 (Ala. Civ. App. June 21, 2024).*

questions of sovereign immunity to simply "lurk" in the background. *See* Defs.Br.30. But both this Court and the Alabama Supreme Court in that case considered sovereign immunity explicitly as to the damages claims in that case, and must also have concluded that immunity did not bar the plaintiffs' injunctive and declaratory relief claims given its obligation to ensure subject matter jurisdiction exists. *Merritt*, 167 So.3d at 287-88; *see also id.* at 289-90 (considering another subject matter jurisdiction question ex mero motu and concluding court did *not* have jurisdiction over one appeals); *see also Ex parte Siderius*, 144 So. 3d 319, 323 (Ala. 2013) ("Subject-matter jurisdiction cannot be waived, and the lack of subject-matter jurisdiction may be raised at any time by a party or by a court ex mero motu." (quoting *Ex parte Punturo*, 928 So. 2d 1030, 1033 (Ala. 2002))).

Defendants also find this Court's consideration of sovereign immunity in *Evatt* to be lacking. Defs.Br.30. But in *Evatt*, this Court explicitly concluded that sovereign immunity did not bar the prospective relief suit challenging an ADOC administrative regulation. 99 So.3d at 893. Regardless of Defendants' assessments, neither *Merritt* nor *Evatt* indicates that Alabama appellate courts shirked their duty to ensure

subject matter jurisdiction exists over an action, and both cases support the conclusion here that Defendants are not immune from Plaintiffs' challenge to AR 403.[3]

Defendants rely primarily on *Jenkins v. State*, an Alabama Court of Criminal Appeals case predating *Rodgers*, *Evatt*, *Merritt*, and *Wood* by more than a decade. Defs.Br.29 (quoting *Jenkins*, 516 So. 2d 944 (Ala. Crim. App. 1987)). In *Jenkins*, the habeas petitioner brought a due process claim against the reinitiation of disciplinary proceedings in a manner contrary to AR 403. *Jenkins*, 516 So. 2d at 945. However, a copy of AR 403 was not introduced in the record. Thus, the Court of Criminal Appeals considered whether ADOC AR 403 had "the force and effect of law" only for purposes of determining whether the court could take judicial notice of it. *Id.* Unlike *Evatt* and *Merritt*, the ADOC administrative regulation's import in *Jenkins* had nothing to do with

[3] Defendants also contend that *Wood v. State Personnel Board*, 705 So. 2d 413 (Ala. Civ. App. 1997), has no precedential import because this Court did not explicitly consider whether sovereign immunity barred the constitutional challenge to AR 227. Defs.Br.32. Such an argument, again, ignores the courts' ongoing duty to ensure subject matter jurisdiction and implies that this Court erred in exercising jurisdiction. *Wood* is just one example of what should be common sense: Alabama courts have jurisdiction over constitutional challenges to agency rules and regulations.

sovereign immunity. *Merritt*'s consistent and persuasive authority and *Evatt*'s on-point precedent, which was binding on the circuit court, should thus control.

To preserve the basic functioning of the rule of law, the second *Moulton* category of actions "to enjoin State officials from enforcing an unconstitutional law"—as well as the other categories of actions enumerated in *Ex parte Moulton*—must be read to include constitutional challenges to rules and regulations, as well as executive orders and state statutes.

C. Plaintiffs' Claims Fall within the Fourth *Moulton* Circumstance.

Defendants also argue that the fourth *Moulton* circumstance–declaratory-judgment actions "seeking construction of a statute and how it should be applied in a given situation"–does not apply because AR 403 is not a "statute" for purposes of the Declaratory Judgments Act.[4] But Plaintiffs do not seek construction of AR 403 (or EO 725, or Alabama Code Section 14-9-41); Plaintiffs seek construction–and enforcement of–

[4] Defendants do not contend that EO 725 and Section 14-9-41 are not "statutes" for purposes of the fourth exception or otherwise argue that Plaintiffs' challenges to them do not fall within that exception. *See generally* Defs.Br.

