

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA**

KELLY McGINLEY and RICHARD C.)	
DORLEY,)	
)	
Plaintiffs,)	
)	
v.)	Case No.: 03-0563-WS-M
)	
GORMAN HOUSTON, Senior)	
Associate Justice of the Alabama)	
Supreme Court, HAROLD SEE,)	
Associate Justice of the Alabama)	
Supreme Court, CHAMP LYONS,)	
Associate Justice of the Alabama)	
Supreme Court, JEAN BROWN,)	
Associate Justice of the Alabama)	
Supreme Court, BERNARD HARWOOD,)	
Associate Justice of the Alabama)	
Supreme Court, THOMAS WOODALL,)	
Associate Justice of the Alabama Supreme)	
Court, LYN STUART, Associate Justice of)	
The Alabama Supreme Court, and)	
DOUGLASS JOHNSTONE, Associate)	
Justice of the Alabama Supreme Court,)	
)	
Defendants.)	

**DEFENDANTS' OBJECTION AND OPPOSITION
TO PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING
ORDER AND PETITION FOR PRELIMINARY INJUNCTION**

Defendants Gorman Houston, in his official capacity as senior Associate Justice and acting chief justice of the Supreme Court of Alabama, and Harold See, Champ Lyons, Jean Brown, Bernard Harwood, Thomas Woodall, Lyn Stuart, and Douglass Johnstone, in their official capacities as Associate Justices of the Supreme Court of Alabama, respectfully object to and oppose Plaintiffs' application for a temporary restraining order ("TRO") and petition for preliminary injunction. As grounds why Plaintiffs' motion and petition should be denied, Defendants submit the following:

STANDARDS OF REVIEW

1. The standards applicable to a motion for a TRO and a motion for a preliminary injunction are virtually identical. The Eleventh Circuit has held that,

To be entitled to a TRO, a movant must show: (1) a substantial likelihood of ultimate success on the merits; (2) the TRO is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the TRO would inflict on the non-movant; and (4) the TRO would serve the public interest.

Ingram v. Ault, 50 F.3d 898, 1900 (11th Cir. 1995). Similarly, to be entitled to a preliminary injunction, a movant must show:

(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

Four Seasons Hotels And Resorts, B.V. v. Consorcio Barr, S.A., 320 F.3d 1205, 1210 (11th Cir. 2003) (citing *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir.2000) (*en banc*)).

2. “[A] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the ‘burden of persuasion’ as to each of the four prerequisites.” *Four Seasons*, 320 F.3d at 1210 (quoting *McDonald’s Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998) (internal citations and quotations omitted); *see also Texas v. Seatrain Int’l, S.A.*, 518 F.2d 175, 179 (5th Cir.1975) (grant of preliminary injunction “is the exception rather than the rule,” and movant must clearly carry the burden of persuasion).¹ A TRO is an even more drastic remedy. *See Sampson*

¹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981.

v. Murray, 415 U.S. 61, 86 n.58 (1974) (“ ‘It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65(b) by protective provisions.’ ”) (quoting *Pan Am. World Airways, Inc. v. Flight Engineers’ Int’l Ass’n*, 306 F.2d 840, 843 (2nd Cir. 1962)).

ARGUMENT

3. Plaintiffs have not and cannot satisfy the four prerequisites for either a TRO or a preliminary injunction.

4. First, for the reasons stated in Defendants’ brief in support of their motion to dismiss, Plaintiffs are unlikely to succeed on the merits of their claim. Defendants need not repeat those arguments, and will simply incorporate those reasons here by reference in opposition to Plaintiffs’ motion for a TRO and petition for a preliminary injunction.

5. Second, the relief requested by Plaintiffs in this case would require the Associate Justices to disobey a binding injunction from another federal district court, albeit an injunction with which Associate Justices do not necessarily agree. *See Glassroth v. Moore*, ___ F. Supp. 2d ___, 2003 WL 21892927 (M.D. Ala. Aug. 5, 2003). Judge Thompson has stated that he intends to impose fines if the monument is not removed in compliance with that court’s injunction, *id.* at *2; these fines would be payable from the State treasury. Judge Thompson has suggested that the fine could be as much as \$5,000 per day for the first week, and doubled during each additional week of noncompliance. *Id.* Simple arithmetic shows that, at this projected rate, the fines payable by the State would exceed \$1 million in 5 weeks, \$10 million in less than 9 weeks, \$100 million in less than 12 weeks, and \$1 billion in less than 15 weeks.

6. Plaintiffs offer no adequate security for this harm to the State, as required by Federal Rule of Civil Procedure 65(c). In fact, they ask that bond be waived or only a nominal bond required. App. for TRO at 3.

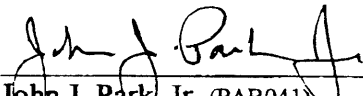
7. Finally, a TRO or preliminary injunction from this Court would create jurisdictional conflict between two co-equal district courts over the same res. It would also upset the orderly process of appellate review already well under way in *Glassroth v. Moore*.

CONCLUSION

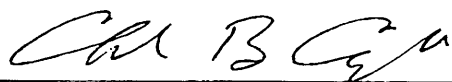
For the reasons stated above, Plaintiffs are not entitled to a TRO or preliminary injunction in this case. For the reasons already stated in Defendants' brief in support of their motion to dismiss, this case should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has this the 26th day of August, 2003 been furnished by facsimile and United States mail to:

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