

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

CENTRAL ALABAMA FAIR
HOUSING CENTER, et al.,

Plaintiffs,

V.

**JULIE MAGEE, Revenue
Commissioner for the State of Alabama,
et al.,**

Defendants.

CIVIL ACTION NUMBER:
2:11-cv-00982-MHT-CSC

STATE DEFENDANT'S PROPOSED FINDINGS OF FACT

State Defendant Julie Magee, sued in her official capacity as Revenue Commissioner for the State of Alabama, respectfully submits these proposed findings of fact:

Act No. 2011-535

1. On June 2, 2011, a majority of the 105-member Alabama House of representatives and a majority of the 35-member Alabama Senate passed Act No. 2011-535. On June 9, 2011, Alabama Governor Robert Bentley signed the Act into law.

2. The Act contains more than 30 separate provisions that deal with a wide variety of subjects, including law enforcement, private employment, government services, education, and contracting with State Government, each as related to aliens unlawfully present in the State of Alabama.

3. Section 2 of the Act sets out the Alabama Legislature's findings and declaration as follows:

The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status.

Because the costs incurred by school districts for the public elementary and secondary education of children who are aliens not lawfully present in the United States can adversely affect the availability of public education resources to students who are United States citizens or are aliens lawfully present in the United States, the State of Alabama determines that there is a compelling need for the State Board of Education to accurately measure and assess the population of students who are aliens not lawfully present in the United States, in order to forecast and plan for any impact that the presence such population may have on publicly funded education in this state.

The State of Alabama further finds that certain practices currently allowed in this state impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Alabama.

Therefore, the people of the State of Alabama declare that it is a compelling public interest to discourage illegal immigration by requiring all agencies within this state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws.

The State of Alabama also finds that other measures are necessary to ensure the integrity of various governmental programs and services.

Act No. 2011-535 §2 (paragraph breaks added).

4. Plaintiffs purport to bring an “as-applied” challenge to one application of one Section of the Act, Section 30, which provides as follows:

An alien not lawfully present in the United States shall not enter into or attempt to enter into a business transaction with the state or a political subdivision of the state and no person shall enter into a business transaction or attempt to enter into a business transaction on behalf of an alien not lawfully present in the United States.

Specifically, Plaintiffs focus their claims on Section 30’s application to the annual registration of manufactured homes, and argue that because one may not purchase a registration decal for a manufactured home without proof of lawful presence, Section 30 is preempted and violates the Fair Housing Act.

Related Litigation

5. There are three challenges to Act No. 2011-535 pending in the District Court for the Northern District of Alabama. Two of the cases are currently on interlocutory appeal from the Court’s holdings on motions for preliminary injunction.

6. *Hispanic Interest Coalition of Alabama v. Bentley*, Case No. 5:11-cv-02484-SLB (N.D. Ala., pending), was filed on July 8, 2011. *HICA* Doc. 1. The

plaintiffs are twelve organizations and twenty-four individuals. *HICA* doc. 1 at ¶¶ 10-165. They are represented by lawyers from across the country, including lawyers from the Southern Poverty Law Center who represent the Plaintiffs in this case. *HICA* Doc. 1 at 117-18.

7. On August 1, 2011, the United States filed suit against the State of Alabama and Governor Bentley. *United States v. Alabama*, Case No. 2:11-cv-02746-SLB (N.D. Ala., pending). *U.S.* Doc. 1.

8. Also on August 1, 2011, a group of church leaders filed suit against Governor Bentley, Attorney General Strange, and a district attorney, *Parsley v. Bentley*, Case No. 5:11-cv-02736-SLB (N.D. Ala., pending). *Parsley* Doc. 1.

9. While there is some overlap in the three lawsuits, each lawsuit targets specific provisions; the *HICA* Plaintiffs additionally challenge Act No. 2011-535 as preempted in its entirety. The United States contends that federal law preempts various provisions of Act No. 2011-535, including Section 30. The *HICA* Plaintiffs also argue that various provisions are preempted, but they raise other constitutional and statutory claims as well; they do challenge Section 30. The Church Leaders focus on Sections 13 and 27 of the Act, which they allege violate their federal constitutional rights with respect to religion.

10. Plaintiffs in each of the three cases filed motions for preliminary injunction. The Honorable Sharon Lovelace Blackburn, Chief Judge of the

Northern District of Alabama, heard arguments on all three pending motions for preliminary injunction on August 24, 2011.

11. On September 28, 2011, Judge Blackburn ruled in all three cases. First, the Court denied the United States' requested injunction as to Section 30, and also declined to grant relief as to Sections 10, 12(a), 18, 27 and 28. The Court granted the United States' motion as to Sections 11(a), 13, 16, and 17.