Section 32, C_55-58, which even Defendants seem to recognize, focusing their Rule 12(b)(6) argument on the construction of Section 32, not AR 403, EO 725, or Section 14-9-41. *See* Defs.Br.37-54. Consistently, Alabama courts recognize that it is the construction of the applicable statute that could limit or invalidate the challenged agency action that controls the sovereign immunity analysis. *See, e.g.*, *Ex parte Ala. Dep't of Youth Servs.*, No. SC-2023-0627, 2024 WL 1335931, at *5-6 (Ala. Mar. 29, 2024) (holding that lawsuit seeking construction of statute and application to an agency's adverse employment action was not barred by sovereign immunity); *Ex parte Wilcox Cnty. Bd. of Educ.*, 279 So. 3d 1135, 1144-45 (Ala. 2018) (same); *Curry v.* Woodstock *Slag Corp.*, 6 So. 2d 479, 480-81 (1942) (holding that suit seeking interpretation and application of Sales Tax Act in a given circumstance was not barred by sovereign immunity).

Critically, a constitutional provision is a "statute" for purposes of the Declaratory Judgment Act and therefore, also for the fourth *Moulton* exception. *Morgan v. Bd. of Sch. Comm'rs of Mobile Cnty.*, 26 So. 2d 108, 110 (1946); *see also* Ala. Code § 6-6-226. Thus, because Plaintiffs seek

declaratory relief in the form of construction and application of Section 32, their relief fits the fourth *Moulton* circumstance.

D. Plaintiffs' Claims Fall within the Sixth *Moulton* Circumstance.

The sixth *Moulton* circumstance includes "actions for injunction brought against State officials in their representative capacity . . . where it is alleged that they had acted . . . beyond their authority or in a mistaken interpretation of law." *Ex parte Moulton*, 116 So. 3d 1119, 1131-32 (Ala. 2013). Defendants contend that Commissioner Hamm did not act beyond his authority because he "directly follow[ed] what AR 403 permits." Defs.Br.34. Defendants have it backwards: this Court cannot prematurely rule against Plaintiffs on the merits of their constitutional claims to determine, at the pleading stage, that it lacks subject matter jurisdiction. Plaintiffs filed this lawsuit because the slavery and involuntary servitude that AR 403–and EO 725 and Section 14-9-41–permit are unconstitutional. C_55-58. A state official is *not* acting within her authority when her actions violate the Alabama Constitution. *See Ingle v. Adkin*s, 256 So. 3d 62, 68 (Ala. 2017) (holding that, under the sixth *Moulton* category, board of education members in their official capacities were not immune from suit challenging unconstitutional

employment contract); *cf. Ex parte Moulton*, 116 So. 3d at 1141-42 (holding that sixth exception would have applied to a lawsuit seeking injunctive relief from an adverse employment action had the plaintiff shown he was entitled to due process prior to the adverse action); *Wallace v. Bd. of Educ. of Montgomery Cnty.*, 197 So. 2d 428, 431, 434-36 (Ala. 1967) (holding that building commission members exceeded their statutory authority, and thus were not immune from suit, when they mandated minimum wages for state contractors). Thus, at the pleading stage where Plaintiffs have adequately alleged that AR 403, EO 725, and Section 14-9-41 violate Section 32, the Court cannot conclude that Defendants are acting within their authority in promulgating and enforcing those provisions such that they are immune from suit.

II. The Circuit Court Erred by Dismissing Plaintiffs' Claims for Lack of Standing.

Plaintiffs' allegations are sufficient for standing. To make their argument that Plaintiffs lack standing, Defendants attempt to narrow the scope and impact of the challenged laws. However, given the generous Rule 12 standard, Op.Br.21, every possible construction of Plaintiffs' alleged facts leads to the conclusion that all Plaintiffs were and continue

to be injured by EO 725, AR 403, and Ala. Code 14-9-41, and that those injuries are traceable to Defendants.

A. The Parties Agree that Plaintiffs Have Standing to Challenge ADOC Administrative Rule 403.

All of the Plaintiffs have been punished in the past for violations of AR 403 for not working. As noted in Defendants' Response Brief, "Defendants do not raise a standing argument as to [Plaintiffs'] challenge to AR403 against Commissioner Hamm." Defs.Br.18 n3. Thus, the circuit court's blanket dismissal of all three of Plaintiffs' claims for lack of standing, including for Defendants' enforcement of AR 403, was erroneous.

