Nos. 11-14535 and 11-14675

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

HISPANIC INTEREST COALITION OF ALABAMA, *et al.*,
Plaintiffs-Appellants/Cross-Appellees,

v.

ROBERT BENTLEY, *et al.*,
Defendants-Appellees/Cross-Appellants

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

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Since the Court heard oral argument on March 1, 2012, there have been two developments warranting supplemental briefing. First, on May 18, 2012, Governor Bentley signed H.B. 658 into law, which amends various sections of H.B. 56. None of the amendments cure the statute's constitutional defects. Second, on June 25, 2012, the U.S. Supreme Court decided *Arizona v. United States*, No. 11-182 (slip opinion available at www.supremecourt.gov/ opinions/11pdf/11-182b5e1.pdf), which reaffirms federal supremacy over immigration and makes even clearer that Alabama's H.B. 56 cannot stand.

The Supreme Court's decision in *Arizona* supports Plaintiffs' arguments in the instant case. First, the Supreme Court strongly refuted Arizona's state immigration policy of "attrition through enforcement," which also pervades Alabama's H.B. 56. *See Arizona*, slip op. 1; *see also* Ala. Code § 31-13-2 (policy of "discouraging illegal immigration"). Second, the Supreme Court held preempted three key provisions of Arizona's law: (1) an alien registration statute analogous to Section 10 of Alabama's H.B. 56; (2) a substantive criminal statute penalizing unauthorized employment or solicitation of employment, analogous to Section 11(a) of H.B. 56; and (3) a warrantless arrest provision that would have empowered Arizona officers to make arrests based on probable cause to believe that an individual had committed a "public offense" that made him or her deportable. And third, the Supreme Court reversed the lower court's order

enjoining Arizona's Section 2(B), which requires immigration status checks during stops and detentions, by finding that the United States had not presented sufficient evidence of a facial conflict with federal law or policy. The Court warned, however, that "it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision," and that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." *Arizona*, slip op. 22. The Court therefore held that Section 2(B) should not have been enjoined, and remanded to permit clarification by lower courts on the provision's meaning, and for consideration of other constitutional challenges to Section 2(B). *Id.* at 22-24.

The *Arizona* decision stands for the basic proposition that when a state enacts its own immigration policy—either by creating immigration crimes or by enforcing federal immigration laws in a manner not contemplated by Congress—it is preempted by federal law. The Supreme Court's decision makes clear that Alabama's Sections 10 (criminalizing failing to register) and 11(a) (criminalizing solicitation of work) must be enjoined, because they are indistinguishable from parts of the Arizona law the Supreme Court struck down. The *Arizona* decision also provides further support to maintain this Court's injunction of Section 28 because it functions as a de facto and impermissible alien registration scheme in conflict with federal law. Sections 12, 18 (as amended by H.B. 658) and 19 also

must be enjoined because, on the record in this case, they contravene the constitutional limits set in *Arizona v. United States*. While Sections 13, 27, and 30 have no exact analogues to Arizona's law, they are clearly invalid under the Court's analysis. Finally, the injunction of Section 8 should be remanded to the district court in light of H.B. 658's recent amendment of that section.

ARGUMENT

I. Section 10/Ala. Code § 31-13-10 is preempted.

Arizona requires reversal of the district court's denial of an injunction of Section 10. Section 10 creates a state crime for failing to carry registration papers, and is virtually identical to Section 3 of S.B. 1070. *Compare* Ala. Code § 31-13-10(a) *with* Ariz. Rev. Stat. § 13-1509(A) & (F). The Supreme Court found the Arizona provision to be field-preempted. *Arizona*, slip op. 8-11. The same result is required here. Because "Congress intended to preclude States from 'complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations'" related to alien registration, *id.* at 11 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66–67, 61 S.Ct. 399 (1941), alterations in original), Section 10 is preempted.

