

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

HISPANIC INTEREST COALITION  
OF ALABAMA; *et al.*,

Plaintiffs,

vs.

ROBERT BENTLEY, in his official capacity  
as Governor of the State of Alabama; *et al.*,

Defendants.

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) Case Number:  
) 5:11-cv-02484-SLB  
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**STATE DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' EMERGENCY MOTION TO ENJOIN  
PORTIONS OF H.B. 56 PENDING APPEAL (DOC. 140)**

Defendants Governor Robert Bentley, Attorney General Luther Strange, Interim Superintendent Larry E. Craven, Chancellor Freida Hill, and District Attorney Robert L. Broussard, sued in their official capacities ("State Defendants"), request that the Court deny Plaintiffs' Emergency Motion to Enjoin Portions of H.B. 56 Pending Appeal (doc. 140), because the lesser standard of *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) ("*Ruiz I*") applies to a motion for *stay* pending appeal, not to a motion for *injunction* pending appeal, and Plaintiffs' have not clearly established a substantial likelihood of success on the merits. Even if *Ruiz I* applies, Plaintiffs have not shown a substantial case on the merits and, in any event, the balance of the equities does not weigh heavily in favor of granting the injunction.

## **INTRODUCTION**

The day after this Court ruled that Plaintiffs are not entitled to a preliminary injunction,<sup>1</sup> Plaintiffs asked this Court again for that same relief without presenting any new facts or legal arguments. They claim that they should get it this time because, now that they are appealing, they no longer have to show a substantial likelihood of success on the merits.

The State Defendants do not agree that some lesser standard applies the second time around. Plaintiffs seek an *injunction* pending appeal, not a *stay* pending appeal, and as discussed below, that distinction matters. But even if the lesser standard applies to such motions generally, Plaintiffs' motion should be denied because they have not shown that the equities tilt so overwhelmingly in their favor that the lesser standard applies in *this* case. As discussed below, Plaintiffs rely on conclusory statements, speculation, and conjecture to show irreparable harm, and at times they argue that they are irreparably harmed because H.B. 56 may reveal their pre-existing violations of *federal* law. If there is any evidence to show irreparable harm, it is not of such magnitude that the Court may

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<sup>1</sup> This Court denied these Plaintiffs' Motion for a Preliminary Injunction in its order, doc. 138, which was accompanied by a memorandum opinion, doc. 137. The Court therein relied in part on the reasoning it used when dealing with a similar motion in a companion case filed by the United States of America, case no. 2:11-CV-2746-SLB. The memorandum opinion entered in that case was doc. 93, and the State Defendants will cite to that memorandum opinion as "(U.S. doc. 93)."

conclude that the equities tilt in Plaintiffs' favor (much less *heavily* so), considering the State's strong interests in having its valid laws enforced.

All that said, even if the lesser standard does apply here, it is not met by showing that some court somewhere agrees with Plaintiffs. Plaintiffs still must show that their case has "patent substantial merit." *Ruiz v. Estelle*, 666 F.2d 854, 856-57 (5<sup>th</sup> Cir. 1982) ("*Ruiz II*"). They cannot; this Court was correct not to enjoin enforcement of Sections 10, 12, 27, 28, and 30, and Plaintiffs have given the Court no reason to revisit its decision.

For all these reasons, Plaintiffs' motion is due to be denied.

**I. HAVING JUST LOST ON THEIR REQUEST FOR A PRELIMINARY INJUNCTION, PLAINTIFFS ASSERT THAT THEY ARE DUE THE SAME RELIEF ON A LESSER SHOWING. THIS CANNOT BE.**

"For this Court to grant the extraordinary remedy of an injunction pending appeal, the petitioners must show: (1) a substantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the [petitioners] unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest. *See In re Federal Grand Jury Proceedings*, 975 F.2d 1488, 1492 (11th Cir. 1992); *MacBride v. Askew*, 541 F.2d 465 (5th Cir. 1976)." *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000).

While it is true that “[t]here is substantial overlap between” the factors governing a stay and “the factors governing preliminary injunctions,” the two are not “one and the same.” *Nken v. Holder*, 129 S.Ct. 1749, 1761 (2009). A stay is directed toward the court’s own judgment, the court staying its own hand (not the parties’), which it has an inherent power to do. “The power to grant a stay pending review” is “part of a court’s ‘traditional equipment for the administration of justice.’” *Id.* at 1757 (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9-10 (1942)).

In contrast, an injunction is “a means by which a court tells someone what to do or not to do.” *Id.* “When a court employs ‘the extraordinary remedy of injunction,’ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982), it directs the conduct of a party, and does so with the backing of its full coercive powers.” *Id.* In other words, while “[i]n a general sense, every order of a court which commands or forbids is an injunction,” “in its accepted legal sense, an injunction is a judicial process or mandate operating *in personam*” whereas “a stay operates upon the judicial proceeding itself.” *Id.* at 1757-58 (internal quotation marks and citations omitted).