B. All Five Plaintiffs Are Injured by EO 725.

Defendants incorrectly argue that Plaintiffs fail to satisfy the injury-in-fact requirement of standing for EO 725 because the only punishment authorized by EO 725 is the loss of GTC. Defs.Br.19. They argue that, as a result, the only incarcerated people who might have standing to challenge EO 725 are those who are good-time eligible and actively earning GTC. Defs.Br.21.

While it is true that EO 725 makes specific reference to the sanctions that *must* be imposed through loss of GTC, that is not all that

EO 725 does. Through subsections (1)(a)(ii)-(iv), Governor Ivey mandates that certain behavior by incarcerated people "shall" be deemed rule violations–or violations of AR 403–including several related to not working, e.g., rioting or inciting a riot and encouraging or causing a work stoppage must be high-level violations, and refusing to work must be a medium-level violation. C_99-100. Under EO 725, Defendant Hamm cannot use his authority to change these or any of the rule violations specifically laid out by Defendant Ivey in subsections (1)(a)(ii)-(iv). *See generally* C_98-105. Thus, each time Defendants issue rule violations under EO 725 for behavior related to not working, Defendants issue a corresponding work-related punishment, including those not explicitly identified in EO 725 but referenced in AR 403. This is because AR 403 is the mechanism by which Defendants Ivey and Hamm punish people in ADOC custody for rule violations under EO 725. C_35-40, 107-146. In short, the force and effect of EO 725 cannot exist absent enforcement of AR 403, which is in turn directed by the requirements of EO 725.

Nonetheless, Defendants claim that Plaintiffs "ignore EO 725's pronouncements of the sanctions for these violations, which include only revoking good-time credits." Defs.Br.20. But it is Defendants who ask

this Court to ignore whole sections of EO 725. EO 725 does spell out specific good-time sanctions for rule violations, but it also enumerates some rule violations that "shall" exist, assigns them a severity level, and ensures, through subsection 1(h),[5] that no one can make the very construction that Defendants seek: that EO 725 only authorizes good-time sanctions.

Through EO 725, Defendant Hamm's authority is constrained, and he is obligated to maintain administrative regulations that continue ADOC's policy of treating refusing to work and other work-related behavior as a rule violation necessitating punishment. Importantly, the rule violations in EO 725 apply to all incarcerated people, not just those eligible for GTC. That EO 725 goes on to be more specific about good-time sanctions does not negate its mandated rule violations for all incarcerated people who engage in the specifically enumerated behaviors, including refusing to work. Indeed, as pled, Plaintiffs have been disciplined or threatened with discipline for refusing to work or for being

[5] Executive Order 725 1(h) reads: "Additional sanctions. Nothing in this executive order shall preclude the imposition of further or additional sanctions beyond those set forth above, including but not limited to, time to be served in restrictive housing, loss of prison privileges, and other sanctions for disciplinary rule violations." C_103.

fired from a job, pursuant to EO 725. C_33-34, 45, 47. For these reasons, the circuit court erred in dismissing Plaintiffs' Complaint for lack of standing to challenge EO 725.

C. Plaintiffs Have Satisfied the Traceability Requirement of Standing as to Defendant Ivey.

The circuit court should have found that Plaintiffs' injuries are traceable to Defendant Ivey. Defendants challenge traceability as to Defendant Ivey for AR 403, Defs.Br.24, by incorrectly arguing that "[t]here is no allegation that she enforces or otherwise caused [Plaintiffs'] alleged injuries under AR 403." Defs.Br.25. That misconstrues Plaintiffs' allegations. The connection that Plaintiffs allege is quite clear: Defendant Ivey's EO 725 on January 9, 2023, prompted Defendant Hamm's adoption of AR 403 on January 10, 2023. C_27,30.

As discussed in II.B. above, Plaintiffs allege that "Defendant ADOC Commissioner John Hamm revised . . . AR 403 to incorporate EO 725's requirements" as ordered by the plain language of EO 725. C_3. Because she directed Defendant Hamm's conduct and required him to promulgate and enforce a revised AR 403, *see id.*, which injured and continues to injure Plaintiffs, Defendant Ivey is liable for actions under AR 403.

