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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

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| HISPANIC INTEREST COALITION OF ALABAMA; *et al.*, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | Case Number: 5:11-cv-02484-SLB |
| 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. | ) | Case Number: 5:11-cv-02736-SLB |
| ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; *et al.*, | ) | |
| Defendants. | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| vs. | ) | Case Number: 2:11-cv-02746-SLB |
| STATE OF ALABAMA; GOVERNOR ROBERT J. BENTLEY, | ) | |
| Defendants. | ) | |

**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.[1]

**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

[1] 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,

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