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

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

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' MOTION TO CERTIFY QUESTION TO THE SUPREME COURT OF ALABAMA

Governor Robert Bentley, Attorney General Luther Strange, and Madison County District Attorney Robert L. Broussard (the State Defendants) respectfully move this Court to certify to the Supreme Court of Alabama the question of what Sections 13 and 27 of Act No. 2011-535 mean, given that they must be interpreted in compliance with the Alabama Religious Freedom Amendment, Ala. Const. Art. I, § 3.01.

1. On August 1, 2011, Rt. Rev. Henry N. Parsley, Jr., in his official capacity as Bishop of the Episcopal Church in the Diocese of Alabama, Rev. Dr. William H. Willimon, in his individual capacity as Bishop of the Northern Alabama Conference of the United Methodist Church, Most Rev. Thomas J. Rodi, Roman Catholic Archbishop of Mobile, a corporation sole, and Most Rev. Robert J. Baker, Roman Catholic Bishop of Birmingham in Alabama, a corporate sole, ("Church Leaders") filed suit against the State Defendants challenging Act No. 2011-535. Case No. 5:11-cv-02726-SLB, doc. 1.

2. The Church Leaders contend that, on its face, Act No. 2011-535 violates various federally protected rights and should be enjoined in its entirety. Case No. 5:11-cv-02726-SLB, doc. 1 at ¶¶ 78-105, *id.* at Prayer for Relief.

3. Specifically, however, the Church Leaders only focus on Section 13 (which creates new crimes related to concealing, harboring, shielding, inducing, or

transporting illegal aliens), Section 27 (which concerns contracting), and Section 25 (which concerns solicitation, attempt or conspiracy to commit any crime created by the Act). Case No. 5:11-cv-02726-SLB, doc. 1 at ¶¶ 57-68.

4. On August 5, 2011, the Church Leaders filed a motion for a preliminary injunction, incorporating a memorandum in support. Case No. 5:11-cv-02726-SLB, doc. 15.

5. The Church Leaders' motion alleges that Act No. 2011-535 "also violates the Alabama Religious Freedom Amendment that guarantees that Alabama residents' freedom of religion is not burdened by [S]tate or local laws." Case No. 5:11-cv-02726-SLB, doc. 15.

6. "The purpose of the Alabama Religious Freedom Amendment is to guarantee that the freedom of religion is not burdened by [S]tate and local law; and to provide a claim or defense to persons whose religious freedom is burdened by government." Ala. Const. Art. I, § 3.01 (III).

7. It was passed in the wake of the Supreme Court's holding that the Religious Freedom Restoration Act was unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Ala. Const. Art. I, § 3.01 (II)(6); *see also* historical note indicating that the Amendment was proposed to the electorate at the November 1998 election.

8. The Amendment prohibits the State of Alabama from "burden[ing] a person's freedom of religion even if the burden results from a rule of general applicability," unless the State "demonstrates that application of the burden to the person: (1) Is in furtherance of a compelling governmental interest; and (2) Is the least restrictive means of furthering that compelling governmental interest." Ala. Const. Art. I, § 3.01 (V).

9. The Alabama Religious Freedom Amendment is to "be liberally construed to effectuate its remedial and deterrent purposes." Ala. Const. Art. I, § 3.01 (VII)(a).

10. The Amendment clearly acts as a constraint on the meaning of Act No. 2011-535. *See* Ala. Const. Art. I, § 3.01 (VI)(a) ("This amendment applies to all government rules and implementations thereof, whether statutory or otherwise, and whether adopted before or after the effective date of this amendment.").

11. This Court lacks jurisdiction to direct State officials to comply with State law, including the Alabama Religious Freedom Amendment. U.S. Const. Amend. XI; *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 106 (1984) ("A federal court's grant of relief against [S]tate officials on the basis of [S]tate law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on [S]tate sovereignty than when a federal court instructs [S]tate officials

on how to conform their conduct to [S]tate law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.").

12. Accordingly, this Court cannot adjudicate any claim that the Church Leaders may be attempting to put before it concerning the Alabama Religious Freedom Amendment.[1]

13. Nonetheless, as a State law may not violate the State Constitution, the Alabama Religious Freedom Amendment is key to interpreting Act No. 2011-535.

