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) **Case Number:**
) **2:11-cv-02746-SLB**
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On September 28, this Court ruled that the United States is not entitled to a preliminary injunction with respect to Sections 10, 12(a), 18, 27, 28, and 30 of Act No. 2011-535 (also referred to as H.B. 56). On September 30, 2011, the United

States filed a motion seeking the exact same relief, submitting no new arguments or evidence in its favor.¹

The United States argues that it is entitled to a preliminary injunction, in spite of the Court's previous orders, for four reasons: (1) because it has appealed the adverse portions of the Court's order, the United States argues that a relaxed standard applies to its motion and it is no longer required to show a substantial likelihood of success on the merits; (2) this Court temporarily enjoined enforcement of Act No. 2011-535 to give it an opportunity to consider the various motions before it, and "should now afford the Court of Appeals the same opportunity;" (3) portions of this Court's ruling are inconsistent with the results of a similar legal challenge to a statute in Arizona; and (4) this is a case of great importance.

The State Defendants dealt with the first argument—that a relaxed standard supposedly applies once a party loses in its first attempt at a preliminary injunction—in a brief filed in a related case, HICA Doc. 144, filed October 3, 2011 in case number 5:11-cv-02484-SLB. That filing is adopted and incorporated herein by reference, and attached as Exhibit A. For the reasons stated therein, a

¹ The United States has moved to incorporate by reference Plaintiffs' Notice of Supplemental Evidence in support of their motion for an injunction pending appeal filed in *Hispanic Interest Coalition of Alabama, et al. v. Robert Bentley, et al.*, Case No. 5:11-cv-02484-SLB (HICA Doc. 143). (Doc. 97.) The State Defendants deal with this issue in Section V, *infra*. Documents filed in case number 5:11-cv-02484-SLB will be cited by docket number as "HICA Doc. ____."

relaxed standard does not apply to this case, and even if it did, the United States could not meet even that burden.

In this opposition, the State Defendants will respond to arguments and issues not raised in the companion case, including the United States' argument that it will be irreparably harmed if the Court does not reconsider its decision, and the application of these arguments to Section 18 (which was not raised in the motion filed in the companion case).

I. THIS COURT'S TEMPORARY INJUNCTION OF AUGUST 29, 2011, WHICH IN "NO WAY ADDRESS[ED] THE MERITS" OF PLAINTIFFS' MOTIONS, IS NOT GROUNDS TO ENJOIN PORTIONS OF ACT NO. 2011-535 THAT THE COURT HAS DETERMINED PASS CONSTITUTIONAL MUSTER.

Three separate sets of Plaintiffs filed three separate cases challenging Act No. 2011-535, and the Plaintiffs in each filed motions for a preliminary injunction, including the United States' motion filed on August 1, 2011 (Doc. 2).² The preliminary injunction motions addressed numerous sections of Act No. 2011-535, some on multiple legal grounds. The State Defendants replied to all three motions and this Court held a hearing on August 24, 2011.

Most of Act No. 2011-535 was scheduled to go into effect on September 1, 2011. In light of the volume of paperwork before the Court, and the number and

² The three cases are *Hispanic Interest Coalition of Alabama, et al. v. Robert Bentley, et al.*, Case No. 5:11-cv-2484-SLB; *Rt. Rev. Henry N. Parsley, Jr., et al. v. Robert Bentley, et al.*, Case No. 5:11-cv-2736-SLB; and *United States of America v. State of Alabama, et al.*, Case No. 2:11-cv-2746-SLB.

complexity of the issues involved, this Court entered an order on August 29, 2011, temporarily enjoining enforcement of Act No. 2011-535 in its entirety until September 29, 2011, or until the Court's rulings, whichever came first, to give the Court time to adequately address the numerous challenges to the Act. (HICA Doc. 126.) The Court noted that the order was entered after the Court "discussed with counsel its concerns regarding the limited time available to adequately address the numerous challenges to Act 2011-535 [H.B. 56] by the effective date." (*Id.*) The Court further noted: **"In entering this order the court specifically notes that it is in no way addressing the merits of the motions."** (*Id.*) (emphasis in original).

Thus, the temporary injunction was entered after discussion with counsel, and more importantly, the order was entered on a blank slate, without any finding that the Plaintiffs met the requirements of a temporary injunction.

The slate is no longer blank. Now there have been express findings that the United States is not entitled to relief on the sections in question, and that it is not likely to succeed on the merits of those challenges. Those findings were not made hastily or in a vacuum, but after the Court's consideration of hundreds of pages of argument and briefing. What purpose will the prior eight weeks of advocacy and judicial consideration have served if the United States is given what, pursuant to the results of that process, it is not legally entitled to receive?