Because Plaintiffs “petition this Court to enjoin sections 10, 12, 27, 28, and 30 of HB 56 pending appeal,” (doc. 140 at 1), Plaintiffs seek an injunction—judicial process or mandate operating *in personam*—prohibiting the State

Defendants from executing or enforcing these provisions of validly enacted Alabama law. Plaintiffs must therefore meet the standard for injunctions.

Plaintiffs agree that they “must generally satisfy the traditional preliminary injunction requirements” (which the Court held they have not met, Order on Plaintiffs’ Mot. for Prelim. Injunct. (doc. 138)). (Doc. 140 at 3). However they seek to benefit from *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (“*Ruiz I*”) which provides a lesser standard for a movant seeking a *stay* pending appeal if the movant shows that “the balance of the equities weighs heavily in favor of granting the stay.” *Ruiz I*, 650 F.2d at 565. The balance of equities equates to “consideration of the other three [stay] factors.” *Id.*<sup>2</sup> In such a case, “the movant need only present a substantial case on the merits” instead of meeting the more stringent substantial likelihood of success on the merits standard. *Id.*

This distinction between stays and injunctions is critical to an understanding of *Ruiz I*. The movant in *Ruiz I* sought a stay, not an injunction, and the *Ruiz I* court never mentioned the standard for injunctions pending appeal. While the Plaintiffs bracket the word “injunction” in place of “stay” when quoting *Ruiz I*, (see Doc. 140 at 3), the two are not interchangeable.

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<sup>2</sup> The factors regulating the issuance of a stay are “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted).

By its terms, then, the lesser standard of *Ruiz I* applies to stays, not injunctions. From a common sense standpoint, it could not apply to them because to do so would eviscerate the preliminary-injunction standard. Although an applicant for a preliminary injunction must show a substantial likelihood of success on the merits, under Plaintiffs' view, if the applicant fails to make that showing and therefore is denied the preliminary injunction, the applicant may obtain effectively the same relief, on a lesser showing, by immediately appealing and seeking an injunction pending appeal. If the district court continues with proceedings and enters a final order while the preliminary injunction is on appeal, then the injunction pending appeal will have had the same effect as a preliminary injunction even though the applicant could not satisfy the requirements for a preliminary injunction. This would give plaintiffs an incentive to appeal after every denial of a preliminary injunction just to get the more lenient standard, and it cannot be the law.

Even if *Ruiz I* applies, it is not as lenient a standard as Plaintiffs suggest. It is not a free pass on the first prong. In *Ruiz II*, the Court explained:

In the short time that has elapsed since *Ruiz I*, many applicants for stay seem to have assumed that *Ruiz I* was a coup de grace for the likelihood-of-success criterion in this circuit. This assumption, however, is unwarranted, for it ignores the careful language of *Ruiz I*. Likelihood of success remains a prerequisite in the usual case even if it not an invariable requirement. Only "if the balance of equities (i.e., consideration of the other three [stay] factors) is ... heavily tilted in

the movant's favor" will we issue a stay in its absence, and, even then, the issue must be one with patent substantial merit.

*Ruiz v. Estelle*, 666 F.2d 854, 856-57 (5th Cir. 1982) ("*Ruiz II*"). Thus, even if *Ruiz I* and *II* apply to injunctions pending appeal, and even if Plaintiffs show that the other three stay factors are "heavily tilted" in their favor, Plaintiffs still must show that their case has "patent substantial merit." *Id.* For reasons stated in this Court's orders (U.S. doc. 93, doc. 137), Plaintiffs have not met that burden. Plaintiffs' motion, therefore, is due to be denied.

The State Defendants will now address four cases cited in reference to *Ruiz I* by the United States in a similar motion to stay.<sup>3</sup> The United States points to *Save Our Dunes v. Pegues*, 642 F.Supp. 393 (M.D. Ala. 1985), where the District Court noted that it had earlier denied a motion for preliminary injunction but granted a motion for injunction pending appeal applying the *Ruiz I* standard. *Id.* at 399 n. 4. (The cited opinion was a later decision on the merits and was reversed in 834 F.2d 984 (11<sup>th</sup> Cir. 1987), a decision that did not address the preliminary injunction or injunction pending appeal.) *Save Our Dunes* is distinguishable because it does not appear that any party pointed out that *Ruiz I* applies to stays, not injunctions; as stated above, it was error to expand the holding of *Ruiz I* in that way. In addition,

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<sup>3</sup> The United States, in the related case no. 2:11-cv-02746-SLB, appealed portions of the Court's order denying in part the United States' motion for preliminary injunction. The United States filed a motion for injunction pending appeal similar to the instant motion. (U.S. doc. 96). Both motions urge the Court to apply the *Ruiz* standard. While the State Defendants will file a separate response to the United States' motion as soon as practicable, the State Defendants will attempt to avoid overlap and address the *Ruiz* question fully here.

the equities were on a different scale where denial of the injunction in *Save Our Dunes* would lead to irreparable environmental destruction that would essentially moot the case; as discussed below, Plaintiffs have not demonstrated such irreparable harm. It is important, too, that the Court in *Save Our Dunes* apparently considered the legal questions to be a close call, even deciding later that it should have granted the original motion for preliminary injunction. *Id.* at 407 n.11. As discussed below, the legal conclusions reached by the Court with respect to Sections 10, 12, 27, 28, and 30 are clearly correct.