Because of Defendant Ivey's direct involvement in the adoption of AR 403, Defendants' reliance on *Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003), incorrectly implies that Plaintiffs' traceability argument hinges on Governor Ivey's "general executive power." In *Women's Emergency Network*, the challenged action was the independent decision of the Florida Department of Highway Safety and Motor Vehicles to authorize certain specialty license plates and the disbursement of funds raised from those plates to specific organizations. *Id.* at 940. Defendant Governor Bush's only connection to the challenged action was his shared authority over the Department. *Id.* at 949. That was too attenuated to meet the *Ex Parte Young* requirement that state officers must have "'some connection to' the unconstitutional act at issue." *Id.*

But here, Plaintiffs do not allege that AR 403 is traceable to Governor Ivey merely because she shares authority over ADOC. Governor Ivey, herself, issued mandates to Commissioner Hamm, via EO 725, that required the revision and enforcement of AR 403. Defendants' argument that AR 403 is not traceable to Defendant Ivey fails.

D. Defendants Incorrectly Argue That Plaintiff Smith Lacks Standing to Challenge Section 14-9-41 and EO

725 Because He Was Not Accruing Good-Time Credits at the Time of the Complaint.

The circuit court should have found that Plaintiff Smith has standing to challenge Section 14-9-41 and EO 725. Defendants argue that Plaintiff Smith does not have standing to challenge Section 14-9-41 or EO 725 because he was not accruing GTC at the time the Complaint was filed, , as if that makes Section 14-9-41 irrelevant to this analysis. Defs.Br.24. However, it is this very statute that creates Plaintiff Smith's inability to accrue good-time, and the threat that the period of time when he cannot accrue good-time will be extended for not working. Because he is injured by Section 14-9-41, Plaintiff Smith has standing to challenge it.

The Parties agree that at the time of the Complaint, Plaintiff Smith was classified as Class IV, which the statute describes as the category used for those "not yet classified and for those who are able to work and refuse, or who commit disciplinary infractions of such a nature which do not warrant a higher classification, or inmates who do not abide by the rules of the institution." Ala. Code Section 14-9-41(c)(4). As Defendants indicate, Defs.Br.23, ADOC also uses "Class IV - Prohibited From Earning Goodtime" for incarcerated people who are categorically barred

from earning good-time credits pursuant to Section 14-9-41(e). Except for those barred by subsection (e) and those not yet classified by ADOC, people at Class IV–like Plaintiff Smith– are so designated by ADOC to punish them with the withholding of GTC for being "able to work and refus[ing]," "commit[ing] disciplinary infractions," and/or "not abid[ing] by the rules." § 14-9-41(c)(4).

Indeed, the withholding of new good-time credits as its own form of punishment is one of the two ways[6] that EO 725 imposes punishment on incarcerated people. EO 725 subsections 1(b)(ii), 1(c)(ii), and 1(d)(ii) mandate, "[a]s an additional sanction," periods of time during which incarcerated people who are not categorically barred from earning good-time are punished with the withholding of new good-time credits, including for refusing to work. C_98-105.[7] Anyone sanctioned at the identified rule violation level, including violations for refusing to work,

[6] EO 725 uses good-time credits to impose two kinds of sanctions on incarcerated people: punishment through the loss of existing good-time credits and punishment through the withholding of new good-time credits that incarcerated people are otherwise eligible to earn.

[7] *See, e.g.*, subsection I(c)(ii) which reads, "**Earning status.** As an additional sanction for a high-level rule violation, an inmate otherwise eligible to earn good time shall be barred from good time-earning status for at least one year . …"

"shall be classified . . as a Class IV prisoner under Ala. Code Section 14-9-41" and– like Plaintiff Smith–cannot be re-classified as Class I, II, or III for a period of time set by Defendant Ivey in EO 725.[8] This punishment moves an incarcerated person into Class IV under Section 14-9-41(c)(4) for being "able to work and refus[ing]," "commit[ing] disciplinary infractions," and/or "not abid[ing] by the rules."[9]

Thus, the injury to Plaintiff Smith is not conjectural. As Defendants concede, Defs.Br.22 n.5, and Plaintiffs plead, C_49, Plaintiff Smith is not categorically barred from earning GTC pursuant to Section 14-9-41(e). He is not ineligible for good-time; he is currently being punished with the withholding of good-time pursuant to Section 14-9-41(c)(4). Just as ADOC reclassified him to Class IV, ADOC can reclassify him again as Class I, Class II, or Class III,[10] and may well do so before this appeal is

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[8] *See, e.g.*, Executive Order 725 1(d)(ii). This subsection, which applies to violations for refusing to work, reads, "an inmate otherwise eligible to earn good time shall be barred from good time-earning status for at least six months (that is, shall be classified for at least six months as a Class IV prisoner under Ala. Code § 14-9- 41(a)(4) ...." Id. (emphasis added).