II. Section 11(a)/Ala. Code § 31-13-11(a) is preempted.

Arizona requires affirmance of the district court's injunction of Section 11(a). Section 11(a), which criminalizes seeking or engaging in work when a

person lacks federal work authorization, parallels Section 5(C) of S.B. 1070. *Compare* Ala. Code § 31-13-11(a) *with* Ariz. Rev. Stat. § 13-2928(C). The Supreme Court held that Arizona's provision conflicted with the Immigration Reform and Control Act of 1986 ("IRCA"), reasoning that a "[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy." *Arizona*, slip op. 15 (citation omitted, alterations in original). Section 11(a) likewise conflicts with IRCA, and is preempted.

III. Section 28/Ala. Code § 31-13-27 is preempted.

Section 28, which sets up a system to inquire into the immigration status of students and their parents when the students are enrolled in school, is unconstitutional because it is preempted as a regulation of immigration, conflicts with federal law, and violates the Equal Protection Clause. Blue Br. 44-64; Yellow Br. 32-41. The *Arizona* decision further supports enjoining Section 28 because it constitutes an impermissible "'additional or auxiliary regulation'" of immigration registration. Slip op. 11 (quoting *Hines*, 312 U.S. at 66-67, 61 S. Ct. 399).

Section 28 creates a de facto immigration registration process with which every immigrant child entering Alabama's public schools (and parent or guardian thereof) must comply. The data will be stored in a centralized database, along with other demographic information such as date of birth and home address. *See, e.g.*, Morton Mem. at *10 (Vol. II, R. 82-3) (providing screen shot of student

management system). Indeed, Section 28 not only intrudes into an area of federal dominance, but it also conflicts with the federal registration scheme by imposing requirements on children as young as those entering kindergarten, while the federal registration requirements explicitly exempt children under the age of 14. 8 U.S.C. § 1302(a). It also conflicts with § 1643(a)(2) by serving as a deterrent to enrollment. *See* Blue Br. 42, Yellow Br. 53-54.

Because Section 28 is designed to deter enrollment of children of immigrants through a de facto registration scheme, it intrudes into an area reserved by Congress, and therefore is preempted. *See Arizona*, slip op. 11.

IV. Section 12/Ala. Code § 31-13-12, Section 18 as amended by H.B. 658/Ala. Code § 32-6-9, and Section 19/Ala. Code § 31-13-18, are preempted.

Sections 12, 18, and 19 of H.B. 56 relate to circumstances where an officer must make inquiries into an individual's immigration status. H.B. 658 did not amend Section 12, but did amend Section 18 by eliminating subparts (b)-(d) and inserting a new subpart (b). *See* H.B. 658 (amending Ala. Code § 32-6-9). The elimination of Section 18(d) neither resolves nor moots any part of Plaintiffs' preemption claim however, for an identical provision appears in Section 19(b) of H.B. 56. *Compare* Ala. Code § 32-6-9(d) (2011) *with* § 31-13-18(b). *See Naturist Soc., Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992). Plaintiffs' briefing on identical language in Section 18(d) applies equally to Section 19(b). *See* Blue Br.

35; Yellow Br. 16.

As explained below, the Court should reverse the district court's denial of an injunction of Sections 12, 18, and 19 because these statutes authorize extended detention both after a person is determined to be an alien unlawfully present, and while that verification is occurring. This authorization directly conflicts with federal law and policies, as articulated in *Arizona*.

A. H.B. 56 requires extended detention after immigration status verification, which is preempted under *Arizona v. United States*.

The *Arizona* Court warned that "it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision." Slip op. 22. Section 19(b) violates this requirement. Where Alabama law enforcement has "determined" that an individual is "an alien unlawfully present," the individual must continue to "be detained until prosecution or until [the person is] handed over to federal immigration authorities." Ala. Code § 31-13-18(b). Thus, under Section 19's plain language, a person will be detained for an indeterminate period until the Alabama officer deems it sufficiently clear that she will not be prosecuted, and that federal authorities will not take her into custody. State Defendants appear to agree with this reading, based on their analysis of the identical Section 18(d) language. *See* Red Br. 26 ("So if authorities decline to prosecute the defendant and the federal government does not request the person's detention, Section 18[(d)]

envisions that person's immediate release.").