In *Peck v. Upshur County Board of Education*, 941 F.Supp. 1478 (N.D. W.V. 1996), the District Court considered a motion to restore a preliminary injunction which the District Court had lifted after an adverse ruling on the merits. The District Court had preliminarily enjoined a school's policy permitting third parties to make Bibles available to students, but lifted that injunction upon a finding that the policy did not violate the Establishment Clause. On a request to restore the preliminary injunction pending appeal, the Court cited a relaxed standard, but *did not restore the injunction*. *Id.* at 1481-83. The Court merely required that on the close Establishment Clause question, the school board would require the schools to display a sign where the Bibles were distributed that distanced the schools from the private citizens making the distribution. *Id.* at 1483. That is, obviously, a far cry from the relief the Plaintiffs request here, which is an



injunction that prevents the enforcement of a validly-enacted State statute, a statute which the Court has already ruled to pass constitutional muster regarding the sections at issue.

Unlike this case, the issue in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), was a *stay* pending appeal, not an injunction. The Court of Appeals reviewed the District Court's stay of its order granting a permanent injunction. Thus the stay was entered after a final decision on the merits, and did not involve the same party asking for the same relief (a preliminary injunction) twice, and claiming that losing once actually made their job easier.

Finally, in *Protect Our Water v. Flowers*, 377 F.Supp.2d 882 (E.D. Cal. 2004), while the District Court cited a relaxed sliding-scale standard when considering a motion for injunction pending appeal, the court denied the relief requested. *Id.* at 884-85. Whatever likelihood of success on the merits the plaintiffs were required to show, plaintiffs "specified neither any factual error nor any rationale for concluding that this court's determination was incorrect." *Id.* at 884. The plaintiffs also "made no stronger showing of irreparable harm" than they did during trial. *Id.* That is, they gave the District Court nothing new.

In short, the cases cited by the United States on this issue are distinguishable.

What Plaintiffs essentially assert is that a finding by a District Court that they are *not* entitled to a preliminary injunction actually makes it easier to get that precise relief. The standard for preliminary injunctive relief, before or after appeal, requires plaintiff to show “a substantial likelihood that they will prevail on the merits of the appeal.” *Touchston*, 234 F.3d at 1132. It makes no sense for an easier standard to apply to those found not to pass the test.

Either Plaintiffs are entitled to a preliminary injunction or they are not. After this Court spent months closely scrutinizing hundreds of pages of evidence and argument, the Court said “not” with respect to Sections 10, 12, 27, 28, and 30. That correct ruling does not entitle the Plaintiffs to the same relief on an easier standard.

**II. THE BALANCE OF EQUITIES DOES NOT WEIGH HEAVILY IN FAVOR OF PLAINTIFFS, AND, EVEN IF IT DID, PLAINTIFFS HAVE NOT MADE EVEN THE LESSER SHOWING OF “PATENT SUBSTANTIAL MERIT.”**

As discussed below, Plaintiffs’ motion is due to be denied because the balance of equities does not, in fact, weigh heavily in favor of granting them an injunction. This means Plaintiffs cannot benefit from the lesser standard of “patent substantial merit” in the first instance. (As discussed below, even if Plaintiffs could benefit from this lesser standard, their motion should still be denied because Plaintiffs have not shown that their case has “patent substantial merit.”)

The balance of the equities—factors 2, 3, and 4 of the injunction test outlined in *Touchston*—does not, in fact, weigh heavily in favor of granting Plaintiffs the injunction they seek. As outlined above, factors 2, 3, and 4 are: “(2) a substantial risk of irreparable injury to the [petitioners] unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest.” *Touchston*, 234 F.3d at 1132.

**A. There Is No Substantial Risk Of Irreparable Injury To Plaintiffs Absent An Injunction.**

Whatever standard applies, Plaintiffs must show that they will be irreparably harmed if the Court does not enter the preliminary injunction that this Court has already decided Plaintiffs are not entitled to receive. Plaintiffs have not met this burden, and certainly have not shown such an overwhelming balance of harm in their favor that would give them a free pass on the “likelihood of success” prong.

As a preliminary matter, it may be true that at the preliminary injunction stage, the State Defendants focused most of their arguments on the “likelihood of success on the merits” prong, not on whether Plaintiffs will face irreparable harm now that the contested provisions are in effect. (The State Defendants did dispute such harm at Doc. 82, pp. 107-113, 125-127, 141-150, and Doc. 115, pp. 2-6, incorporated herein by reference.). We certainly did not concede the point and dispute it here in greater detail.