12. Next, Judge Blackburn denied the Church Leader's motion in its entirety, holding that their challenge to Section 13 was moot because of the ruling in the *United States* case and that they lacked standing to prosecute the challenge to Section 27. *Parsley* Doc. 83; *Parsley* Doc. 84.

13. Lastly, the Court ruled in the *HICA* case; the Court again denied a motion for preliminary injunction as to Section 30, finding that Section 30 does not, on its face, discriminate on the basis of race or national origin. The Court held that the *HICA* Plaintiffs' challenges to Sections 11(a) and 13 were moot because of the ruling in the *United States* case, and additionally denied the motion as to Sections 12, 18, 19, 20, 27 and 28. The Court granted the *HICA* Plaintiffs' motion as to Sections 8, 11(f) and 11(g), as well as to the last sentences of Sections 10(e), 11(e), 13(h).

14. The United States and the *HICA* Plaintiffs appealed Judge Blackburn's rulings to the United States Court of Appeals for the Eleventh Circuit.

On October 6, 2011, the United States filed a *Time Sensitive Motion for Injunction Pending Appeal and Temporary Injunction Pending Full Consideration and for Expedited Briefing and Argument*. On October 7, 2011, the *HICA* Plaintiffs filed a *Time-Sensitive Motion for Preliminary Injunction Pending Appeal and for Expedited Appeal*.

15. On October 14, 2011, the Eleventh Circuit issued an Order declining to enjoin Section 30 pending appeal. The Eleventh Circuit declined to enjoin Sections 12, 18 and 27, but did grant the motions as to Sections 10 and 28.

16. The parties are now in the process of briefing the appeal. The *HICA* Plaintiffs and the United States filed their principal briefs on November 14, 2011. As the schedule currently stands, briefing should be complete in late January 2012, and oral argument will be held the week of February 27, 2012, in Atlanta, Georgia.

Plaintiffs' Pre-emption Claim

17. The Court in *Hispanic Interest Coalition of Alabama v. Bentley*, Case No. 5:11-cv-02484-SLB (N.D. Ala., pending), found that Act No. 2011-535 is not preempted in its entirety as a regulation of immigration. *HICA* Doc. 137 at 31. The Court found that the Act does not determine “who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *Id.* (citing *DeCanas v. Bica*, 424 U.S. 351, 355 (1976)). The Court found

that the Act does not create standards for determining who is and is not in the United States legally, but instead repeatedly defers to federal verification of an alien's lawful presence. *Id.*

18. The Court in *Hispanic Interest Coalition of Alabama v. Bentley*, Case No. 5:11-cv-02484-SLB (N.D. Ala., pending), found that Act No. 2011-535 is not conflict-preempted because it relies on federal tools to determine an alien's immigration status. *Id.* at 33.

19. The Court in *United States v. Alabama*, Case No. 2:11-cv-02746-SLB (N.D. Ala., pending), found that Section 30 is intended to prohibit the State from issuing a license to an unlawfully-present alien. *U.S. Doc.* 93 at 113. The Court found that the United States had not demonstrated that Congress has – expressly or implicitly – preempted the power of the states to refuse to license an unlawfully-present alien. *Id.* at 114.

20. Plaintiffs make no claim of express preemption. They instead argue that federal immigration law impliedly preempts the practice at issue here and Section 30 itself. To prevail on this implied-preemption claim, Plaintiffs would need to show, under the Supreme Court's decision in *De Canas v. Bica*, 424 U.S. 351 (1976), that

(a) the State law or practice falls into the narrow category of laws deemed to be a "regulation of immigration," *id.* at 355;

(b) Congress expressed “the clear and manifest purpose” of completely occupying the field and displacing all State activity, *id.* at 357; or

(c) the State law or practice conflicts with federal laws, such that it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” *id.* at 363.

21. Section 30 as applied in this instance means that the individual Plaintiffs cannot continue living in Alabama in manufactured homes they own and maintain on certain property without violating either Section 30 or Ala. Code § 40-12-255 or causing others to violate Section 30.

22. Section 30 as applied in this instance does not, however, prevent Plaintiffs from residing in Alabama.

23. Section 30 as applied in this instance is an attempt by the State of Alabama to defer to and support federal immigration law, including the federal government’s determination of who should or should not be admitted into the United States, and the conditions under which a legal entrant may remain in the United States.

24. Section 30 as applied in this instance “neither prohibits egress/ingress into [Alabama], nor prohibits the very presence of undocumented individuals in the United States.” Doc. 14, Plaintiffs’ Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, at 27.