Of course, the State Defendants reserve their right to disagree with portions of the Court's rulings that enjoin portions of Act No. 2011-535, and to seek appellate review. The point about the work the parties and the Court have put into this case is not that the State Defendants are signaling agreement with all aspects of the Court's orders, but that the time and effort made by the parties and the Court to this point are worth more than tossing out the results just because someone has appealed.

Comparing the United States' motion for a preliminary injunction pending appeal with the Court's temporary injunction of August 29, 2011 is like comparing apples with oranges. The Court's temporary injunction was entered before the Court denied the United State's motion on the merits, and is no reason to enjoin enforcement of Act No. 2011-535 pending appeal.

II. NEITHER THE IMPORTANCE OF THE CASE NOR DISAGREEMENT WITH A NON-BINDING DECISION IS A GROUND TO GRANT THE PRESENT MOTION.

The State Defendants recognize that this is a noteworthy case that has received a great deal of attention. Some of the issues are indeed "novel and complex." (*See* Doc. 96 at 3.) The United States suggests that the "great importance," novelty, and complexity of the case are reasons it would be "appropriate to maintain an injunction pending appeal." (*Id.*)

The law, however, does not support that argument. The grounds the United States must prove to receive an injunction pending appeal are “(1) a substantial likelihood that [it] will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the [United States] unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest.” *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000).

The importance of the case, its novelty or complexity—however those factors would be measured—are nowhere listed as legal grounds for the extraordinary relief the United States seeks: An injunction prohibiting enforcement of a validly-enacted State statute in the face of findings that the United States is due no such injunction.

The United States suggests further that an injunction is even more appropriate “because with respect to key features of the Alabama statute, this Court’s ruling is at odds with the decisions of [the] district court and court of appeals in the *United States v. Arizona* case.” (Doc. 96 at 3.) However, like the factors discussed above, disagreement with a non-binding decision is not a ground for an injunction pending appeal. Such extraordinary relief requires more than pointing to a non-binding decision coming out the other way.

III. THE UNITED STATES HAS NOT MET ITS BURDEN OF SHOWING IRREPARABLE HARM.

In its motion for preliminary injunction, the United States identifies four categories of irreparable harm, none of which are linked to specific sections of Act No. 2011-535:

“First, H.B. 56 irreparably undermines the federal government’s control over the regulation of immigration and immigration policy.” (Doc. 2 at 77 of 85.)

“Second, . . . H.B. 56 will immediately alter the conditions of residence for lawfully present aliens, thereby resulting in the harassment of lawfully present aliens. Such harassment and alteration of aliens’ conditions of residence frustrates the United States’ relationship with immigrant communities and damages the United States’ reputation both with other countries and with lawfully admitted aliens.” (Doc. 2 at 78 of 85.)

“Third, . . . H.B. 56 will . . . place a significant burden on DHS resources and force DHS to react to Alabama’s enforcement of H.B. 56 at the expense of its own policy priorities.” (Doc. 2 at 80 of 85.)

“Finally, the enforcement of H.B. 56 will inflict irreparable injury on the United States’ ability to manage foreign policy.” (Doc. 2 at 81 of 85.)

This Court has made findings, however, that refute the United States’ claims:

- “The court finds H.B. 56 § 10 does not stand ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (Doc. 93 at 32) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).
- “The United States has not cited the court to a specific conflict between Section 10, or any other Section of H.B. 56, and some Congressionally-granted Executive Branch authority directly relating to foreign policy.” (*Id.* at 33.)
- “There is no evidence before the court that Section 10, or any other provision of H.B. 56, conflicts with Congressional intent regarding national foreign policy goals.” (*Id.* at 36.)
- “H.B. 56 § 12 reflects an intent to cooperate with the federal government, in that all final determinations as to immigration status are made by the federal government, § (a), unlawful presence is defined by federal law, *id.* (e), and state law enforcement will only transfer illegal aliens to the federal government’s custody at the federal government’s request. *Id.*” (*Id.* at 68.)
- “[T]he federal government still retains discretion as to whether it wishes to pursue those found to be unlawfully present.” (*Id.* at 69.)
- “[T]his court finds Section 12(a) is consistent with the purposes of Congress . . . The court is not persuaded that H.B. 56 § 12 must be preempted because

it will result in ‘substantial burdens on lawful immigrants,’ as discussed in *Hines*.” (*Id.*)