14. Act No. 2011-535 is entirely new, and the Alabama "courts have had no occasion to construe the law in the context of actual disputes . . . , or to accord the law a limiting construction to avoid constitutional questions." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008).[2]

15. Only the Alabama Supreme Court can authoritatively construe Act No. 2011-535. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972) ("Only the Georgia courts can supply the requisite construction, since of course we lack jurisdiction authoritatively to construe state legislation.") (internal quotation marks and citation omitted).

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[1] There is no reference to the Alabama Religious Freedom Amendment in the Complaint. *See* Case No. 5:11-cv-02726-SLB, doc. 1, generally.

[2] A challenge to Act No. 2011-535 was filed in the Montgomery County Circuit Court on July 22, 2011. *See Doe v. Bentley*, Case No. CV-2011-882 (Montgomery County Circuit Court, Hardwick, J.). The *Doe* litigation originally raised State constitutional claims, and an amended complaint raising federal claims has been filed. The Plaintiffs moved for a preliminary injunction, but have now moved to stay the proceedings. The Circuit Court has set a hearing on the stay motion for September 7, 2011.

16. If the Alabama Religious Freedom Amendment requires that Sections 13 and 27 be read in a more limited manner, it is the Alabama Supreme Court that can offer "a limiting construction." *Washington State Grange*, 552 U.S. at 450; *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) ("[T]his Court ordinarily accepts the construction given a state statute in the local courts and also presumes that the statute will be construed in such a way as to avoid the constitutional question presented . . . .").

17. As the Eleventh Circuit has noted:

> When substantial doubt exists about the answer to a material [S]tate law question upon which the case turns, a federal court should certify that question to the [S]tate supreme court in order to avoid making unnecessary [S]tate law guesses and to offer the [S]tate court the opportunity to explicate [S]tate law. Only through certification can federal courts get definitive answers to unsettled [S]tate law questions. Only a [S]tate supreme court can provide what we can be assured are 'correct' answers to [S]tate law questions, because a [S]tate's highest court is the one true and final arbiter of [S]tate law.

Forgione v. Dennis Pirtle Agency, Inc., 93 F.3d 758, 761 (11th Cir.1996) (*per curiam*) (internal quotation marks and citations omitted); *see also Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably 'the ultimate exposito[r] of state law.'") (alteration by the Court; *quoting Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975)); *McMahan v. Toto*, 311 F.3d 1077, 1079 (11th Cir. 2002) ("[W]hen we write to a state law issue, we write in faint and disappearing ink.") (internal quotation marks and citation omitted).

18. Alabama's Rules of Appellate Procedure allow this Court to certify questions to the Alabama Supreme Court to give it the opportunity to interpret the Act once and for all. Rule 18(a) provides:

> When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify such questions or propositions of law of this State to the Supreme Court of Alabama for instructions concerning such questions or propositions of [S]tate law, which certified question the Supreme Court of this State, by written opinion, may answer.

Ala. R. App. P. 18(a).

19. If this Court certified questions to the Supreme Court of Alabama, the parties to this litigation would have the opportunity, and responsibility, to brief the issues to the State court. Ala. R. App. P. 18(g).

20. Certification of novel questions of State law to the State's highest court promotes judicial economy. "Certification procedure ... allows a federal court faced with a novel [S]tate-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997).

21. In the consolidated case of *Hispanic Interest Coalition of Alabama v. Bentley*, Case No. 5:11-cv-02484-SLB, the State Defendants similarly argued that

this Court should consider certification to the Supreme Court of Alabama as a tool for interpreting Act No. 2011-535. *See, e.g.,* Case No. 5:11-cv-02484-SLB, doc. 82 at 25-29.

22. The reasons for certification are all the more compelling in the Church Leaders' case because a proper construction from the Supreme Court of Alabama may moot the entire litigation.

23. Prompt certification may allow the Supreme Court of Alabama to offer an authoritative construction of Sections 13 and 27 of Act No. 2011-535 before this Court rules on the Church Leaders' motion for preliminary injunction. In the alternative, prompt certification may help to avoid the expenditure of additional resources thereafter.

For the foregoing reasons, the State Defendants respectfully move this Court to certify to the Supreme Court of Alabama the question of what Sections 13 and 27 of Act No. 2011-535 mean, given that they must be interpreted in compliance with the Alabama Religious Freedom Amendment, Ala. Const. Art. I, § 3.01.

Respectfully submitted,

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I hereby certify that on August 9, 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:

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