Because this provision requires holding noncitizens for as long as is necessary to determine if the federal government of whether it is interested in that individual, it runs afoul of the guidepost established in *Arizona*: state statutes may not authorize detention without "federal direction or supervision." *Arizona*, slip op. 22; *cf.* slip op. 19 (state officers generally "may not make warrantless arrests of aliens based on possible removability"). Section 19(b) is thus preempted.

B. H.B. 56 requires extended detention before immigration status is verified, which is preempted under *Arizona v. United States*.

Sections 12(a) and 18(b) (as amended by H.B. 658) also authorize extended detention, and are therefore preempted. Section 12(a) provides that a verification of immigration status must occur "where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States . . . ." Ala. Code § 31-13-12(a). Although the provision goes on to say that only "a reasonable attempt shall be made, when practicable," this language does not eliminate Section 12(a)'s clear mandate that officers must extend detention. In contrast, Section 12(b) specifically provides that if the "federal verification . . . is delayed beyond the time that the alien would otherwise be released from custody, the alien shall be released from custody." § 31-13-12(b). The lack of similar language in an adjacent subsection demonstrates that Section 12(a) cannot be read as anything other than a mandate to detain pending status verification. The natural reading of

the phrase "a reasonable attempt shall be made, when practicable" is that the officer is authorized to hold the suspect for as long as is necessary to complete the inquiry, absent some exigent circumstance that makes completion of the status check impracticable.

Section 12 also lacks a "limit" the Supreme Court found noteworthy in *Arizona*: the requirement that the provisions "'be implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.'" Slip op. at 20 (quoting Ariz. Rev. Stat. § 11-1051(L)).

Moreover, Section 12(a) must be read in the context of the rest of the statute. In particular, Section 6 prohibits law enforcement agencies from adopting any "policy or practice that limits or restricts the enforcement of this act to less than the full extent permitted by this act." § 31-13-6(a). Agencies that fail to comply face civil fines, and individuals who fail to report violations face criminal prosecution. § 31-13-6(d), (f). These full-enforcement provisions require local police to do all they can to "discourage illegal immigration," § 31-13-2, including awaiting a verification before releasing somebody they suspect of being undocumented.

The above analysis applies equally to Section 18, as amended by H.B. 658. Indeed, Section 18 specifically authorizes checks to be commenced "within 48 hours." § 32-6-9(b) (as amended by H.B. 658). On its face, Section 18 authorizes

detention for up to 48 hours before an immigration status check is even initiated, in addition to the period of detention while the check is pending.

The language of Sections 12(a) and 18(b) clearly authorizes Alabama officers to "hold[] aliens in custody for possible unlawful presence," and are therefore preempted. *Arizona*, slip op. 22. However, in the alternative, if the Court determines that it cannot definitively conclude whether Sections 12(a) and the new 18(b) authorize prolonged detention solely to determine status, Plaintiffs would suggest it certify this issue to the Alabama Supreme Court. *See* Ala. R. App. Proc. 18. Suggested questions are attached as Exhibit A.

V. Section 13/Ala. Code § 31-13-13, as amended by H.B. 658, is preempted.

Section 13, criminalizing harboring, transporting, and inducing/encouraging the presence of certain noncitizens, was amended by H.B. 658 in several ways. However, these amendments do not eliminate Section 13's "objectionable features," and so Plaintiffs' claims are not moot. *Naturist Soc.*, 958 F.2d at 1520. First, H.B. 658 moves subpart (a)(4), expanding the definition of "harbor" to include the act of "entering into a rental agreement," to a new section of the Alabama Code. *Compare* Ala. Code § 31-13-13(a)(4) (2011) *with* H.B. 658 § 6. Because the text of H.B. 658 § 6 is identical to the original Section 13(a)(4), its relocation does not moot Plaintiffs' claim that that it is preempted. Indeed, the parties have stipulated that the injunction entered by the district court against

Section 13(a)(4) applies to H.B. 658 § 6. *See* Joint Stip., attached as Exhibit B.

