

NO. 24468

NO. 24561

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 24468

JOHN W. GARDNER, SECRETARY OF THE UNITED STATES
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

APPELLANT-RESPONDENT

v.

THE STATE OF ALABAMA, FOR AND IN BEHALF OF AND AS
TRUSTEE FOR THE DEPARTMENT OF PENSIONS AND
SECURITY OF THE STATE OF ALABAMA, ET AL.,

APPELLEE-PETITIONER

NO. 24561

PETITION OF THE STATE OF ALABAMA TO REVIEW
THE DECISION, DIRECTIVE OR ORDER OF HONOR-
ABLE JOHN W. GARDNER, SECRETARY OF THE
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
OF THE UNITED STATES, DATED JANUARY 12, 1967

APPENDIX TO BRIEF OF
APPELLEE-PETITIONER

The Exhibits adopted and made a part of the Petition are already reproduced in the record in No. 24468, or in the Appendix to the Brief of the Appellant-Respondent which is a reproduction of a part of the original record, and therefore will not be reproduced here (leave to omit is asked of the Court), and are shown in the record as follows:

1. Exhibit A contains Secretary Gardner's decision or action, dated January 12, 1967, directing the cutting off of welfare funds of the Alabama State Department, and is reproduced on page 273, Volume II, of the Appendix to Secretary Gardner's Brief. Said action of the Secretary is also shown at page 16 of the printed record in No. 24468.
2. Exhibit B to the Petition contains the original complaint filed in the United States District Court, Northern District of Alabama, and is shown at page 6 of the printed record on appeal in No. 24468.
3. Exhibit C to the Petition contains an amendment filed to the complaint, which is shown at page 48 of the printed record in No. 24468 (it is erroneously stated in the index to such printed record that it is contained on page 60).
4. Exhibit D contains the Decree of the United States District Court, Northern District of Alabama, granting a preliminary injunction, including findings of fact and conclusions of law, and is shown at page 77 of the printed record in No. 24468 (it is erroneously stated in the index to such printed record as being at page 87).
5. Exhibit E contains Secretary Gardner's answer to the complaint, and is shown at page 73 of the printed record in No. 24468.

6. Exhibit F contains the Notice of Appeal by Secretary Gardner to this Court from the decree granting the motion of the State of Alabama for a preliminary injunction. It is shown at page 88 of the printed record in No. 24468 (erroneously stated in the index as being shown at page 98).

All of these Exhibits are attached to the original petition on file with this Court.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

PETITION OF THE STATE OF ALABAMA

Petitioner, State of Alabama, shows unto this Court the following:

1. On January 12, 1967, the Secretary of the Department of Health, Education and Welfare of the United States rendered a decision, directive or order, a true copy of which is attached at the end of this petition as Exhibit A and made a part hereof. On January 13, 1967, the State of Alabama (in the capacity in which it is named in the action) filed a suit against Honorable John W. Gardner, said Secretary of Health, Education and Welfare, praying for, among other things, a judicial review of said decision of January 12, 1967, and a permanent and temporary injunction against the carrying into effect of such decision, and other relief, all as shown by the complaint in said action, filed in the United States District Court, Northern District of Alabama, Southern Division, a true copy of which is attached to this petition as Exhibit B (Exhibits to complaint omitted). On January 16, 1967, an

amendment was filed to said complaint, a true copy of which is attached to this petition as Exhibit C. Thereupon a hearing was set in said United States District Court on the prayer for motion for preliminary injunction as of Wednesday, February 1, 1967, and on February 3, 1967, there was rendered in and by said United States District Court a decree granting a preliminary injunction against said Secretary of Health, Education and Welfare, his officers, agents, servants, employees, and attorneys, and others acting in active concert or participation with him, against the carrying into effect of said decision or order of January 12, 1967, a true copy of which decree is attached to this petition as Exhibit D and made a part hereof.

2. Prior to the said hearing on preliminary injunction there was filed in behalf of said Secretary of Health, Education and Welfare an answer to the complaint, a true copy of which is attached to this petition as Exhibit E.

