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

SUPPLEMENTAL BRIEF FOR APPELLEES/CROSS-APPELLANTS ON *ARIZONA V. UNITED STATES* AND HB658

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July 6, 2012

CERTIFICATE OF INTERESTED PERSONS

The following is a list of all **additional** known judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly held company that owns 10 percent or more of a party's stock, and other identifiable legal entities related to a party:

[no new entries]

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ARGUMENT

The State Defendants adopt the arguments regarding Sections 10, 12, 18, 27, 28, and 30 from the State and Governor's supplemental brief in the United States' case. *See* Ala. Supp. Br., Nos. 11-14532-CC and 11-14674-CC, at 1-11.[1] This brief addresses the one additional provision, Section 8, for which preemption-related issues are presented in *HICA*. It also addresses the general effect of the *Arizona* decision on the HICA Plaintiffs' overarching regulation-of-immigration theory.

I. Section 8 is not preempted.

HB658 moots the HICA Plaintiffs' challenge to Section 8 and requires vacatur of the District Court's judgment against that provision. *See* Red Br. 64-68.

Section 8 states that "[a]n alien who is not lawfully present in the United States shall not be permitted to enroll in or attend any public postsecondary education institution" in Alabama. ALA. CODE §31-13-8. The HICA Plaintiffs' challenge to this provision was premised on a single sentence. That sentence said "[a]n alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8

[1] Because the District Court is due to be reversed on the Section 10 issue in the United States' case, this Court can vacate the District Court's judgment on Section 10 in the HICA Plaintiffs' appeal and allow the District Court on remand to deny their motion on that provision as moot, as the District Court did with respect to Section 13.

U.S.C. § 1101, et seq." *Id.* The District Court preliminarily enjoined the entire provision based on that sentence. It reasoned, correctly, that "Alabama may, without conflicting with Congress's classifications of aliens, exclude unlawfully-present aliens, as determined by federal law, from enrolling in and attending its public postsecondary educational institutions." Doc. 137 – Pg 44 n. 13 (citing *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 601-08 (E.D. Va. 2004)). But it found that the sentence in question was flawed because it precluded some lawfully present persons from enrolling in and attending postsecondary institutions. *Id.* at 38, 44. On that basis the District Court enjoined the entirety of Section 8. *Id.* Before this Court, the State Defendants argued that the District Court should have enjoined only the sentence, not the whole provision. *See* Red Br. 64-68.

The HICA Plaintiffs' claims against Section 8 are now moot because HB658 eliminated that sentence. *See* Ala. Act No. 2012-491 §1, at p. 17. The District Court identified only one plaintiff, Esayas Haile, as having standing to challenge Section 8. Doc 137 – Pg 37. Amended Section 8, by its terms, should no longer preclude Haile, who is alleged to be lawfully present, from obtaining a postsecondary education.

Because the HICA Plaintiffs have not argued that a preliminary injunction would be appropriate for any other reason, *see* Yellow Br. 48-51, they no longer

have any argument that the provision is preempted. The federal code specifically authorizes states to deny postsecondary-education benefits to unlawfully present persons. *See* 8 U.S.C. §1621. Section 8 expressly defers to the federal government's determination as to whether the person is unlawfully present under 8 U.S.C. §1373(c). *See* ALA. CODE §31-13-8. Under the binding former Fifth Circuit decision in *Doe v. Plyler*, a state can "deny illegal aliens its largess," including educational benefits, without fear of preemption. 628 F.2d 448, 453 (5th Cir. 1980). Nothing in *Arizona* is to the contrary.

The Court thus should vacate the district court's judgment on Section 8. "Where a law is amended so as to remove its challenged features, the claim for injunctive relief becomes moot as to those features." *Naturist Soc'y v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992). Because the HICA Plaintiffs offer no other basis for a claim against Section 8, this Court should vacate the judgment and remand with instructions to deny their request for a preliminary injunction as moot.

II. *Arizona* refutes the HICA Plaintiffs' "regulation of immigration" theory.

One additional point about the HICA Plaintiffs' particular preemption theory, beyond what is noted in the State and Governor's supplemental brief in the United States' case, bears emphasis in light of what the Supreme Court said in *Arizona*.

The HICA Plaintiffs' overarching theory is that HB56 as a whole, and particularly Sections 10 and 12, amounts to an unconstitutional regulation of immigration. *See* Blue Br. 33-34, 36-38. That theory is incompatible with the way the Supreme Court analyzed the Arizona statute. The Supreme Court did not hold that Arizona's version of Section 10 was preempted because it regulated immigration; it instead held that the provision was preempted because Congress has occupied the particular field of alien registration. *See Arizona v. United States*, No. 11-182, ___ U.S. ___, ___ S. Ct. ____, 2012 WL 2368661, at *8-*10 (June 25, 2012). Likewise, the Supreme Court rejected the argument that Arizona's version of Section 12 was facially preempted. *See id.* at *15-*17. Under HICA's sweeping theory, both of those provisions would have been facially invalid on the theory that they were regulations of immigration. The Supreme Court's approach thus makes clear that HICA was mistaken to suggest that all state laws that "place[] special burdens on" unlawfully present persons are unconstitutional regulations of immigration. Blue Br. 33.

III. *Arizona* and HB658 shed no light on the non-preemption issues.

HICA's appeal also presents Fourteenth Amendment issues relating to Section 28, and the State Defendants' cross-appeal presents Sixth Amendment issues under Sections 10(e), 11(e), and 13(h). The cross-appeal as to Sections 10(e)

and 11(e) appear to be moot because *Arizona* means that Section 10 and Section 11(a) are preempted. *See* Ala. Supp. Br., Nos. 11-14532-CC and 11-14674-CC, at 3. But the cross-appeal as to Section 13(h) remains ripe, and neither HB658 nor *Arizona* affects the analysis on this point. The Court should resolve those constitutional claims in the State Defendants' favor for the reasons set forth in the briefs. *See* Red Br. 49-64; Gray Br. 1-3.

Also, for the first time in this appeal, the HICA Plaintiffs have argued in their supplemental brief that Section 19 is preempted. *See* HICA Supp. Br. 5-7. This provision is not the subject of this appeal, and that portion of the HICA supplemental brief should be stricken.

CONCLUSION

This Court should do the following:

(1) affirm the District Court's judgment on Sections 12, 18, 27, 28, and 30;

(2) reverse the District Court's judgment on Section 13(h); and

(3) vacate the District Court's judgment on Sections 8, 10, 10(e), and 11(e) and remand with instructions to deny the request for a preliminary injunction on these provisions as moot.

Respectfully submitted,

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I certify this brief complies with the applicable page limitation under this Court's order. 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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