H.B. 658 also added a narrow religious exemption, rearranged wording in subpart (a)(1), added text to subparts (a)(1)-(3) stating these provisions "shall be interpreted consistent with 8 U.S.C. § 1324(a)(1)(A)," and lowered the threshold for a crime to be classified as a felony. *See* Ala. Code § 31-13-13(a), (c) (as amended by H.B. 658). These amendments also do not affect the legal analysis.

Section 13 still contemplates crimes never envisioned in the federal harboring statute, 8 U.S.C. § 1324. These new crimes include: (i) inducing, enticing, or assisting undocumented immigrants to enter the state, Ala. Code § 31-13-13(a)(2); (ii) criminalizing conspiracy for all crimes created by Section 13, and for transporting specifically, §§ 31-13-13(a)(3) (conspiracy to transport); 31-13-24 (omnibus conspiracy provision); and (iii) expanding the act of harboring to include renting, H.B. 658 § 6. Furthermore, the criminal penalties of Section 13 do not correspond to the federal statute and can result in harsher sentences. *Compare* Ala. Code §§ 13-13-13(c) (as amended by H.B. 658) (class C felony to, *inter alia*, transport more than five individuals); 13A-5-6 (punishable up to ten years) *with* 8 U.S.C. § 1324(a)(1)(B) (establishing graduated penalties based on conduct and harm, with baseline sentence of at most five years for transporting). These conflicts create an impermissible "obstacle to the full purposes and objectives of Congress." *Arizona*, slip op. 19.

Furthermore, Section 13 would be preempted even if it were identical to 8 U.S.C. § 1324, because it vests prosecutorial authority in the hands of state prosecutors, something Congress never intended. *See* 8 U.S.C. § 1324(c). Section 1324 is part of a federal scheme "so pervasive that it left no room in this area for the state to supplement it." *United States v. South Carolina*, Nos. 11-2958,11-2779, 2011 WL 6973241 at *13 (D.S.C. Dec. 22, 2011). "Were [Section 13] to come into force, the State would have the power to bring criminal charges against individuals suspected of harboring or transporting, even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona*, slip op. 11. Such auxiliary enforcement to a comprehensive scheme is preempted. *Id.*

VI. Section 27/Ala. Code § 31-13-26, as amended by H.B. 658, is preempted.

Section 27, limiting the ability of certain noncitizens to enforce contracts, was amended by H.B. 658 to make it prospective only and to exempt contracts related to "appointment or retention of legal counsel in legal matters." Ala. Code § 31-13-26(c) (as amended by H.B. 658). This does not alleviate the "objectionable features" of Section 27, and therefore the amendment does not moot Plaintiffs' claims. *See Naturist Soc.*, 958 F.2d at 1520.

The *Arizona* decision establishes that the district court's denial of an injunction must be reversed, because Section 27 conflicts with federal immigration

policy and control over foreign relations. As the Supreme Court reaffirmed, the federal government's control over immigration policy necessarily involves the exercise of discretion and balancing, to enable the federal government to address perceptions that foreign nationals are not being treated fairly under our nation's laws. *See Arizona*, slip op. 3. Thus "the removal process is entrusted to the discretion of the Federal Government," which has the authority to account for "immediate human concerns," such as prioritizing the removal of "alien smugglers or aliens who commit a serious crime" over "[u]nauthorized workers trying to support their families." *Id.* at 18, 4. Congress clearly has contemplated that noncitizens—even those in removal proceedings—will be able to live in the community. *See, e.g.*, 8 C.F.R. § 1003.19 (authorizing immigration judge to review bond determinations). Section 27 intentionally interferes with that federal law and policy by fundamentally undercutting the ability of certain immigrants to live in Alabama.

