

No. 11-14535-CC and No. 11-14675

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

HISPANIC INTEREST COALITION OF ALABAMA, ET AL.

Appellants/Cross-Appellees,

v.

ROBERT BENTLEY, ET AL.,

Appellees/Cross-Appellants.

**On Appeal from the United States District Court
for the Northern District of Alabama
Case No. 5:11-cv-02484-SLB**

**REPLY BRIEF FOR CROSS-APPELLANTS GOVERNOR BENTLEY,
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February 8, 2012

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ARGUMENT

Although the District Court got the complex questions right in this case, *see* Red Br. 11-60, it erred on the limited questions at issue in the cross-appeal. The analysis of these two points is simple and straightforward, and HICA has offered no meaningful response.

I. The District Court abused its discretion in enjoining Sections 10(e), 11(e), and 13(h) on compulsory-process grounds.

The question of the propriety of the injunction on the compulsory-process issue is not a close one. It is a basic tenet of equity jurisprudence that “‘courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.’” *Pompey v. Broward Cnty.*, 95 F.3d 1543, 1546 (11th Cir. 1996) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 499, 94 S. Ct. 746, 677-78 (1974)). As the Alabama Defendants have already explained, the fundamental problem with the District Court’s injunction on this front is that it was wholly unnecessary. *See* Red Br. 63. If HICA is right that the provisions at issue violate the Compulsory Process Clause, then the plaintiffs will have an adequate remedy at law. In any prosecution brought in state court, they can argue that these provisions violate the Clause—and, if they are right, the state court will decline to apply those provisions.

HICA is wrong to assert that the plaintiffs’ fear of arrest and prosecution is sufficient to establish that the plaintiffs will suffer irreparable harm absent an

injunction. HICA Reply Br. 45-47. HICA is relying on standing jurisprudence for this proposition, but as this Court has recognized, the standing inquiry is distinct from the harm standard necessary for a preliminary injunction. *See Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1130, 1133 (11th Cir. 2005) (holding that the plaintiffs had the requisite injury for standing but failed to establish the distinct element of a substantial likelihood of irreparable harm necessary for a preliminary injunction). That is so because the injury must also be irreparable. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (*en banc*). Here, if the plaintiffs are right, they will suffer no Compulsory Process injury, much less an irreparable one, because if they are charged under the provisions at issue, they can raise their Compulsory Process challenge in that forum and avoid the application of the provisions that they claim to be problematic. *See* Red Br. 63. The mere possibility that they will be prosecuted is not an “irreparable injury.”

To be clear, the point the Alabama Defendants are making is not that “a state court would intentionally defy the plain text of H.B. 56.” HICA Reply Br. 45. The point is instead that the federal Constitution is the supreme law of the land. In fact, “[m]inimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.” *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 431, 102 S. Ct. 2515, 2521 (1982). And if a state law is contrary to the federal Constitution, the

Supremacy Clause requires the state court to apply the Constitution rather than the state law. That is not “defiance” in any sense of the word.

There is no reason to think that the state courts will not follow federal constitutional law if and when this asserted compulsory-process clause issue presents itself. As both this Court and the Supreme Court have long recognized, “The state courts are courts of equal dignity with all of the federal ‘inferior courts’ – to use the Framers’ phrase – and state courts have the same duty to interpret and apply the United States Constitution as we do.” *Pompey*, 95 F.3d at 1550. *Accord Robb v. Connelly*, 111 U.S. 624, 637, 4 S. Ct. 544, 551 (1884). “Federal ‘inferior courts’ have no more business issuing supervisory injunctions to safeguard federal constitutional rights in state court proceedings than state courts have issuing such injunctions to safeguard federal constitutional rights in federal court proceedings.” *Pompey*, 95 F.3d at 1550. Because HICA’s ability to object to these provisions during any state-court prosecution is an adequate remedy at law, the preliminary injunction against these provisions was an abuse of discretion.

HICA is wrong to assert that this conclusion “would dictate that a federal court may never issue a preliminary injunction against state criminal laws.” HICA Reply Br. 47 (emphasis omitted). HICA again mistakenly relies on standing jurisprudence. To be sure, a plaintiff who alleges an intention to engage in constitutionally-protected *conduct* that is proscribed by statute has an injury

cognizable under Article III, and “he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2309 (1979) (internal quotation marks omitted). But that precept has no application here. HICA is not arguing that, on this point, the plaintiffs’ actual *conduct* is protected. It is thus not making any argument, on this particular point, that could preclude a prosecution altogether. It is instead arguing that during a prosecution, the state court will use a particular procedural mechanism that is unconstitutional. No principle of equity allows a plaintiff to seek an injunction against that sort of feared procedural concern. Just as HICA could not seek an injunction precluding the State from enforcing a rule that HICA contended violated the Confrontation Clause during a state-court prosecution, it cannot seek the injunction here. Instead, its proper remedy is to object to the enforcement of the procedural rule once any prosecution begins.