25. Congress has expressed its intent that illegal aliens not receive federal, State, or local benefits, including “public or assisted housing.” 8 U.S.C. §§ 1611, 1621.

26. Plaintiffs have made no showing that they have been denied a license under Section 30. Nor have they shown that they have been indicted or otherwise charged with violating Section 30.

27. The factual basis for the Court’s temporary restraining order no longer exists. State Defendant Magee has directed the relevant officials to seek verification of an alien’s immigration status only through the federal SAVE program, or through 8 U.S.C. § 1373(c), as provided by Section 30(c) of Act No. 2011-535.

28. Section 21 of Act No. 2011-535 provides that, absent a request from federal immigration officers for state or local officials to take custody of an unlawfully present person, all provisions of the Act are stayed as to unlawfully present persons who are victims of crimes, children of victims of crimes, critical witnesses in any prosecution, or children of critical witnesses in any prosecution of a state or federal crime, until all the related legal proceedings are concluded.

Standing to Raise Conflict Pre-emption Claim

29. Plaintiffs argue that Section 30 is preempted because at the time of the hearing, the Revenue Commissioner had not directed the relevant officials to seek verification of an alien's immigration status only through the federal SAVE program or through 8 U.S.C. § 1373(c), as provided by Section 30(c) of Act No. 2011-535. Plaintiffs argued that the previous policy conflicted with federal law in circumstances where a person who was lawfully present, or on a path to citizenship, may not have documentation that exhibited that status. This was the basis of the Court's previously-entered temporary restraining order. The Alabama Revenue Department's policy has since changed and local officials have been directed to use the SAVE program or 8 U.S.C. § 1373(c) to verify a person's status. *See* doc. 57. In any event, the Court finds that Plaintiffs lack standing to argue that Section 30 is pre-empted on this basis.

30. Neither of the individual "John Doe" plaintiffs falls within this category. As Plaintiffs concede, the John Doe plaintiffs are not lawfully present. They would be unable to obtain a manufactured home registration decal even if the SAVE program was used. The individual John Doe plaintiffs therefore lack standing to raise this claim.

31. At the hearing on this matter, Plaintiffs challenged the State Defendant's then-policy of requiring verification of an alien's status through one of

the listed forms of documentation, instead of through the SAVE program or through 8 U.S.C. § 1373(c). Plaintiffs asserted that the then-policy was conflict-preempted in that certain persons who are known to the federal government and approved by the federal government to remain in the United States, such as asylum-seekers, may not contain any of the forms of documentation. Plaintiffs asserted that although the named individual Plaintiffs do not fall within this category (rather, they are admittedly unlawfully present), they can nevertheless raise this preemption claim. Plaintiffs made reference to case law generally but to no case in particular. In their proposed findings of fact, Plaintiffs cite to *Georgia Latino Alliance for Human Rights v. Deal*, --- F. Supp. 2d ---, 2011 WL 2520752 at *4-5 (N.D. Ga. June 27, 2011) and *Hispanic Interest Coalition of Alabama v. Bentley*, Case No. 5:11-cv-02484-SLB at 46, 59, 72, 85 (N.D. Ala., pending). However, these cases did not hold that individual plaintiffs who are not lawfully present can bring claims on behalf of those who are. To the contrary, these courts made specific findings that the named plaintiffs had traceable injuries that gave rise to standing to assert the specific claims at issue.

32. Nor do the organizational plaintiffs have standing to raise this claim. The organizational plaintiffs do not identify any single member of theirs who will be adversely affected by the defendants' enforcement of Section 30 with respect to registration of manufactured homes. They therefore have standing to challenge

this policy only if it creates a distinct and palpable injury to these entities themselves.

33. The challenged policy does not directly injure any of the organizational plaintiffs. These plaintiffs allege that they are expending additional resources in an effort to “counteract” the defendants’ enforcement of Section 30. But they do not identify how these expenditures will hinder some specific, established activity the organizations undertook before the defendants began enforcing Section 30 in the manner challenged in this lawsuit.

34. In particular, none of these plaintiffs has assisted persons with manufactured-home registration prior to the defendants’ enforcement of Section 30 in this context. Nor, more broadly, have these plaintiffs assisted housing consumers in complying with generally applicable government policies.

35. In fact, these plaintiffs’ own pleadings and evidentiary materials make clear that any expenditure of resources in response to the defendants’ conduct represents a major shift in their activities. They concede, for example, that these new expenditures will be for activities *other* than “their core activities,” Compl. ¶16, or their “regularly planned activities,” *id.* ¶¶112, 113.

