

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

HISPANIC INTEREST COALITION  
OF ALABAMA; *et al.*,

Plaintiffs,

vs.

ROBERT BENTLEY, in his official capacity  
as Governor of the State of Alabama; *et al.*,

Defendants.

RT. REV. HENRY N. PARSLEY, JR., in his  
official capacity as Bishop of the Episcopal  
Church in the Diocese of Alabama; *et al.*

Plaintiffs,

vs.

ROBERT BENTLEY, in his official capacity  
as Governor of the State of Alabama; *et al.*,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF ALABAMA; GOVERNOR  
ROBERT J. BENTLEY,

Defendants.

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**STATE DEFENDANTS' SURREPLY OPPOSING THE CHURCH LEADERS' MOTION FOR PRELIMINARY INJUNCTION (DOC. 99)**

The Church Leaders' reply brief contains more unfounded assertions about Act No. 2011-535's effect on the exercise of their religion. *E.g.*, doc. 112 at 11 (“Section 27 attacks the ability of the Church Leaders . . . to enter into contracts, including the covenants of marriage, baptism, [etc.]”); *id.* at 22 (“[T]his law criminalizes the conduct of our priests, deacons and laity when [the sacraments] are administered to persons without proper documentation.” (quoting Rodi Aff. ¶5)); *id.* at 49 (the Act “prohibits the Church Leaders and their churches from welcoming undocumented strangers”). There is no basis in the law or the Act's text for these assertions, and merely opining about how the Act will apply—this time with affidavits—does not make it so.

The fact remains that it is the Church Leaders' burden to establish a substantial likelihood that their rights will be violated. The Church Leaders are wrong about what the Act requires, but as should now be apparent, they lose even if the Act means what they say it means. They certainly have not carried their burden here. *See generally* doc. 107.

A few of the Church Leaders' reply-brief arguments concerning the underlying substantive issues nevertheless merit a response because they have not been raised before. They may be disposed of in short order.<sup>1</sup>

**1. The Church Leaders cannot get around *Smith II*'s religion-neutrality principle.**

The Church Leaders' arguments that Sections 13 and 27 discriminate against religion, and thus must withstand strict scrutiny, *see* doc. 112 at 41-47, are implausible on their face:

- (a) First, the exception to Section 15's ban on employing unauthorized aliens for "casual domestic labor" performed in a household, *see* Act No. 2011-535, §15(l), has no bearing on the operation of Sections 13 and 27. But even if Section 15(l)'s domestic-labor exception could somehow "taint" Sections 13 and 27, "favoring the wealthy" is not the functional equivalent of "targeting religion."
- (b) Second, the Legislature's failure to include a limited, "transportation" exception to Section 13 for "bona fide religious organization[s]," doc. 112 at 44 (quoting Bedford Aff. ¶ 4), only strengthens the State

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<sup>1</sup> Also in the category of newly raised arguments is the Church Leaders' purported adoption of "all arguments of the other plaintiffs in the consolidated cases." *See* doc. 112 at 14 n.5. This statement raises issues which go far beyond anything the Church Leaders pled in their complaint, *see Parsley* doc. 50, and should therefore be given no effect. To the extent necessary, though, the State Defendants adopt their responses to those arguments, doc. 82 (response to *HICA* plaintiffs) and doc. 110 (response to the United States).

Defendants’ argument that this provision is “neutral [towards religion] and of general applicability.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Employment Division, Dep’t of Human Res. v. Smith (Smith II)*, 494 U.S. 872 (1990)). The Church Leaders seem to be asserting that a law is not religion-neutral *unless* it exempts religion. To say that argument is to refute it.

Under *Smith II*’s religion-neutrality standard, the question is whether Sections 13 and 27 target actions “*only* when they are engaged in for religious reasons” or “*only* because of the religious belief that they display.” *Smith II*, 494 U.S. at 877 (emphasis added). Section 13, which applies to all “person[s],” Act No. 2011-535, §13(a), and Section 27, which applies to “any contract,” *id.* §27(a), do not come close.