[9] Section 14-9-41(c)(4) mandates that "Inmates who are classified in this earning class receive no correctional incentive time. This class is generally referred to as 'flat time' or 'day-for-day.'

[10] Under any of those classifications, an incarcerated person accrues good-time credits.

even resolved. *See* C_348-49 (reporting Plaintiff Smith's most recent disciplinary as dated January 17, 2024); C_101 (EO 725 stating that Defendants may only restore an incarcerated person's ability to earn good time after one year if the person demonstrates "good behavior"). Pursuant to Section 14-9-41, Plaintiff Smith cannot accrue GTC, and he is subject to EO 725's mandate that he be punished for rule violations–including refusing to work–with an extension of the time period during which new GTC are withheld from him.

For these reasons, the circuit court's dismissal for lack of standing must be reversed.

III. While the Legal Sufficiency of Plaintiffs' Claims Is Not at Issue in This Appeal, Plaintiffs Have Adequately Pleaded Claims under Section 32.

While the issue on appeal is the circuit court's dismissal for lack of subject matter jurisdiction, Defendants have chosen to argue their undecided Motion to Dismiss for Failure to State a Claim. If this Court decides to consider the issue, it should rule in Plaintiffs' favor, as they have plausibly alleged violations of Section 32 sufficient to survive a Rule 12(b)(6) motion to dismiss.

A. Whether Plaintiffs State A Claim for Relief Is Not an Issue Before This Court On Appeal.

Defendants spend an entire section of their response arguing an issue of first impression not resolved by the court below. *See* Defs.Br.35-54. Defendants' contention that Plaintiffs fail to state a claim under Section 32 is therefore procedurally improper, as this issue was never decided by the circuit court.

The circuit court granted the Motion to Dismiss solely for lack of subject-matter jurisdiction, making no reference to Defendants' 12(b)(6) motion. C_435. Thus, Defendants' attempt to obtain a favorable ruling on their 12(b)(6) motion "is moot and not correctly presented." *Figures v. Figures*, 658 So. 2d 502, 504 (Ala. Civ. App. 1994). The Supreme Court of Alabama has repeatedly said that issues not ruled on by the trial court cannot be considered on appeal. *See Hayes v. Apperson*, 826 So. 2d 798, 805 n.4 (Ala. 2002) (stating that the Court "cannot" consider an issue on appeal that was not ruled on below because "an issue raised on appeal must have first been presented to *and ruled on* by the trial court[]" (emphasis added) (quoting *Norman v. Bozeman*, 605 So.2d 1210, 1214 (Ala. 1992))). Thus, the only issue before this Court is whether the circuit court properly dismissed Plaintiffs' claims for lack of subject matter jurisdiction based on sovereign immunity and lack of standing.

Notwithstanding this well-established law, Defendants rely on *Jefferson County Commission v. Edwards* to incorrectly suggest that this Court "must affirm '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[.]" Defs.Br.36 (quoting 49 So. 3d 685, 691 (Ala. 2010)). Defendants conveniently exclude from their reliance on *Edwards* that the Supreme Court of Alabama decided in the case *not* to apply the rule that Defendants cite, refusing to "*resurrect an omitted affirmative defense.*" *Edwards*, 49 So. 3d at 691 (emphasis added) ("Based on the abandonment of all grounds other than § 95 [raised by the taxpayers], we do not consider whether there might be alternative grounds for affirming the trial court's judgment based on theories independent of § 95."). Furthermore, at the crux of *Edwards* was resolution of the merits of a challenge to a state law's constitutionality, not questions of subject matter jurisdiction or as Defendants would (incorrectly) have it, the sufficiency of Plaintiffs' claims at the pleading stage at issue here. Defendants' reading of *Edwards* therefore does not apply. Given the circuit court's failure to rule on Defendants' 12(b)(6) motion, this Court need not consider those arguments.