36. The defendants’ conduct therefore does not injure the organizational plaintiffs in any concrete way. *Accord, Hispanic Interest Coalition of Alabama v. Bentley*, Case No. 5:11-cv-02484-SLB at 20-24, 99-101 (N.D. Ala., pending)

(rejecting organizations' standing arguments similar to Plaintiffs' arguments here).

Plaintiffs' Intentional Discrimination Claim

37. The Fair Housing Act, which prohibits certain forms of discrimination on the basis of race or national origin, does not bar discrimination on the basis of immigration status. *See, e.g., Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86 (1973) (holding that nothing in the equal employment opportunities provisions, which preclude discrimination on the basis of national origin, makes it illegal to discriminate on the basis of citizenship). To prevail on their Fair Housing Act claim, Plaintiffs therefore bear the burden of proving that Alabama's immigration law discriminates on the basis of race or national origin. Plaintiffs present three types of evidence in support of their intentional discrimination claim, and none is sufficient to show a substantial likelihood of success on the merits.

38. First, Plaintiffs presented evidence that Kris Kobach participated to some degree in drafting the bill; that Kobach, the Kansas Secretary of State, is associated with the legal division of an organization; and that leaders of that organization allegedly hold racist views.

39. The evidence related to Kobach does nothing to meet Plaintiffs' burden. There is no evidence that the allegedly racist organization leaders had

anything to do with drafting the bill; there is no evidence that Kobach himself holds any racist views; and even if there was evidence that Kobach held racist views, there is no evidence that Kobach voted on the legislation or that any member of the Alabama Legislature had knowledge of Kobach's alleged racist views.

40. The Court need not decide the extent of Kobach's role in drafting legislation or whether Kobach had any racist intent in performing that role, because those findings would have no relevance to whether the Alabama Legislature as a whole intended to discriminate on the basis of race or national origin.

41. Second, Plaintiffs presented testimony from four members of the Alabama Legislature and argue that these Legislators have, in their own minds, confused race (or national origin) and immigration status. In point of fact, Plaintiffs' arguments are focused primarily on three of the four Legislators: Plaintiffs did not file a transcript of the testimony of Senator Scoffield, who gave impassioned testimony that he was motivated by the desire to uphold the rule of law by discouraging illegal immigration.

42. Plaintiffs appear to argue that because at least three of the four Legislators who testified allegedly intended to discriminate against Hispanics on the basis of race or national origin, the Court should find that the Alabama Legislature as a whole intended to discriminate against Hispanics. That is not a

leap that the Court is willing to make. Even if these Legislators held such a discriminatory intent, there is no evidence that such intent was shared by any other Legislator who voted in favor of the Act.

43. In the alternative, Plaintiffs argue that from the testimony of the Legislators, the Court may find that race “played some role” in the challenged conduct, citing *Sofarelli v. Pinellas County*, 931 F.2d 718, 722 (11th Cir. 1991), and *United States v. Pelzer Realty Co.*, 484 F.2d 438, 443 (5th Cir. 1973). Those cases, however, dealt with fair housing claims against individuals (neighbors in *Sofarelli*, and a realtor in *Pelzer Realty*), and the courts held that the plaintiffs in those cases were not required to prove that race was the only factor that motivated the individual defendants. The cases do not hold that discriminatory intent on the part of one senator or representative taints the work of the entire Legislature.

44. The Court need not decide at this point (if ever) what motivated four individual Legislators to vote in favor of the Act, because even if race or national origin was a motivation on the part of four, that would not be sufficient to find that the Alabama Legislature as whole was motivated by race or national origin, or even that race or national origin was one of many motivating factors for the Legislature *as a body*.

45. The third form of evidence Plaintiffs offer in support of their intentional discrimination claim is evidence that constituents of the four testifying

Legislators held discriminatory intent, and that these Legislators bowed to the discriminatory intent of others by voting in favor of the Act. Even if those constituents were motivated by race or national origin when raising concerns about illegal immigration, and even if the four testifying Legislators acted on the basis of constituent complaints, Plaintiffs have not met their burden. There is no evidence that any other Legislator was so motivated.

46. Testimony of individual lawmakers would have more force if this case dealt with a zoning decision by a 7-member body (as in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), cited by the Plaintiffs), or a condemnation decision by a 5-member County Commission. In such a case, the testimony of a few members would go much further to showing the intent of the body as a whole. Here, however, when dealing with Legislative bodies of 105 and 35 members, the intent of three, or even four, will not do.