- “[T]he court finds the United States has not submitted sufficient evidence that Section 12 conflicts with federally-established foreign policy goals.” (*Id.*)
- “For the reasons discussed more fully with regard to Section 12, this court agrees with the State Defendants that the verification requirements ... amended by Section 18, do not stand ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (*Id.* at 100.)
- “The United States argues that Section 27 is preempted by federal immigration laws contending that ‘Alabama has impermissibly altered the conditions imposed by Congress upon admission, naturalization and *residence* of aliens in the United States or the several states.’ . . . However, this argument is inadequate to find implied preemption because nothing shows Congress intended that such contracts would be enforceable.” (*Id.* at 101-02.) (quoting Doc. 2 at 51.)
- “Section 28 does not create an independent, state-specific registration scheme, attempt to register anyone, or create registration requirements in addition to those established by Congress in the INA.” (*Id.* at 108.)

- “[T]he court finds the United States has not submitted evidence sufficient that Section 28 conflicts with federally-established foreign policy goals.” (*Id.* at 109.)
- “[With respect to Section 30, the] United States has not demonstrated that Congress has – expressly or implicitly – preempted the power of the states to refuse to license an unlawfully-present alien.” (*Id.* at 114.) (citation omitted).

The United States’ assertion of injury as a result of the enforcement of Sections 10, 12(a), 18, 27, 28, and 30 cannot be squared with the conclusions this Court has already reached. And as State Defendants argue elsewhere, granting the United States’ motion and enjoining enforcement of these sections will cause harm to the State Defendants and to the public interest. (HICA Doc. 144 at 22-23.) The United States therefore cannot show that the equities favor the injunction, much less that the equities are “heavily tilted” in their favor so as to require a lesser showing on the merits. *See Ruiz v. Estelle*, 666 F.2d 854, 856-57 (5th Cir. 1982) (“*Ruiz II*”).

IV. THE UNITED STATES IS NOT LIKELY TO SUCCEED ON THE MERITS (OR HAS NOT PRESENTED A CASE OF PATENT SUBSTANTIAL MERIT) WITH RESPECT TO SECTION 18.

The State Defendants’ opposition brief to the HICA Plaintiffs’ emergency motion to enjoin portions of Act No. 2011-535 pending appeal explained why the

Plaintiffs, including the United States, are not likely to succeed on the merits with respect to Sections 10, 12, 27, 28, and 30 of H.B. 56, including on the merits of their preemption claims.³ (*See* HICA Doc. 144 at 23-29.)

Section 18, which was not a subject of the HICA Plaintiffs' motion, is no different. That section provides that if a person is unable to furnish a valid driver's license (when State law already requires drivers of motor vehicles to have their driver's licenses in their possession at all times), "[a] reasonable effort shall be made to determine the citizenship of the person and if an alien, whether the alien is lawfully present in the United States by verification with the federal government pursuant to 8 U.S.C. § 1373(c). An officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States." Act No. 2011-535 § 18.

As the United States' arguments against Section 18 are similar to the arguments it made against Section 12, the Court's findings regarding Section 18 are similar to its findings regarding Section 12. Congress intended for the States to

³ With respect to Section 10, *see* doc. 93 at 36 ("[T]he court finds the United States has not established a likelihood of success on its claim that H.B. 56 § 10 is preempted by federal law."). With respect to Section 12, *see* doc. 93 at 69-70 ("[T]he court concludes that the United States is not likely to succeed on its claim that H.B. 56 § 12 conflicts with Congressional intent as expressed in provisions of the INA."). With respect to Section 18, *see* doc. 93 at 100 ("[T]he court finds the United States has not shown a likelihood of success on its claim that Section 18 is impliedly preempted by federal law."). With respect to Section 27, *see* doc. 93 at 102 ("[T]he court finds that the United States has not established a likelihood of success on its claim that Section 27 is preempted by federal law."). With respect to Section 28, *see* doc. 93 at 109 ("[T]he United States has not shown a likelihood of success on its claim that Section 28 is preempted by federal law."). With respect to Section 30, *see* doc. 93 at 114 ("This law is not preempted.")

cooperate with the federal government regarding enforcement of the immigration laws, and Section 18 (as is Section 12) is consistent with such cooperation. (*See* HICA Doc. 144 at 25 (citing U.S. Doc. 93 at 62-69); Doc. 93 at 99-100). With regard to Section 12, this Court found that “local officials have some inherent authority to assist in the enforcement of federal immigration law, so long as the local official ‘cooperates’ with the federal government.” (Doc. 93 at 68.) States have the option of making immigration status requests and requiring their local officials to do the same. (*Id.* at 69.)