B. Plaintiffs State a Claim for Relief.

Should this Court deem it proper and advisable to consider whether Plaintiffs state a claim for relief, it should rule in Plaintiffs' favor. Plaintiffs have alleged sufficient facts to plausibly show a violation of Section 32 grounded in basic understandings of coercion and forced labor at the heart of any reasonable construction of "involuntary servitude" and "slavery." Thus, Plaintiffs' claims should survive a 12(b)(6) motion, and Defendants' arguments for dismissal on this basis fall flat.

1. Defendants apply an improper standard for 12(b)(6).

Defendants recite an incorrect standard to support their argument that Plaintiffs failed to state a claim. Defendants claim Plaintiffs "must demonstrate 'beyond a reasonable doubt' that the [challenged] law is unconstitutional." Defs.Br.35. This is not the standard at the civil pleading stage. Rather, Defendants extrapolate from *State ex rel. King v. Morton*, 955 So. 2d 1012 (Ala. 2006), to argue that Plaintiffs have to meet a heightened standard of proof to overcome the principle that "acts of the legislature . . . 'are presumed constitutional.'" Defs.Br.15-16 (quoting *Morton*, 955 So. 2d at 1017) (additional citation omitted). *Morton*, however, concerned the review of a trial court's ruling on the merits and

issuance of an injunction, not a motion to dismiss at the pleading stage.[11] *See* 955 So. 2d at 1016–17. The appropriate standard under 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 the pleader to relief." *Ex parte Mobile Infirmary Ass'n*, 349 So. 3d 842, 845 (Ala. 2021) (cleaned up). In fact, Defendants themselves "agree that the 12(b)(6) standard requires assuming that the [Plaintiffs'] factual allegations are true." Defs.Br. 36. Thus, the question is not whether Plaintiffs *would prevail* on the merits but "only whether [Plaintiffs] *may possibly* prevail." *Ex parte Mobile Infirmary Ass'n*, 349 So. 3d at 845 (emphasis added). Proof "beyond a reasonable doubt" is nowhere to be seen in the well-settled case law on the standard of review for Rule 12 motions.

2. Defendants introduce facts not within the four corners of the pleadings and mischaracterize Plaintiffs' allegations.[12]

[11] Moreover, Defendants have not pointed to any legal authority to show that the purported presumption of constitutionality applies to executive and administrative acts, like EO 725 and AR 403, at issue here.

[12] Defendants' mischaracterizations of Plaintiffs' allegations, the law, and the issues on appeal have also shaped inaccurate, misguided Statements of Oral Argument, Jurisdiction, the Case, Issues (collectively, the "Statements"), and Facts, as well as the Standard of Review. Plaintiffs also oppose Defendants' Statement of Jurisdiction for the reasons stated

Defendants introduce a number of factual disputes in their response–a move that is wholly improper at the pleading stage. *Ex parte McKesson Corp.*, 393 So. 3d 1180, 1183 (Ala. 2023) ("Because this petition concerns a motion to dismiss under Rule 12(b)(6) . . . the facts in the complaint constitute the only operative facts for our review of the petition." (quoting *Ex parte Abbott Lab'ys*, 342 So. 3d 186, 188 (Ala. 2021))).

First, Defendants improperly introduce new (and unsupported) allegations regarding the intent of Alabama voters when ratifying the current version of Section 32. According to Defendants, when voters decided to remove the penal exception from the Alabama Constitution's ban on slavery and involuntary servitude, they did not intend to "abolish . . . ADOC's various inmate work programs." Defs.Br.37-41. But Plaintiffs' Complaint contains no such allegations; rather, Plaintiffs simply allege that voters elected to prohibit slavery and involuntary servitude in all forms, including within prisons. C_7, 28-32. Defendants

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in their opposition brief to Defendants' Motion to Transfer, including Defendants' improper framing of the merits of Plaintiffs' claims. *See* Defs.Br.iv; *see generally* Pls. Br. in Opp. to Mot. to Transfer.

cannot allege new facts beyond the pleadings for the Court to consider when ruling on the legal sufficiency of Plaintiffs' claims.