## 1. Section 10

Section 10 makes it a crime for a person to be (1) “an alien unlawfully present in the United States” (as determined by federal officials pursuant to federal law) *and* (2) in violation of either 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a). This Court found that Section 10 does not criminalize mere unlawful presence (U.S. doc. 93 at 31) and that Section 10 is not preempted by federal law. Yet Plaintiffs argue they will be irreparably harmed if Alabama is permitted to prosecute them for something that is *already a federal crime*. That cannot be; any so-called harm can be avoided by complying with existing federal law.

Plaintiffs cite to their Motion for Preliminary Injunction (doc. 37) to show irreparable harm. That motion includes only conclusory allegations that they face a “risk of unconstitutional and extended detention while police officers investigate their immigration status” (doc. 37 at 71); a “risk of discriminatory treatment, unwarranted police scrutiny, prolonged detentions, and arrest every time they come into contact with Alabama law enforcement” (*id.*); a “very real threat of unlawful criminal prosecutions” (*id.* at 72); and that organizations are diverting resources to discuss the statute (*id.* at 77). The motion cites in turn to various declarations containing their own conclusory allegations.

We cannot, in the time permitted, go through every paragraph of every declaration cited by the Plaintiffs as “evidence” of irreparable harm. Quotes from

just a few of the paragraphs will show that this is not the quality of evidence that supports extraordinary relief:

- “[B]ecause I do not have a valid, unexpired driver’s license ... I am afraid that I could be subjected to extended interrogation and detention.” (Doc. 37-14 at 5). (*Conclusory*).
- “I also advise them to know all the risks under HB 56, including that they could be profiled and picked up by the police outside a roadblock ... or while walking down the street.” (Doc. 37-17 at 7). (*Conclusory*).
- “I do not believe that a law enforcement officer in Alabama would understand [that approval of an I-130 petition] means that the federal government is aware that I am in the country without lawful status and has elected not to remove me.” (Doc. 37-25 at 4). (*But Section 10 provides that unlawful presence is to be determined by federal officials and that “[a] law enforcement officer [of this state] shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.” (H.B. 56, §10(b))*).
- “If HB 56 goes into effect, I am afraid that I will be stopped and detained by the police because I cannot produce the kinds of identity documents specified in that law.” (Doc. 37-26 at 6). (*Such fear alone is not evidence of*

*irreparable harm, and there is no evidence that if such a stop does occur, that the stop will be unlawful or unreasonable.).*

- “I am very fearful that if HB 56 is implemented that I will be subject to interrogation and arrest by local law enforcement officers because I lack immigration status.” (Doc. 37-28 at 4). (*Again, plaintiffs present no evidence that such a stop would be unlawful or unreasonable, if it occurs.*).

As another example, John Doe #3 concedes that he is “not lawfully present in the United States.” (Doc. 37-33 at 3). He then says he is “afraid that if HB 56 goes into effect, I can be stopped by the police and detained for failing to provide any of the documents specified in that law.” (*Id.* at 5). There is no evidence that such a stop would be unlawful or unreasonable. And John Doe #3 is no more harmed by enforcement of §10 than he would be by enforcement of the federal laws linked to § 10 (which federal laws he is also violating).

The evidence cited in support of Plaintiffs’ argument that Section 10 will cause irreparable harm is simply a series of conclusory statements that people fear they will be injured. That is not sufficient to meet their burden.<sup>4</sup> *See e.g. Ne. Fla. Chapter of the Ass’n of Gen. Contractors of Am. v. City of Jacksonville, Florida*, 896 F.2d 1283, 1286 (11<sup>th</sup> Cir. 1990) (“Conjecture about a possibility of difficulties with damage computations is inadequate to support an injunction before trial.”);

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<sup>4</sup> This is true for the evidence cited with regard to Sections 12, 27, 28, and 30 as well, and this argument is asserted in opposition to their motion on all such sections.

*Windsor v. U.S.*, 379 Fed.Appx. 912, 916 (11<sup>th</sup> Cir. 2010) (“[T]he asserted irreparable injury must be neither remote nor speculative, but actual and imminent.”); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11<sup>th</sup> Cir. 2000) (“As we have emphasized on many occasions, the asserted irreparable injury must be neither remote nor speculative, but actual and imminent.”) (internal quotation marks and citation omitted).

In short, there is no harm in being prosecuted for something that is already a crime under federal law, and there is no evidence that any stops or investigations with respect to Section 10 will be unlawful or unreasonable. And in any event, the conclusory statements cited as evidence of harm are not sufficient to support a claim for extraordinary relief. Plaintiffs therefore have not shown that they will suffer irreparable harm if Section 10 goes into effect.