More broadly, *Arizona* reaffirms that federal immigration enforcement is a complex undertaking, and the fact that a person is undocumented today does not mean that she will remain so, nor that she will be removed in the future. *See Plyler v. Doe*, 457 U.S. 202, 226, 102 S. Ct. 2382 (1982); *see also* DHS, *Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities*, *available at* http://www.dhs.gov/ynews/releases/

20120612-napolitano-announces-deferred-action-process-for-young-people.shtm (June 15, 2012). Section 27 contravenes that federal principle, expressly aiming to impose harsh living conditions and penalties in order to achieve the expulsion of undocumented immigrants by largely stripping them of the right to contract. Section 27 intentionally ignores the complexity of federal removal procedures by assuming every person who is undocumented will be immediately removed, and it also undermines the ability of the federal government to act as the nation's voice on immigration policy related to "perceived mistreatment of aliens in the United States." *Arizona*, slip op. 3. Section 27 is therefore preempted.

VII. Section 30/Ala. Code § 31-13-29, as amended by H.B. 658, is preempted.

Section 30, which criminalizes an attempt by some noncitizens to engage in certain transactions with government entities, was amended by H.B. 658. These amendments have been addressed already in the State Defendants' motion to dissolve this Court's injunction pending appeal of Section 30 (filed May 24, 2012); the HICA Plaintiff's response (filed June 6, 2012); the United States' response (filed June 7, 2012); and the State Defendants' reply (filed June 7, 2012). As that briefing explains, the amendment "leaves objectionable features of the prior law substantially undisturbed," and Plaintiffs' preemption claim against Section 30 is not moot. *Naturist Soc.*, 958 F.2d at 1520.

The *Arizona* opinion makes it even clearer that Section 30 is preempted.

Section 30 makes it a class C felony for any "alien not lawfully present" to request a motor vehicle license plate, driver's license or nondriver identification card, a business license, a commercial license, or a professional license. Ala. Code § 31-13-29(a) & (d) (as amended by H.B. 658). There is "no federal counterpart" to these new state immigration crimes. *Arizona*, slip op. 12. Indeed, while the State points to federal statutes authorizing the denial of some types of public benefits to immigrants who are not qualified, *see* Red Br. 32, Congress has never provided that states may *criminalize* merely asking a government agency for such documents.[1] Section 30 therefore would upset Congress's calibration of penalties. Because Section 30 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it is preempted. *Arizona*, slip op. 14-15 (quotation omitted).

VIII. Section 8/Ala. Code § 31-13-8, as amended by H.B. 658, should be remanded for further consideration by the district court.

H.B. 658 amends Section 8—which limits access to postsecondary institutions for certain immigrants—by deleting the second sentence that factored into the district court's injunction. *See HICA v. Bentley*, No. 11-2484, 2011 WL 5516953, at *20-24 (N.D. Ala. Sept. 28, 2011). State Defendants have moved the

[1] In addition to the conflict over creating a new state immigration crime, Section 30 further conflicts with the federal scheme by targeting business licenses and license plates. Federal law does not authorize denying these items. Indeed, 8 U.S.C. § 1621(c) classifies "professional" and "commercial" licenses as a state or local public benefit which may be denied, but is silent regarding business licenses.

district court to lift its injunction on Section 8, which Plaintiffs have opposed. The motion remains pending, and the filings are attached as Exhibits C, D, and E.