**2. The Church Leaders’ Free Exercise claim is entitled to no special treatment as a “hybrid” or “Free Exercise Plus” claim.**

The Church Leaders also invoke the *Smith II* Court’s observation that some religion-neutral laws have been invalidated in cases involving “not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections.” *Smith II*, 494 U.S. at 881. It is far from clear that the Court intended these “hybrid” Free Exercise claims to be given any special treatment merely *because* they are brought in tandem with other constitutional

claims. *See Kissinger v. Bd. of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (“We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights.”); *see also City of Hialeah*, 508 U.S. at 567 (Souter, J., concurring in part and concurring in the judgment) (“If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule.”). Accordingly, courts have recognized that when a plaintiff asserts a “hybrid” or “Free Exercise Plus” claim, the proper mode of analysis is to determine whether either claim can succeed on the merits. Unless one of the individual claims can succeed, the “hybrid” claim must fail as well. *See, e.g., Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272, 1288 n.12 (S.D. Fla. 1999); *see also Chabad of Nova, Inc. v. City of Cooper City*, 575 F. Supp. 2d 1280, 1297 (S.D. Fla. 2008). Because the Church Leaders’ other First Amendment claims have no merit, their “hybrid” Free Exercise claim is not likely to succeed either.

**3. The Church Leaders are not entitled to a preliminary injunction on the basis of their Free Speech claim or any right to expressive association.**

For the first time, the Church Leaders attempt to develop a free-speech claim as a basis for granting the preliminary injunction. But it is clear—both from their briefing and the terms of Sections 13 and 27 (which on their face do not concern

speech)—that they are really only asserting an expressive-association claim. *E.g.*, doc. 112 at 49 (invoking a “fundamental right of freedom of association inherent in the First Amendment right of free speech”); *see also City of Dallas v. Stanglin*, 490 U.S. 19, 23-25 (1989) (describing and applying this right).

Because the Church Leaders’ complaint raised only free-speech and free-assembly claims, it did not sufficiently plead an expressive-association claim. But procedural issues aside, the Church Leaders cannot show even a chance of succeeding on this claim, much less a substantial likelihood, for multiple reasons. First, Sections 13 and 27 do not ““directly and substantially” interfere’ with [the Church Leaders’] ability to associate” in any way that would implicate this right. *See Lyng v. UAW*, 485 U.S. 360, 366 (1988) (quoting *Lyng v. Castillo*, 477 U.S. 635, 638 (1986)). Second, these provisions are sufficiently justified even if they do. And third, as explained before, any right to associate cannot include the right of associating with persons who are not legally present in the United States. *See* doc. 107 at 30-31.

\* \* \*

For these reasons, and those set out in the State Defendants’ previously filed response, doc. 107, the Court should deny the Church Leaders’ motion for a preliminary injunction.

Respectfully submitted,

LUTHER STRANGE  
(ASB-0036-G42L)  
*Attorney General*

BY:

s/William G. Parker, Jr.

Margaret L. Fleming  
(ASB-7942-M34M)

Winfield J. Sinclair  
(ASB-1750-S81W)

James W. Davis  
(ASB-4063-I58J)

Misty S. Fairbanks  
(ASB-1813-T71F)

William G. Parker, Jr.  
(ASB-5142-I72P)

*Assistant Attorneys General*

*Of counsel:*

John C. Neiman, Jr.  
*Solicitor General*  
(ASB-8093-O68N)

Prim F. Escalona  
*Deputy Solicitor General*  
(ASB-7447-H69F)

OFFICE OF THE ATTORNEY GENERAL  
501 Washington Avenue  
Montgomery, Alabama 36130-0152  
(334) 242-7300  
(334) 242-4891 (fax)  
[jneiman@ago.state.al.us](mailto:jneiman@ago.state.al.us)  
[pescalona@ago.state.al.us](mailto:pescalona@ago.state.al.us)