## **2. Section 12**

Section 12 “sets forth circumstances under which ... law enforcement officers must attempt to verify the citizenship and immigration status of persons detained or arrested.” (U.S. Doc. 93 at 52). This Court found that Section 12 is not preempted by federal law when State law enforcement is only called upon to cooperate with federal officials. (U.S. Doc. 93 at 68-70). This Court also found that Section 12 does not violate the Fourth Amendment on its face because it requires “only that the law enforcement officer make a ‘reasonable attempt ...

when practicable’ to verify the individual’s immigration or citizenship status.” (Doc. 137 at 75, 77, 79).

Plaintiffs cite generally to the same portions of their preliminary injunction briefing cited with respect to Section 10. John Doe # 4, for example, says that “[i]f HB 56 is implemented, the police could arrest me and hold me for federal immigration authorities. I fear detention and deportation because I understand that HB 56 would require police to arrest me and investigate my immigration status.” (Doc. 37-34 at 4). However, such an investigation will consist only of a “reasonable attempt ... when practicable.” (Doc. 137 at 75). There is no evidence that Section 12 will be mis-applied, and if applied correctly, there will be no violation of the Fourth Amendment by application of Section 12. In the event of a mis-application, such case is better suited, as this Court found, to an as-applied challenge.

Moreover, fears of unwarranted deportation are unfounded, because as this Court found, Section 12 requires that State and local officials *communicate* with the federal government, in certain circumstances, regarding the immigration and citizenship status; however, “[t]he statute does not require the federal government to act upon this information; therefore, the federal government still retains discretion as to whether it wishes to pursue those found to be unlawfully present.” (U.S. Doc. 93 at 68-69).



To the extent Plaintiffs claim that Section 12 will harm them because State officials will apply the statute incorrectly (and conduct unreasonable searches and seizures), those cases can be addressed, if they arise, in as-applied challenges. There is no *evidence* that any such case will occur. To the extent any person claims that he will be harmed by Section 12 because he is here unlawfully but has not been caught, and as a result of Section 12 he will come to the federal government's attention, then he is no more harmed by Section 12 than by the federal immigration laws he is already violating.

### **3. Section 27**

Section 27 provides that Alabama State courts are not to “enforce the terms of, or otherwise regard as valid, any contract between a party and an alien unlawfully present in the United States, if the party had direct or constructive knowledge that the alien was unlawfully present in the United States at the time the contract was entered into,” except in certain delineated circumstances. This Court noted that while Congress never expressed an intent that such contracts be unenforceable, it also never expressed an intent that they *must* be enforceable. (U.S. Doc. 93 at 102). Thus, “Federal immigration law does not prohibit Alabama from passing a law regarding the enforceability of contracts involving aliens unlawfully present in the United States.” (*Id.*). This Court also found that Plaintiffs’ claim under 42 U.S.C. § 1981 is not likely to prevail because that statute

“does not protect a person from discrimination on the basis of unlawful presence.”  
(Doc. 137 at 93).

Plaintiffs suggest that this Court has already found that plaintiffs will suffer a “real and imminent” injury if this law goes into effect. (Doc. 140 at 12). This Court’s statement was made, however, when assessing whether the allegations of the complaint were sufficient to find Article III standing. (Doc. 137 at 91). To have alleged a sufficient injury to demonstrate standing is not to have made a sufficient *showing* of harm to entitle Plaintiffs to extraordinary relief.

Plaintiffs’ harm must be, of course, *irreparable*. And the only harm at issue is what would occur during the time this appeal is pending. With that in mind, several factors limit any alleged harm that Plaintiffs might possibly suffer as a result of Section 27:

- Section 27 does not void any contract (or “strip” contract rights), but merely provides that a State Court may not enforce it.
- Section 27 does not apply to contracts for food or medical services. § 27(b)
- Section 27 does “not apply to a contract authorized by federal law.” § 27(c).
- Section 27 does not apply to any contract enforceable in federal court.
- Section 27 applies only when the contracting party has *actual or constructive knowledge* that the other party is unlawfully present, *at the time the contract is entered into*.

- Section 27 applies only to contracts that require the alien to remain in this country unlawfully for more than 24 hours.

Plaintiffs have not pointed to a specific contract affected by §27. Even if there is harm, the record does not support a conclusion that the harm is so great that the equities tilt heavily in favor of the Plaintiffs.

#### **4. Section 28**

Section 28 requires public elementary and secondary schools to request birth certificates from children at the time of enrollment. If that birth certificate shows that the student was born outside the United States, or if a birth certificate is unavailable, the student's parent or guardian is asked to notify the school within 30 days of the actual citizenship or immigration status of the student. Enrollment is a one-time event (doc. 137 at 98), and Section 28 does not require schools to investigate the immigration status of parents (U.S. doc. 93 at 106). Moreover, as emphasized at oral argument, Section 28 provides no enforcement mechanism in the event that a parent or guardian declines to provide the requested information. Finally, and most importantly, this data collection system does not prevent any child from enrolling in school. Former Superintendent Morton made it very clear that "No student shall be denied enrollment or admission to the school due to a failure to provide the birth certificate or other supplemental documentation described in this section." (Doc. 82-3 at 2; *see also id.* at 6; *id.* at 7).