47. In the end, the only reliable evidence before the Court of the intent of the Legislature as a whole is found in Section 2 of the Act, where the Legislature expressed a clear intent to address the problem of illegal immigration, without regard to the race or nation of origin of aliens unlawfully present. On numerous occasions, the Act expressly prohibits discrimination on the basis of race or national origin. *See e.g.*, Section 30(e) (“An agency of this state or a county, city, town, or other political subdivision of this state may not consider race, color, or

national origin in the enforcement of this section except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901.”).

48. The Court therefore finds that race or national origin were not motivating factors on the part of the Alabama Legislature in passing the Act.

49. The Court therefore finds that Plaintiffs have not shown a likelihood of success on the merits of their intentional discrimination claim.

Plaintiffs’ Discriminatory Impact Claim

50. Plaintiffs also claim that Section 30 violates the Fair Housing Act on the basis of its alleged discriminatory impact. The Court finds that Plaintiffs have not shown a likelihood of success on the merits of this claim.

51. The basis of Plaintiffs’ claim is that (allegedly) 72% of aliens unlawfully present in Alabama are Hispanic or Latino, and that a law prohibiting the registration of manufactured homes by aliens unlawfully present impacts Hispanics or Latinos to a greater degree than other ethnic groups. There are holes, however, in the statistical evidence Plaintiffs present. Moreover, even if Plaintiffs are correct in their data, the Court is unwilling to find that every law addressing illegal immigration is tainted by discriminatory impact whenever the majority of illegal aliens in a state are from a single country or part of a single ethnic group.

52. Through the declaration of Jamie L. Crook (doc. 14-2), Plaintiffs argue that because 77.2% of undocumented persons in the United States are Hispanic or Latino, the Court should assume that 77.2% of undocumented persons in Alabama are Hispanic or Latino, and that 77.2% of undocumented persons who live in manufactured homes in Alabama are Hispanic or Latino. *Id.* at ¶¶ 8, 12.

53. The Court finds that Plaintiffs' assumptions are not valid. Exhibit C to the Crook Declaration (at page 15) notes that aliens unlawfully present are not evenly spread throughout the country by nation of origin. Native Mexicans, for example, "account for half or more of the unauthorized population" in 28 states, and less than half in 22 states. *Id.* There simply is no evidence before the Court supporting a finding that Hispanics or Latinos make up a majority of aliens unlawfully present in Alabama, much less a majority of undocumented manufactured home residents in Alabama.

54. Even if Plaintiffs' statistical evidence is correct, Plaintiffs' argument proves too much. It goes without saying that 100% of aliens unlawfully present are natives of other countries. If, as Plaintiffs claim, Hispanics make up the majority of the undocumented population, then *any* law addressing illegal immigration would be tainted by discriminatory impact under Plaintiffs' theory. Illegal immigration is too serious of a problem for the Court to place it off limits

on the basis that an alleged majority of illegal aliens happen to fall in a certain category.

55. Plaintiffs' own evidence notes that in 2009, "more than 70% of deportees were Mexican, according to the Department of Homeland Security." Crook declaration, Exhibit C, p. 10. If Alabama's law (as applied to manufactured homes) suffers from discriminatory impact, why would the policies of the United States Government not suffer the same?

56. It is true that deportations are not necessarily a housing policy affected by the Fair Housing Act, but another federal immigration law is directly related to housing. An alien not lawfully present "is not eligible for any State or local public benefit," 8 U.S.C. § 1621 (a), including "any retirement, welfare, health, disability, *public or assisted housing*, post-secondary education, food assistance, unemployment benefit, or any other similar benefit," 8 U.S.C. § 1621(c)(1)(B) (emphasis added). *See also* 8 U.S.C. § 1611(a) and (c)(1)(B) (the same is true "for any Federal public benefit"). Again, by Plaintiffs' logic, this law would be barred as a result of discriminatory impact, because most undocumented persons who are ineligible for public or assisted housing benefits are Hispanic.

57. Even if there is a discriminatory impact, the Court finds that it is justified by Alabama's legitimate government purpose of seeking to discourage illegal immigration.

58. For these reasons, the Court finds that Plaintiffs have not shown a likelihood of success on the merits with respect to their discriminatory impact claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of November 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 counsel for Plaintiffs who are registered for electronic service in this case.

I FURTHER CERTIFY that on the 28th day of November 2011, I am serving by electronic mail the following co-defendant for whom no counsel has yet appeared:

Judge Jimmy Stubbs probatejudge@elmoreco.org

I FURTHER CERTIFY that on the 28th day of November 2011, I am serving by electronic email the following counsel for Plaintiffs who are not yet registered for service using the CM/ECF system:

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