OFFICE OF THE ATTORNEY GENERAL  
501 Washington Avenue  
Montgomery, Alabama 36130-0152  
(334) 242-7300  
(334) 353-8440 (fax)  
[mfleming@ago.state.al.us](mailto:mfleming@ago.state.al.us)  
[wsinclair@ago.state.al.us](mailto:wsinclair@ago.state.al.us)  
[jimdavis@ago.state.al.us](mailto:jimdavis@ago.state.al.us)  
[mfairbanks@ago.state.al.us](mailto:mfairbanks@ago.state.al.us)  
[wparker@ago.state.al.us](mailto:wparker@ago.state.al.us)

*Attorneys for Governor Bentley, Attorney General Strange,  
and District Attorney Broussard*

## **CERTIFICATE OF SERVICE**

I hereby certify that on August 22, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send a copy of this filing to the following persons:

Mary Bauer  
Samuel J. Brooke  
Andrew H. Turner  
SOUTHERN POVERTY LAW CENTER  
400 Washington Ave.  
Montgomery, Alabama 36104  
Telephone: 334.956.8200  
Facsimile: 334.956.8481  
[mary.bauer@splcenter.org](mailto:mary.bauer@splcenter.org)  
[sam.brooke@splcenter.org](mailto:sam.brooke@splcenter.org)  
[andrew.turner@splcenter.org](mailto:andrew.turner@splcenter.org)

Cecilia D. Wang  
Katherine Desormeau  
Kenneth J. Sugarman  
AMERICAN CIVIL LIBERTIES UNION  
39 Drumm Street  
San Francisco, California 94111  
Telephone: 415.343.0775 Wang  
                  415.343.0778 Desormeau  
                  415.343.0777 Sugarman  
Facsimile: 415.395.0950  
[cwang@aclu.org](mailto:cwang@aclu.org)  
[kdesormeau@aclu.org](mailto:kdesormeau@aclu.org)  
[irp\\_ks@aclu.org](mailto:irp_ks@aclu.org)

Sin Yen Ling  
ASIAN LAW CAUCUS  
55 Columbus Avenue  
San Francisco, California 94111  
Telephone: 415.896.1701 ext. 110  
Facsimile: 415.896.1702  
[sinyenL@asianlawcaucus.org](mailto:sinyenL@asianlawcaucus.org)



Michelle R. Lapointe  
Naomi Tsu  
Daniel Werner  
SOUTHERN POVERTY LAW CENTER  
233 Peachtree St., NE, Suite 2150  
Atlanta, Georgia 30303  
Telephone: 404.521.6700 Lapointe & Werner  
404.221.5846 Tsu  
Facsimile: 404.221.5857  
[michelle.lapointe@splcenter.org](mailto:michelle.lapointe@splcenter.org)  
[naomi.tsu@splcenter.org](mailto:naomi.tsu@splcenter.org)  
[daniel.werner@splcenter.org](mailto:daniel.werner@splcenter.org)

Erin E. Oshiro  
ASIAN AMERICAN JUSTICE CENTER  
1140 Connecticut Ave., NW, Suite 1200  
Washington, DC 20036  
Telephone: 202.296.2300  
Facsimile: 202.296.2318  
[eoshiro@advancingequality.org](mailto:eoshiro@advancingequality.org)

G. Brian Spears  
G. BRIAN SPEARS PC  
1126 Ponce de Leon Avenue  
Atlanta, Georgia 30306  
Telephone: 404.872.7086  
Facsimile: 404.892.1128  
[bspears@mindspring.com](mailto:bspears@mindspring.com)

Ben E. Bruner  
BRUNER LAW FIRM  
1904 Berryhill Road  
Montgomery, Alabama 36117  
Telephone: 334.201.0835  
[brunerlawfirm@gmail.com](mailto:brunerlawfirm@gmail.com)