This Court found that Section 28 is not preempted by federal law. (U.S. Doc. 93 at 109). This Court also found that no plaintiffs in the instant case had standing to raise an equal protection claim to Section 28. (Doc. 137 at 98).

The ruling on standing is dispositive of Plaintiffs' claim to have suffered irreparable harm. If there is no "real and concrete threat of injury fairly traceable to the enforcement of H.B. 56 § 28," doc. 137 at 99, there can be no irreparable harm. And this Court correctly found that an organization discussing the impact of the Act is not sufficient injury to convey standing. (Doc. 137 at 99-101).<sup>5</sup> For the same reasons, the organizations will not suffer irreparable harm as a result of the enforcement of Section 28.

Even if Plaintiffs had standing, they could not show sufficient harm to meet their burden here. Section 28 does not deny a free public education to anyone. It does not require that schools investigate the status of a student's parents. Any fear that implementation of Section 28 would lead to investigation of parents' status is not "well founded." (*See* Doc. 137 at 99).

## **5. Section 30**

Section 30 provides that "[a]n 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

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<sup>5</sup> Plaintiffs claim that declarations submitted with reply briefing shows that organizations have been damaged, but the quoted paragraphs still claim only that the organizations discussed the impact of Section 28. (Doc. 140 at 10). Plaintiffs have not shown that this Court's ruling on standing is in error.

political subdivision of the state.” H.B. 56 § 30(b). This Court determined that the provision applies to licenses, but not registration requirements. (Doc. 113 at 115; *id.* at n.25). Lawful presence may be shown through “verification of the alien’s lawful presence through the Systematic Alien Verification for Entitlements program operated by the Department of Homeland Security, or by other verification with the Department of Homeland Security pursuant to 8 U.S.C. § 1373(c).” H.B. 56 § 30(c).

This Court found that § 30 is not preempted by federal law. (U.S. Doc. 93 at 114). This Court also found that § 30 does not give rise to a claim under 42 U.S.C. § 1981, which does not preclude discrimination based upon illegal presence. (Doc. 137 at 105-106).

In an attempt to prove irreparable harm, Plaintiffs argue that “water companies have prepared policies to deny water service to people who cannot prove lawful status, and how probate offices will do the same.” (Doc. 140 at 15). They have not, however, shown that any such policy has been implemented or has affected these Plaintiffs.

Plaintiffs also argue that Jane Doe #1 and Jane Doe #2 – each awaiting a visa – may be denied water and sewer services “notwithstanding the fact that the federal government is aware that Jane Doe #’s 1 and 2 are in the United States and has elected not to remove them.” (Doc. 140 at 15). That assumes (without

evidence) that the State will enforce § 30 inconsistently with this Court's memorandum opinion.

Plaintiffs thus have not shown that they will be irreparably harmed by enforcement of § 30.

**B. There Is Substantial Harm to the State Defendants and to the Public Interest If Alabama's Validly Enacted Statutes Are Enjoined.**

The State Defendants and the public interest will both suffer substantial harm if Sections 10, 12, 27, 28 and 30 are enjoined. If these sections are enjoined, a valid enactment of the State of Alabama will not be recognized and enforced by the courts as embodying the will of the people. *See Atkin v. State of Kansas*, 191 U.S. 207, 223 (1903).<sup>6</sup>

When a State's validly enacted statutes are at stake, those enactments "should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." *Id.* Indeed, "the public interests imperatively demand" this result. *Id.*<sup>7</sup>

For this reason, "the harm which would result from an injunction barring enforcement of [Sections 10, 12, 27, 28, and 30 of H.B. 56] tips in favor of [State]

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<sup>6</sup> The State Defendants also rely upon the interests set forth in Section 2 of H.B. 56.

<sup>7</sup> As this Court has recognized, preliminary injunctions of legislative enactments "interfere with the democratic process." (Doc. 137 at 2, quoting *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Florida*, 896 F.2d 1283, 1285 (11<sup>th</sup> Cir. 1990)).

Defendants and the public, both of whom have an interest in noninterference by a federal court in a state's 'legislative enactments.'" *Reed v. Riley*, 2008 WL 3931612 \*3 (M.D. Ala. Aug. 25, 2008) (citing *Atkin*, 191 U.S. at 223). *See also* State Defendants' Response to Plaintiffs' Mot. for Prelim. Injunct. (Doc. 82) at 114, 127-28, 143-50 (public interest and equities); State Defendants' Supplemental Briefing Addressing Equal Protection Challenge (Doc. 115) at 2-6 (same).

The balance of the equities does not weigh heavily in favor of enjoining Sections 10, 12, 27, 28, and 30 of H.B. 56.