With regard to Section 18, this Court further found, “As the court noted in its discussion with regard to Section 12, nothing in the text of the INA expressly preempts states from legislating on the issue of verification of an individual’s citizenship and immigration status.” (*Id.* at 99-100.) Section 18 does not “stand ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (*Id.* at 100.) Therefore, “the United States has not shown a likelihood of success on its claim that Section 18 is impliedly preempted by federal law.” (*Id.*)

For these reasons, the United States has not demonstrated a likelihood of success on the merits with respect to Section 18. Likewise, even if some lesser standard applies, the United States has not demonstrated a case of “patent substantial merit.” *See Ruiz II*, 666 F.2d at 856-57.

V. RESPONSE TO HICA PLAINTIFFS' NOTICE OF SUPPLEMENTAL EVIDENCE, WHICH THE UNITED STATES HAS MOVED TO INCORPORATE BY REFERENCE.

On October 2, 2011, the HICA Plaintiffs filed a Notice of Supplemental Evidence in support of their motion for an injunction pending appeal. (HICA Doc. 143.) The United States has moved to incorporate that filing by reference. (Doc. 97.) The new submission changes nothing.

Like other evidence the HICA Plaintiffs rely on, the new submission includes hearsay and is of limited reliability. HICA Document 143-6, for instance, includes double-hearsay—what the declarant has heard from “friends” relaying what *another* party has said—and the declarant’s own assumptions about what other parties may have meant by their questions.

Regarding Section 28, the HICA Plaintiffs argue that one school implementing the Act, allegedly in a manner that is inconsistent with the way schools have been instructed to perform, entitles them to state-wide relief. If anything, such an outlying circumstance is more appropriate for an as-applied challenge. The news article attached as HICA Doc. 143-2 shows that schools have been instructed merely to request proof of status upon enrollment, and if none is provided, to enter a notation saying as much. (HICA Doc. 143-2 at 2-3 of 4). State and local officials are quoted as stating that federal and state law is being followed—nothing more, nothing less. (*Id.*)

With regard to parents supposedly choosing not to send their children to school, Section 28 does not prohibit any child from going to school, and this Court correctly found that any fear that Section 28 will lead to reporting parents' immigration status to federal officials is not "well founded." (HICA Doc. 137 at 99). In any event, as this Court also correctly found, the HICA Plaintiffs lack standing to challenge Section 28 (HICA Doc. 137 at 98), and the new submission contains nothing that calls that finding into question.

To the extent the new submission shows that portions of the Act are being enforced—as this Court said on September 28 the State can do—it demonstrates that the relief Plaintiffs request would not *preserve* the status quo, but change it.

And nothing in the new submission shows injury to the United States. As discussed above in Section III, any finding of injury to the United States would be squarely inconsistent with the conclusions the Court reached when denying the United States' first motion for a preliminary injunction.

Therefore, nothing in the Plaintiffs' new submission shows an entitlement to the extraordinary relief they request.

CONCLUSION

The parties will soon begin briefing the United States' appeal of the Court's denial (in relevant part) of its motion for a preliminary injunction. It will be an odd

appeal indeed if this Court grants an injunction and the United States is arguing to the Eleventh Circuit that it should get what it already has.

As the State Defendants said in their opposition brief yesterday, either Plaintiffs are entitled to a preliminary injunction or they are not. This Court's correct ruling that Plaintiffs are not entitled to a preliminary injunction does not entitle them to the same relief on an easier standard. (*See* HICA Doc. 144 at 10.)

The United States has not shown “(1) a substantial likelihood that [it] will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the [United States] unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest.” *Touchston*, 234 F.3d at 1132 (11th Cir. 2000). The United States' Motion should therefore be denied.⁴

Respectfully submitted,

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BY:

⁴ The State Defendants also rely on their oppositions to the various motions for preliminary injunction entered in the three cases that were, at the time, consolidated in case number 5:11-cv-02484-SLB, including Alabama and Governor Bentley's Response to United States' Motion for Preliminary Injunction (Doc. 110, dated August 15, 2011); State Defendants' Response to Church Leaders' Amended Motion for Preliminary Injunction and Memorandum in Support (Doc. 107, dated August 15, 2011); State Defendants' Surreply Opposing the Church Leaders' Motion for Preliminary Injunction (Doc. 117, dated August 22, 2011); State Defendants' Response to Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support (Doc. 82, dated August 5, 2011); and State Defendants' Supplemental Briefing Addressing Equal Protection Challenge (Doc. 115, dated August 20, 2011). All such filings are adopted and incorporated herein by reference.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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