Andre Segura  
Elora Mukherjee  
Omar C. Jadwat  
Lee Gelernt  
Michael K.T. Tan  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
125 Broad Street, 18<sup>th</sup> Floor  
New York, New York 10004  
Telephone: 212.549.2676 Segura  
                  212.549.2664 Mukherjee  
                  212.549.2620 Jadwat  
                  212.549.2616 Gelernt  
                  212.549.7303 Tan  
Facsimile: 212.549.2654  
[asegura@aclu.org](mailto:asegura@aclu.org)  
[emukherjee@aclu.org](mailto:emukherjee@aclu.org)  
[ojadwat@aclu.org](mailto:ojadwat@aclu.org)  
[lgelernt@aclu.org](mailto:lgelernt@aclu.org)  
[mtan@aclu.org](mailto:mtan@aclu.org)

Linton Joaquin  
Karen C. Tumlin  
Vivek Mittal  
Melissa S. Keaney  
Shiu-Ming Cheer  
NATIONAL IMMIGRATION LAW CENTER  
3435 Wilshire Boulevard, Suite 2850  
Los Angeles, California 90010  
Telephone: 213.639.3900  
Facsimile: 213.639.3911  
[joaquin@nilc.org](mailto:joaquin@nilc.org)  
[tumlin@nilc.org](mailto:tumlin@nilc.org)  
[mittal@nilc.org](mailto:mittal@nilc.org)  
[keaney@nilc.org](mailto:keaney@nilc.org)  
[cheer@nilc.org](mailto:cheer@nilc.org)

Tanya Broder  
NATIONAL IMMIGRATION LAW CENTER  
405 14<sup>th</sup> Street, Suite 1400  
Oakland, California 94612  
Telephone: 510.663.8282  
Facsimile: 510.663.2028  
[broder@nilc.org](mailto:broder@nilc.org)

Freddy Rubio  
RUBIO LAW FIRM, P.C.  
438 Carr Avenue, Suite 1  
Birmingham, Alabama 35209  
Telephone: 205.443.7858  
Facsimile: 205.433.7853  
[frubio@rubiofirm.com](mailto:frubio@rubiofirm.com)

Herman Watson, Jr.  
Eric J. Artrip  
Rebekah Keith McKinney  
WATSON, MCKINNEY & ARTRIP, LLP  
203 Greene Street  
Post Office Box 18368  
Huntsville, Alabama 35801  
Telephone: 256.536.7423  
Facsimile: 256.536.2689  
[watson@watsonmckinney.com](mailto:watson@watsonmckinney.com)  
[artrip@watsonmckinney.com](mailto:artrip@watsonmckinney.com)  
[mckinney@watsonmckinney.com](mailto:mckinney@watsonmckinney.com)

Diana S. Sen  
LATINOJUSTICE PRLDEF  
99 Hudson Street – 14<sup>th</sup> Floor  
New York, New York 10013  
Telephone: 212.219.3360  
[dsen@latinojustice.org](mailto:dsen@latinojustice.org)

Foster S. Maer  
Ghita Schwarz  
LATINOJUSTICE PRLDEF  
99 Hudson Street – 14<sup>th</sup> Floor  
New York, New York 10013  
Telephone: 212.219.3360  
[fmaer@latinojustice.org](mailto:fmaer@latinojustice.org)  
[gschwarz@latinojustice.org](mailto:gschwarz@latinojustice.org)

Victor Viramontes  
Martha L. Gomez  
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND  
634 S. Spring Street, 11<sup>th</sup> Floor  
Los Angeles, California 90014  
Telephone: 213.629.2512  
[vviramontes@maldef.org](mailto:vviramontes@maldef.org)  
[mgomez@maldef.org](mailto:mgomez@maldef.org)

Amy Pedersen  
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND  
1016 16<sup>th</sup> Street, Suite 100  
Washington, D.C. 20036  
Telephone: 202.293.2828  
[apedersen@maldef.org](mailto:apedersen@maldef.org)

Jessica Karp  
National Day Laborer Organizing Network  
675 S. Park View Street, Suite B  
Loa Angeles, California 90057  
Telephone: 213.380.2785  
[jkarp@ndlon.org](mailto:jkarp@ndlon.org)