### **III. EVEN IF THE BALANCE OF THE EQUITIES WEIGHED HEAVILY IN FAVOR OF AN INJUNCTION (WHICH IT DOES NOT), PLAINTIFFS HAVE NOT MADE EVEN THE LESSER SHOWING OF A CASE WITH "PATENT SUBSTANTIAL MERIT."**

#### **A. Plaintiffs Cannot Show A Substantial Likelihood Of Success On The Merits.**

It is important to note as a preliminary matter that Plaintiffs cannot meet the actual test for the injunction they seek—a showing of substantial likelihood of success on the merits. The Court has already determined as much. Memorandum Opinion on Plaintiffs' Mot. for Prelim. Injunct. (Doc. 137) at 48, 56 (§10), 72, 76-79 (§12), 91-93 (§27), 98-101 (§28), 105-06 (§30); Order on Plaintiffs' Mot. for Prelim. Injunct. (Doc. 138) at 2.

Plaintiffs recognize this fact, as they must. (*See* Doc. 140 at 5 (Regarding Section 10, "this Court did not find that Plaintiffs were substantially likely to

prevail on this claim.”); 8 (same regarding Section 12); 13 (same regarding Section 27); 15 (same regarding Section 30)).

**B. Left To Argue The Lesser Standard Of “Patent Substantial Merit,” Plaintiffs Cannot Even Meet This Threshold.**

Plaintiffs fail to meet even the lesser showing of “patent substantial merit” under *Ruiz I* and *II*.

**1. Plaintiffs’ Preemption Claims Have No Merit.**

Plaintiffs argue that Sections 10, 12, 27, and 30 are preempted by federal law. (Doc. 140 at 5 (§10), 8 (§ 12), 13 (§ 27), and 15 (§ 30)). However, the Court has already found that Plaintiffs lose on these claims.

**a. Section 10**

Regarding Section 10, the Court found that “Congress has not ‘occupied the field’ of alien registration” and that, in any event, Section 10 does not interfere with the registration requirements under federal law. Opinion on U.S.’s Mot. for Prelim. Injunct. (U.S. Doc. 93) at 26-27 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Court therefore held that it “sees no reason why Alabama, pursuant to its dual sovereignty, cannot, consistent with the purposes of Congress, make violations of 8 U.S.C. §§ 1304(e) and 1306(a) by unlawfully present aliens, state crimes in Alabama.” (*Id.*) Plaintiffs’ observation that the court in *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), enjoined enforcement of an



Arizona state law provision similar to Section 10 does not change this fact. There is no reason why Alabama cannot so act pursuant to its dual sovereignty.

**b. Section 12**

Regarding Section 12, the Court “agree[d] that Congressional intent should be determined by the intent of Congress as found in 8 U.S.C. §§ 1357 and 1373(c).” The Court held that Congress intended for the States to cooperate with the federal government regarding enforcement of the immigration laws and that Section 12 was consistent with such cooperation. (U.S. Doc. 93 at 62-69). Indeed, Section 12 requires cooperation. (*Id.*) As with Plaintiffs’ observation regarding Section 10, Plaintiffs’ citation to the non-binding decisions of *Ga. Latino Alliance for Human Rights v. Deal*, Case No. 11-1804, 2011 U.S. Dist. LEXIS 69600 (N.D. Ga.) and *United States v. Arizona* do not change this fact.

**c. Section 27**

Regarding Section 27, which provides that State courts may not enforce certain contracts, the Court found that “[c]apacity to contract is typically understood as established by state law,” and, with regard to Congressional intent (the touchstone of preemption), “nothing shows Congress intended that such contracts would be enforceable.” (U.S. Doc. 93 at 101-02). On this basis, “[f]ederal immigration law does not prohibit Alabama from passing a law

regarding the enforceability of contracts involving aliens unlawfully present in the United States.” (*Id.* at 102.)

In their motion to enjoin, Plaintiffs argue that this Court is wrong and that they have proven a substantial case on the merits, and they cite to *Lozano v. Hazelton*, 496 F. Supp. 2d 477, 530, 33 (M.D. Pa. 2007) (enjoining ordinance placing restrictions on renting to undocumented individuals); *aff’d*, 620 F.3d 170, 219-24 (3d Cir. 2010), *vacated and remanded on other grounds*, No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011), and *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 855 (N.D. Tex. 2010) (invalidating ordinance placing restrictions on renting to undocumented individuals), *appeal docketed* No. 10-10751 (5th Cir. July 28, 2010).

*Lozano* cannot be cited for this purpose. The “other grounds” on which it was vacated and remanded was “for further consideration in light of *Chamber of Commerce of United States of America v. Whiting*, 563 U.S. ----, 131 S.Ct. 1968, 179 L.Ed.2d 1031 (2011).” *City of Hazelton, Pa. v. Lozano*, 131 S.Ct. 2958 (U.S. 2011) (Order granting petition for writ of certiorari). Of course, *Whiting* was the case where the Court *upheld* Arizona’s business license suspension and revocation statute regarding employers who hire unauthorized aliens. *Whiting*, 131 S.Ct. at 1987.