3. On February 10, 1967, the Secretary took an appeal to the United States Court of Appeals for the Fifth Circuit from said decree granting the plaintiff's motion for preliminary injunction, by the filing of a notice of appeal, a true copy of which is attached to this petition as Exhibit F. The appeal is docketed in the Court of Appeals as No. 24468.

4. A contention was made in behalf of the Secretary, defendant in said action, on the hearing both prior to and on the hearing for preliminary injunction, that the District Court had no jurisdiction of the action, in effect that the sole judicial review for the cutting off of funds under four of Alabama's welfare programs (Title I, Title IV, Title X, and Title XIV, of the Social Security Act), is by petition to review in the United States Court of Appeals for the Fifth Circuit in accordance with Section 1316, Title 42, United States Code Annotated; Public Law 89-97, 79 Stat. 419.

5. The State of Alabama asserts (and says that it is not disputed) that Section 1316 makes no mention of any review under Alabama's child welfare program, Title V, Part 3 (Child Welfare Service), of the Social Security Act, Title 42, Sections 721-728. The State says that Section 1316, Title 42, is not applicable at all to any judicial review or action taken by the Secretary of Health, Education and Welfare under the Civil Rights Act of 1964 and says, in the alternative, that if it should be held that Section 1316 does afford judicial review for only a part of Alabama's welfare programs, it is inadequate because, among other reasons, such section does not authorize a

review of all of the programs described and involved in the Secretary's decision of January 12, 1967. Thus, the only adequate remedy or review of the cutting off of funds for all of the programs described in said decision of January 12, 1967, is by recourse to the proper United States District Court, as a court of competent jurisdiction within the meaning of Title 5, Section 703, United States Code Annotated (The Administrative Procedure Act), formerly Section 1009, Title 5, United States Code Annotated.

6. The State of Alabama further asserts that an action in the District Court is at least a concurrent remedy. The State further asserts that under the attack or attacks made upon the validity of the regulations, and requirements, of the Department of Health, Education and Welfare, there is an entitlement to take new or additional evidence, over and above evidence taken on the administrative hearing preliminary to the Secretary's order of January 12, 1967, terminating and cutting off the funds and for that reason, among all others, any method of review in the United States Court of Appeals would be inadequate.

7. The State firmly contends that the District Court has full jurisdiction of the action which it has brought

in connection with all of Alabama's welfare programs (and not just the one in connection with which there is no possible right of review in the Court of Appeals, Title V, Part 3, Social Security Act; Title 42, Section 721-728, U.S.C.A.); but says, in the alternative, that if under the statutes the United States Court of Appeals for the Fifth Circuit has sole jurisdiction over the four welfare programs above named, to-wit:

<u>SOCIAL SECURITY ACT</u>	<u>U.S.C.A.</u>
Title I (Old Age Assistance and Medical Assistance to the Aged)	Title 42, §301-306
Title IV (Aid to Dependent Children - Alabama Program)	Title 42, §601-606
Title X (Blind)	Title 42, §1201-1206
Title XIV (Aid to the Total and Permanently Disabled)	Title 42, §1351-1355;

such a review is hereby sought and prayed for as to each and all of such four programs; and petitioner hereby adopts and assigns all of the reasons and grounds, separately and severally, set forth in the complaint and the amendments thereto (including a second amendment to the complaint, filed February 1, 1967, in the said District Court, a true copy of which is attached to this petition as Exhibit G),

and in addition thereto such other grounds and reasons as are consonant with law and justice, including the ground that any cutting off of funds to needy people under the welfare programs is not consistent with the objectives of the Act under which financial assistance is provided.

STATE OF ALABAMA

McDonald Gallion By /s/ Reid B. Barnes
Attorney General of Alabama Special Assistant Attorney General

Gordon Madison
Assistant Attorney General

Reid B. Barnes
Special Assistant Attorney General

ATTORNEYS FOR PETITIONER

STATE OF ALABAMA)

JEFFERSON COUNTY)

Before me, Shirley Dean Hill, a Notary Public in and for said State and County, personally appeared Reid B. Barnes, who, being by me duly sworn, deposes and says that he has been appointed as Special Assistant Attorney General, for the handling of this cause, and is duly authorized to file this petition and to make this verification, and that the allegations of the foregoing petition are

true to the best of his knowledge, information and belief.