Second, Defendants acknowledge that the Court must accept the facts alleged in the complaint as true, yet they spend nearly ten pages contesting Plaintiffs' alleged facts. *See* Defs.Br.15, 36-42, 46-50. In doing so, they dismissively characterize Plaintiffs' experiences of slavery and involuntary servitude within ADOC prisons as mere "chores" and "voluntary" labor. *E.g.*, Defs.Br.43. As discussed below, *infra* part III.B.iii., Plaintiffs allege that they have been forced to work. Yet, Defendants would have the Court believe that their work programs are "voluntary" because they allow some incarcerated people to initially choose which form of forced labor they will provide.[13] Defs.Br.47-49. At the same time, as discussed earlier, *supra* part I.A., Defendants also assert that the State has contract rights and interests in being able to prevent incarcerated people from stopping work. These statements show what Plaintiffs allege: that they face slavery and involuntary servitude

[13] Defendants would also have this Court ignore that the work options available to incarcerated people are unpaid labor in a major facility, which they cannot decline without threat of punishment or labor for State agencies, cities, and counties or private employers, which they cannot cease without threat of punishment.

through ADOC's prison labor and disciplinary rules which, pursuant to the challenged laws, deny incarcerated people the ability to stop working without punishment. Op.Br.13-21; C_37-40, 43-55.

3. Plaintiffs have alleged slavery and involuntary servitude even under Defendants' proferred definition of involuntary servitude that is unsupported by the case law and the plain language of Section 32.

Plaintiffs have plausibly alleged the existence of slavery and involuntary servitude in violation of Section 32, sufficient to survive a 12(b)(6) motion to dismiss.

To counter Plaintiffs' well-pled facts, Defendants have crafted an unsupported, narrow definition of involuntary servitude alone,[14] not based on the plain language of Section 32, but rather, based on cases interpreting the federal Thirteenth Amendment and its penal exception,

[14] Notably, while Defendants summarily assert that Plaintiffs' "allegations misunderstand the Constitution's prohibition on slavery and involuntary servitude and mischaracterise the use of inmate labor in Alabama," Defs.Br.35-36, Defendants fail to even offer a definition of, or challenge to, Plaintiffs' claims of slavery under Section 32, focusing almost exclusively on involuntary servitude, *see* Defs.Br.43-54. Yet Plaintiffs have alleged that Defendants are subjecting them to both slavery and involuntary servitude. To succeed on a motion to dismiss the entire Complaint, Defendants must show that there is *no* legal basis for relief based on the facts as alleged. C_419-20 (stating Rule 12(b)(6) standard).

which permits in other prison systems what Section 32 now prohibits in Alabama prisons. *See* Defs.Br.43-47, 52-54. Defendants further argue that "the penal exception was never needed to justify ADOC's practices" of punishing people for not working. *Id.* at 43. Yet to support this argument, Defendants still rely on case law rooted in the application of the Thirteenth Amendment.

Indeed, as an issue of first impression, there is no case law interpreting Section 32's prohibition on slavery and involuntary servitude—and its explicit rejection of the Thirteenth Amendment's exception clause—since it was revised in 2022. Thus, Plaintiffs' claims give rise to novel state constitutional issues that have not been addressed by an Alabama court. Dismissal on the pleadings based on federal case law, applied in fundamentally different contexts, and without the benefit of an opinion or even a ruling from the trial court, would be improper. *See Roberts v. Meeks*, 397 So. 2d 111, 114 (Ala. 1981) ("[Alabama] courts should be especially reluctant to dismiss a case on the pleadings when the theory of liability is novel and untested." (citations omitted)).

Defendants' proffered definition of involuntary servitude primarily comes from a cramped reading of *United States v. Kozminski*, a case

interpreting the federal Thirteenth Amendment, where the U.S. Supreme Court stated that situations of involuntary servitude arise when "the victim had no available choice but to work or be subject to *legal sanction*" or "*physical coercion*." 487 U.S. 931, 943 (1988) (emphasis added). Further, Defendants argue, erroneously, an even more narrow definition of "legal coercion" than the *Kozminski* court's, associating it solely with criminal sanctions as punishment for refusal to work. *See* Defs.Br.50.