*Villas at Parkside* dealt with “a residential licensing scheme under which the City would revoke the authorization to occupy rental housing for individuals that the federal government determined to be ‘not lawfully present’ in the United States.” *Villas at Parkside*, 701 F. Supp. 2d at 838. The court took the view that this amounted to regulation of “purely private contracts,” and held that it amounted to “an impermissible regulation of immigration” because “[t]he federal government has not authorized or contemplated classification of aliens for that purpose.” *Id.* at 856, 860.

This Court has rejected that approach. Alabama is a dual sovereign and a court’s enforcement of contracts, what Section 27 actually deals with, is a matter of State law. (U.S. Doc. 93 at 25-27, 101-02).

#### **d. Section 30**

Regarding Section 30, the Court found that “Section 30 is intended to prohibit the state from issuing a license to an unlawfully-present alien,” and that there has been no showing that “Congress has – expressly or implicitly – preempted the power of the states to refuse to license an unlawfully-present alien.” *Id.* at 113-14. *See also Whiting*, 131 S.Ct. at 1987.

Plaintiffs argue that the Court’s interpretation of Section 30 is erroneous, and they again cite to *Lozano* and *Villas Parkside*. For the reasons these cases are unavailing with regard to Section 27, they are unavailing here.

## **2. Plaintiffs' Other Constitutional Claims Have No Merit.**

Plaintiffs do not raise them in their motion to enjoin, but in their motion for preliminary injunction, Plaintiffs raised constitutional claims based on provisions other than the Supremacy Clause, including the 4th Amendment, 6th Amendment, and 14th Amendment. However, the Court noted that these claims were facial challenges. A facial challenge is “the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” (Doc. 137 at 73 (internal quotation marks omitted) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987))). “For purposes [of] deciding a pre-enforcement facial challenge, a finding that some legitimate application of the statute is constitutional ends the court’s inquiry.” (*Id.* at 75 (citing *United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010))).

Regarding Sections 10, 12, 27, and 30, the Court found some legitimate application. (*Id.* at 52-53 (§ 10), 76, 79 (§ 12), 93 (§ 27), and 105-06 (§30)). The inquiry is ended. Plaintiffs’ citation to non-binding decisions of other courts is irrelevant.

## **3. The Court Has No Jurisdiction To Enjoin Section 28 Because Plaintiffs Have No Standing To Challenge It.**

With regard to Plaintiffs’ Section 28 claim, the Court has no jurisdiction to entertain Plaintiffs’ motion to enjoin enforcement of this section. “The court finds that plaintiffs do not have standing to challenge Section 28.” (Doc. 137 at 98.)

(*See also* Doc. 140 at 9 (“This Court found Plaintiffs did not have standing to challenge Section 28.”)). Standing “is jurisdictional and not subject to waiver.” *Lewis v. Casey*, 518 U.S. 343, 348-49, n. 1 (1996). Without standing, there is no jurisdiction to enter an injunction pending appeal. Therefore, Plaintiffs’ motion to enjoin must be denied on this basis.

### **CONCLUSION**

The State Defendants recognize that this is a complex case dealing with important issues. The importance of the case, however, is not one of the four factors involved in an injunction pending appeal. The only issues are whether the equities tilt heavily in Plaintiffs’ favor (they do not) and whether Plaintiffs have shown a substantial likelihood of success on the merits (they have not).<sup>8</sup>

For all these reasons, Plaintiffs’ Motion should be denied.<sup>9</sup>

Respectfully submitted,

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(ASB-0036-G42L)

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<sup>8</sup> The State Defendants also rely on their oppositions to the various motions for preliminary injunction entered in the three cases that were, at the time, consolidated, including Alabama and Governor Bentley’s Response to United States’ Motion for Preliminary Injunction (Doc. 110, dated August 15, 2011); State Defendants’ Response to Church Leaders’ Amended Motion for Preliminary Injunction and Memorandum in Support (Doc. 107, dated August 15, 2011); State Defendants’ Surreply Opposing the Church Leaders’ Motion for Preliminary Injunction (Doc. 117, dated August 22, 2011); State Defendants’ Response to Plaintiffs’ Motion for Preliminary Injunction and Memorandum in Support (Doc. 82, dated August 5, 2011); and State Defendants’ Supplemental Briefing Addressing Equal Protection Challenge (Doc. 115, dated August 20, 2011). All such filings are adopted and incorporated herein by reference.

<sup>9</sup> On October 2, 2011, Plaintiffs filed a Notice of Supplemental Evidence in support of their motion for an injunction pending appeal. (Doc. 143). The State Defendants have not had an opportunity to respond to the late filing but note that it does not change the analysis.

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I hereby certify that on October 3, 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 counsel of record:

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