/s/ Reid B. Barnes
Special Assistant Attorney General

Sworn to and subscribed
before me on this the 18th
day of February, 1967.

/s/ Shirley Dean Hill
Notary Public

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In the Matter of the ALABAMA
STATE BOARD OF PENSIONS AND
SECURITY and the ALABAMA
STATE DEPARTMENT OF PENSIONS
AND SECURITY

Docket No. CR-1
Compliance Proceeding Pursuant to Section 602 of the Civil Rights Act of 1964 and the Regulations of the Department of Health, Education and Welfare Issued Pursuant Thereto.

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MOTION FOR POSTPONEMENT OF THE EFFECTIVE
DATE OF THE ACTION TAKEN BY THE SECRETARY
ON JANUARY 12, 1967, CUTTING OFF FEDERAL
FINANCIAL ASSISTANCE TO THE STATE OF
ALABAMA AND THE DEPARTMENT OF
PENSIONS AND SECURITY OF THE STATE

The State of Alabama, through the undersigned
Special Assistant Attorney General, acting in behalf of and
as Trustee for the Alabama Department of Pensions and
Security and the Alabama State Board of Pensions and Security in accordance with §705, Title 5, U.S.C., and any other applicable provision of law or rule, moves that the effective date of the action taken by Honorable John W. Gardner, Secretary of Health, Education and Welfare, dated January 12, 1967, directing the cutting-off of funds to the State and said State Department (such action being taken by order and determination made as of January 12, 1967,

and by its terms stated to take effect at midnight, February 28, 1967), be postponed pending judicial review, and respectfully shows as follows:

Section 705, Title 5 reads as follows:

"When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

This section along with the other sections of Chapter 7 in which it is contained, apply to all forms of judicial review of any agency action, unless all such review is precluded by statute. The first sentence of §705 authorizes each Federal Department or agency itself to postpone the effective date of any action taken by it, pending judicial review, when it finds that justice so requires. An action has been commenced by the State acting for said department and board in the United States District Court, Northern District of Alabama, Southern Division, Civil Action No. 67-19 (the Secretary should shortly receive a

copy of the complaint in said action, and an amendment thereto), seeking a review of the Secretary's said action taken on January 12, 1967. It is obvious and self-evident, in the opinion of the undersigned that justice does require the postponement of the effective date of the action in view of the serious and irreparable harm that will be done to the aged persons and children receiving Federal funds for the State's welfare program, and in view of the importance that there be a judicial review and a determination once and for all by the Courts of the questions involved, and the extent to which the Department of Health, Education and Welfare is empowered to go in the regulations and in its requirements.

Therefore an earnest request is made that the Secretary himself postpone the effective date of his said action, pending any and all judicial review (it is recognized that part of the State's welfare programs may be subject to review in another Court, but certainly a part, such as the child welfare services program, can be reviewed only in a United States District Court since there is no provision for other review--it is our position that we are entitled to a review of the entire action in one Court and to choose that Court).

A request is made that action on this motion be taken as promptly as possible, because of the necessity of seeking a Court injunction to postpone the effective date of the action in the event that this motion is denied.

Respectfully submitted,

/s/ Reid B. Barnes
REID B. BARNES
Special Assistant Attorney General
Attorney for the State of Alabama
in this cause, and also for the
Alabama Department of Pensions and
Security and the Alabama State
Board of Pensions and Security,
Exchange Security Bank Building
Birmingham, Alabama

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing motion have been sent by airmail to the Hearing Clerk, Room 5440 HEW North Building, Department of Health, Education and Welfare, 330 Independence Avenue, S.W., Washington, D. C., one (1) copy to Honorable John W. Gardner, Secretary of Health, Education and Welfare and one (1) copy to Honorable Joel Cohen, For the General Counsel, this 16th day of January, 1967.

/s/ Reid B. Barnes
Attorney