J.R. Brooks, Jr.  
Taylor P. Brooks  
LANIER FORD SHAVER & PAYNE, P.C.  
Post Office Box 2087  
Huntsville, Alabama 35804-2087  
Telephone: 256.535.1100  
Facsimile: 256.533.9322  
[jrb@lfsp.com](mailto:jrb@lfsp.com)  
[tpb@lanierford.com](mailto:tpb@lanierford.com)

Donald B. Sweeney, Jr.  
BRADLEY ARANT BOULT CUMMINGS LLP  
One Federal Place  
1819 Fifth Avenue North, Seventh Floor  
Post Office Box 830709  
Birmingham, Alabama 35283-0709  
Telephone: 205.521.8000  
Facsimile: 205.488.6275  
[dsweeney@babco.com](mailto:dsweeney@babco.com)

C. Lee Reeves, II  
Joshua Wilkenfeld  
Varu Chilakamarri  
U.S. DEPT OF JUSTICE, CIVIL DIVISION  
FEDERAL PROGRAMS BRANCH  
20 Massachusetts Avenue NW  
Washington, DC 20530  
[lee.reeves@usdoj.gov](mailto:lee.reeves@usdoj.gov)  
[Joshua.i.wilkenfeld@usdoj.gov](mailto:Joshua.i.wilkenfeld@usdoj.gov)  
[varudhini.chilakamarri@usdoj.gov](mailto:varudhini.chilakamarri@usdoj.gov)

Joyce White Vance  
Praveen Krishna  
US ATTORNEY'S OFFICE  
1801 4<sup>th</sup> Avenue North  
Birmingham, AL 35203-2101  
[joyce.vance@usdoj.gov](mailto:joyce.vance@usdoj.gov)  
[praveen.krishna@usdoj.gov](mailto:praveen.krishna@usdoj.gov)

Augusta S. Dowd  
WHITE ARNOLD & DOWD PC  
2025 3<sup>rd</sup> Avenue, North, Suite 600  
Birmingham, AL 35203  
[adowd@waadlaw.com](mailto:adowd@waadlaw.com)

Terry McElheny  
DOMINICK FLETCHER YEILDING  
WOOD & LLOYD  
P.O. Box 1387  
Birmingham, AL 35201  
[tmc@dfy.com](mailto:tmc@dfy.com)

F. Grey Redditt, Jr.  
VICKERS RIIS MURRAY & CURRAN LLC  
106 St. Francis Street, 11<sup>th</sup> Floor  
P.O. Drawer 2568  
Mobile, AL 36652-2568  
[gredditt@vickersriis.com](mailto:gredditt@vickersriis.com)

John F. Whitaker  
WHITAKER MUDD SIMMS LUKE  
& WELLS LLC  
2001 Park Place North, Suite 400  
Birmingham, AL 35203  
[jwhitaker@wmslawfirm.com](mailto:jwhitaker@wmslawfirm.com)

William H. Orrick, III  
OFFICE OF IMMIGRATION LITIGATION  
USDOJ CIVIL DIVISION  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530-0001  
[Bill.Orrick@usdoj.gov](mailto:Bill.Orrick@usdoj.gov)

Sister Lynn Marie McKenzie  
KNIGHT GRIFFITH MCKENZIE  
KNIGHT & McLEROY LLP  
P.O. Box 930  
Cullman, AL 35056  
[slm@knight-griffith.com](mailto:slm@knight-griffith.com)

R. Champ Crocker  
R. CHAMP CROCKER, LLC  
P.O. Box 2700  
Cullman, AL 35056-2130  
[champ@champcrocker.com](mailto:champ@champcrocker.com)

Allison Neal  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION OF ALABAMA  
207 Montgomery Street, Suite 910  
Montgomery, AL 36104  
[aneal@aclualabama.org](mailto:aneal@aclualabama.org)

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

Nina Perales  
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND  
100 Broadway, Suite 300  
San Antonio, Texas 78205  
Telephone: 210.224.5476  
[nperales@maldef.org](mailto:nperales@maldef.org)

s/William G. Parker, Jr.  
Attorney for the State Defendants