II. The District Court abused its discretion in enjoining the entirety of Section 8.

The Section 8 issue is equally simple. Section 8 itself prohibits an “alien who is not lawfully present” from attending any public postsecondary institution in Alabama. ALA. CODE § 31-13-8. As the District Court acknowledged, this provision does not, as a general matter, run afoul of federal law. *See* Red Br. 64. The asserted problem, however, was a single sentence that purports to further limit

enrollment by requiring an alien attending a postsecondary institution to possess “lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq.” ALA. CODE § 31-13-8. But as the Alabama Defendants have explained, the proper remedy for this problem was either (1) to read the sentence out of the statute as a scrivener’s error or (2) to enjoin the single offending sentence, not the entire Section. HICA offers no meaningful response on either point.

HICA is wrong to contend that the District Court would have violated the Legislature’s intent if it had read the sentence out of the statute. HICA offers no support for this conclusion other than the fact that the sentence appears in the statute. HICA Reply Br. 49-50. But as explained in the opening brief, the sentence is contrary to other language in Section 8 and to the statute’s repeated insistence that it is designed to be consistent with federal law. ALA. CODE § 31-13-8; Red Br. 66. As a matter of statutory interpretation, the sentence is a clear scrivener’s error that should have no operation.

But even if the District Court could not have corrected the error through statutory construction, the right result was to enjoin only the single problematic sentence, not the entire provision. This Court has consistently advocated a narrow approach to injunctive relief. *See Alley v. U.S. Dep’t of Health & Human Servs.*, 590 F.3d 1195, 1205 (11th Cir. 2009); Red Br. 67-68. And as the Supreme Court

has directed, “when confronting a constitutional flaw in a statute, [the Court] tr[ies] to limit the solution to the problem” by “sever[ing] its problematic portions while leaving the remainder intact.” *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29, 126 S. Ct. 961, 967 (2006).

HICA’s only response is again to assert that the narrow injunction would defy “the intent of the state legislature,” but that response cannot withstand scrutiny. HICA Reply Br. 50. When determining legislative intent, the Court “must . . . ask: Would the legislature have preferred what is left of its statute to no statute at all?” *Ayotte*, 546 U.S. at 330. Since the stated purpose of Section 8 was “to prohibit a person not lawfully present from being eligible on the basis of residence for education benefits,” Act No. 2011-535 (Doc. 131-1), surely HICA cannot plausibly suggest that the Legislature would have preferred to excise Section 8 in its entirety rather than defer to federal determinations of immigration status. Such a conclusion would be at odds not only with the repeated references to federal status determinations throughout Section 8, but with the express severability provision included in the Act. *See* Act No. 2011-535, § 33 (“If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains.”); *see also Reed v. Ala. Pub. Sch. & Coll. Auth.*, 221 So. 2d 381, 385 (Ala. 1969) (“If the invalid part may be stricken from an act, leaving a statute complete within itself, sensible and capable of being executed, the

striking of the invalid part does not nullify the entire act.”); *id.* (stating that a severability clause extends to an individual “sentence or provision”). At most, the District Court should have enjoined the second sentence of Section 8. This Court has recently and repeatedly held, in parallel circumstances, that district courts should enjoin only the language in the state law that is problematic and that the injunctions should go no further. *See, e.g., Ala. Educ. Ass’n v. State Superintendent of Educ.*, Nos. 11–11266, 11–11267 & 11–12609, 2011 WL 6444602, at *5 (11th Cir. Dec. 23, 2011) (narrowing a broad district court injunction to enjoin only the statutory applications that were potentially unconstitutional).

III. HICA’s remaining arguments are not properly before this Court.

This Court should strike the remainder of HICA’s response brief, in which HICA argues that the District Court properly enjoined Sections 11(a) and 13. These issues are not before the Court in this appeal. Although HICA sought to enjoin Section 11(a) and Section 13 below, the District Court declined its invitation and declared its motion moot. Doc. 138- Pg 2. HICA did not appeal that decision, and questions relating to Section 11(a) and Section 13 are not the subject of the State’s cross-appeal in this case. Instead, Sections 11(a) and 13 are the subject of the State and Governor Bentley’s separate cross-appeal in the United States’ challenge to the immigration law. *See United States v. Alabama*, No. 11-14674.

HICA's inclusion of arguments on Sections 11(a) and 13 here is an improper attempt to inject its views into an action where it is not a party.

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I certify this brief complies with the applicable type-volume limitation under Rule 28.1(e)(2) of the Federal Rules of Appellate Procedure. According to the word count in Microsoft Word 2007, there are 1,797 words in this brief. I also certify this brief complies with the applicable type-style requirements limitation under Rule 32(a)(5) and (6). I prepared this brief in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point, Times New Roman font.

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