While there is no reason why Plaintiffs should be limited at the pleading stage to the definition of involuntary servitude from *Kozminski* instead of Section 32's plain language, Plaintiffs have alleged physical and legal coercion sufficient to state a claim even within the limited contours of *Kozminski*.[15]

Physical coercion: Plaintiffs have alleged in detail the specific ways in which they are forced to work via physical coercion due to the enforcement of AR 403, EO 725, and Section 14-9-41. Under each of these

[15] Even in *Kozminski,* the court made clear that evidence of other means of coercion, poor working conditions, or the victim's special vulnerabilities are all relevant in determining "whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve." 487 U.S. at 952.

laws, Plaintiffs allege they are subject to the following forms of physical coercion for refusal to work: transfers to unconstitutionally dangerous major prison facilities, extra duty (i.e., additional forced labor), and the loss of GTCs for Mr. Smith. *See* C_8, 25-26, 33-37, 39-40, 46, 48, 51-54.

Legal coercion: Defendants claim that only criminal sanctions equal legal coercion. Defs.Br.50. However, they point to no Alabama case law to support this narrow definition of legal coercion. They rely instead on federal case law, here *Kozminski*, without acknowledging other federal precedent that establishes that "[l]egal coercion simply means the use of the law, the legal process, or legal institutions to compel service." *U.S. v. Alzanki*, 54 F.3d 994, 1002 n.6 (1st Cir. 1995); *see also King v. Pridmore*, 961 F. 3d 1135, 1142-43 (11th Cir. 2020) ("Various forms of coercion may constitute a holding in involuntary servitude[, including] . . . when the victim is forced to work for the defendant . . . by the use or threat of coercion through law or the legal process." (quotations and citations omitted)). Here, as Plaintiffs allege, the threat and imposition of disciplinary proceedings through ADOC's prison discipline regime constitutes a form of legal coercion. *See* C_32-42, 44-46, 50. ADOC's disciplinary procedures, as codified in AR 403, are a legal process that

Defendants use to coerce Plaintiffs' labor while they are in ADOC custody. C_35-40. The disciplinaries Plaintiffs are threatened with and have received will be seen by the parole board, and can prolong their time in prison. C_37. Plaintiffs have therefore sufficiently alleged that they are subject to legal coercion.

Defendants further cite *McCullough v. City of Montgomery*, No. 2:15-cv-463-RCL, 2020 WL 3803045, at *8 (M.D. Ala. July 7, 2020), to support their limited definition of involuntary servitude and to assert that Plaintiffs have not alleged involuntary servitude. Defs.Br.46. This case, however, supports Plaintiffs' arguments that they should survive Rule 12(b)(6).

Defendants ignored in their Motion to Dismiss, and then buried in a footnote of their appeal brief, Defs.Br.46-47 n.23, that *McCullough* allowed the plaintiffs' claims, which arose under the Thirteenth Amendment and federal anti-peonage and forced labor laws, to move forward at the motion to dismiss stage. *See* 2020 WL 3803045, at *9 (citing order denying City's motion to dismiss). Defendants attempt to distinguish by arguing that the facts in *McCullough* do not exist here because of Plaintiffs' "voluntary participation in work release programs

that they want to continue participating in." Defs.Br.47 n.23. This explanation is illogical: Plaintiffs have alleged they are subject to forced labor whether or not they are in the work release program because they can always be subjected to institutional job assignments that they cannot refuse without punishment, C_26, 37-38, 46, 50, 54 and they are not free to leave any job, whether or not they volunteered for it, C_43-54. If this Court considers the undecided 12(b)(6) issue, it should follow the lead of *McCullough* and remand with instructions to deny the motion to dismiss for failure to state a claim. Even under the most restrictive definition of involuntary servitude, the Plaintiffs have pled facts that plausibly state a claim under Section 32.

CONCLUSION

For all of the foregoing reasons and the reasons in Plaintiffs' Opening Brief, the circuit court's dismissal of Plaintiffs' Complaint must be reversed, and their Complaint must be reinstated.

Dated: January 7, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the style requirements and word limitations of Alabama Rule of Appellate Procedure 32.

This document is submitted in Century Schoolbook font, size 14, and contains 6951 words.

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2025, Appellants' Reply Brief was filed using the Court's electronic filing system and that a copy of such filing was served via electronic mail upon all counsel of record as listed below:

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