As Plaintiffs explained to the district court, regardless of the change effected by H.B. 658, the State currently has no way to obtain federal verification of students' "lawful presence," meaning that the implementation of Section 8 inevitably would require the State to make its own impermissible immigration status determinations. *See* Ex. D. Moreover, there is no federal standard defining "not lawfully present" for purposes of determining eligibility to enroll in postsecondary institutions.[2] Accordingly, H.B. 658 "leaves objectionable features of the prior law substantially undisturbed," and is not moot. *Naturist Soc.*, 958 F.2d at 1520. Plaintiffs respectfully submit that this Court should leave the injunction in place but dismiss the appeal of Section 8 and remand with instructions for the district court to resolve State Defendants' pending motion, since Plaintiffs' opposition to dissolution is based, in part, on new evidence not previously before that court. *See* Ex. D; *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1352 (11th Cir. 2011) (remanding for district court to determine whether to lift injunction under voluntary cessation theory, which is a "fact-intensive inquir[y]").

[2] The district court declined to grant an injunction on this basis, *HICA*, 2011 WL 5516953, at *17-19, but the claim has not been dismissed.

Dated: July 6, 2012

Respectfully submitted,

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Exhibit A

Proposed Questions for Certification to
Alabama Supreme Court

Submitted in Support of
HICA Plaintiffs' Response to
June 25, 2012, Order

PROPOSED QUESTIONS FOR CERTIFICATION

If this Court decides to certify questions to the Alabama Supreme Court regarding Sections 12, 18, and 19 of H.B. 56, Plaintiffs respectfully propose the following:

> (1) Does Ala. Code § 31-13-12 authorize law enforcement officers to detain an individual, including by extending an individual's detention beyond the point he or she would otherwise be released, in order to determine the individual's immigration status?
>
> (2) Does Ala. Code § 32-6-9, as amended by H.B. 658, authorize law enforcement officers to detain an individual, including by extending an individual's detention beyond the point he or she would otherwise be released, in order to determine the individual's immigration status?
>
> (3) Does Ala. Code § 31-13-18 authorize law enforcement officers to detain an individual, including by extending an individual's detention beyond the point he or she would otherwise be released, based on a "determination" that the individual is an "alien unlawfully present"?

Exhibit B

Joint Stipulation as to Applicability Of Preliminary Injunction to Section 6 of H.B. 658, *HICA v. Bentley*, No. 11-2746 (N.D. Ala. filed May 23, 2012)

Submitted in Support of HICA Plaintiffs' Response to June 25, 2012, Order

FILED
2012 May-23 AM 11:26
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

HISPANIC INTEREST COALITION OF ALABAMA; *et al.*,	)	
Plaintiffs,	)	
vs.	)	Case Number:
ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; *et al.*,	)	5:11-cv-02484-SLB
Defendants.	)	

UNITED STATES OF AMERICA,	)	
Plaintiffs,	)	
vs.	)	Case Numbers:
STATE OF ALABAMA; and GOVERNOR ROBERT J. BENTLEY,	)	2:11-cv-02746-SLB
Defendants.	)	

JOINT STIPULATION AS TO APPLICABILITY OF PRELIMINARY INUNCTION TO SECTION 6 OF H.B. 658

Come now Plaintiffs Hispanic Interest Coalition of Alabama, *et al.* ("HICA Plaintiffs") in Case No. 5:11-cv-02484, Plaintiffs United States of America ("USA Plaintiff") in Case No. 2:11-cv-2746, and Defendants the State of Alabama, Governor Robert Bentley, Attorney General Luther Strange, Superintendent Tommy Bice, Chancellor Freida Hill, and District Attorney Robert L. Broussard

(collectively, "State Defendants") in both actions, to jointly stipulate that the parties agree that the preliminary injunction (hereinafter "the Preliminary Injunction") issued September 28, 2011, in case No. 2:11-cv-02746-SLB,[1] applies to Section 6 of H.B. 658, 2012 Regular Session (which was signed into law and became effective on May 18, 2012) at this time. As a basis for this joint stipulation, the parties state as follows:

1. This litigation involves a challenge to H.B. 56, which was passed by the Alabama Legislature in 2011. After hearings on motions for preliminary injunction brought by HICA Plaintiffs and the USA Plaintiff, the Court preliminarily enjoined some but not all of the provisions of H.B. 56 on September 28, 2011. One of the provisions preliminarily enjoined was Section 13 of H.B. 56, codified at Section 31-13-13 of the Alabama Code, which makes it a crime to, among other things, "[h]arbor an alien unlawfully present in the United States by entering into a rental agreement, as defined by Section 35-9A-141, with an alien to provide accommodations, if the person knows or recklessly disregards the fact that the alien is unlawfully present in the United States." Ala. Code 31-13-13(a)(4); s*ee*

[1] Case No. 2:11-cv-02746-SLB is the case in which the United States of America is a plaintiff. In case no. 5:11-cv-02484-SLB, the Hispanic Interest Coalition of Alabama (HICA) and other private plaintiffs similarly moved to enjoin section 13, but the HICA Plaintiffs' motion was denied as moot following the entry of the injunction in case no. 5:11-cv-02746-SLB.

United States v. Alabama, 813 F. Supp. 2d 1282, 1336, 1328-37 (N. D. Ala. 2011) (preliminarily enjoining Section 13).

2. Defendants appealed, *inter alia*, the Court's ruling preliminarily enjoining Section 13 of H.B., and the appeal remains pending in the Eleventh Circuit.

3. On May 16, 2012, the Alabama Legislature passed legislation amending some of the provisions it originally had enacted into law through H.B. 56. This new Act, originally denominated H.B. 658 at its introduction in the Legislature, became law on May 18, 2012. Of particular relevance to this filing[2] is Section 6 of H.B. 658, which is identical in all material respects to Section 13(a)(4) of H.B. 56. Section 6 of H.B. 658 reads as follows:

> Section 6. Notwithstanding any other provision of law to the contrary, it shall be unlawful for a person to harbor an alien unlawfully present in the United States by entering into a rental agreement, as defined by Section 35-9A-141, with an alien to provide accommodations, if the person knows or recklessly disregards the fact that the alien is unlawfully present in the United States.

H.B. 658 § 6 (attached as Ex. A, pgs. 57-58). H.B. 658, including Section 6, went into effect immediately upon the signature of the Governor. *See id.* § 10 (Ex. A at p. 59).

[2] H.B. 658 made numerous other modifications to H.B. 56. This filing relates to Section 6 of H.B. 658 only, because of Plaintiffs' time-sensitive need for confirmation that Defendants agree that the Preliminary Injunction applies to Section 6 of H.B. 658. The parties seek to reserve the right to submit additional filings related to the impact of other aspects of H.B. 658 on this litigation.

4. Without conceding any issues arising from the Preliminary Injunction, and without Defendants waiving any objection to the validity of that Preliminary Injunction as it relates to Section 13(a)(4) of H.B. 56 or otherwise, all parties take the position that the Preliminary Injunction entered by the District Court on September 28, 2011, nominally applying to Section 13(a)(4) of H.B. 56, applies with equal force to Section 6 of H.B. 658.

5. Because of their understanding of the applicability of the Preliminary Injunction to Section 6 of H.B. 658, the Defendants stipulate that the Preliminary Injunction enjoins them from enforcing Section 6 of H.B. 658, unless and until the Preliminary Injunction is vacated or otherwise modified by this Court or another court as it relates to criminalizing the act of "entering into a rental agreement, as defined by Section 35-9A-141, with an alien to provide accommodations, if the person knows or recklessly disregards the fact that the alien is unlawfully present in the United States." However, by so stipulating, Defendants expressly preserve, and do not waive, any and all of their objections to original entry of the Preliminary Injunction and their appeal of that aspect of the order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2012, I have electronically filed the foregoing using the Court's CM/ECF system, which will send notice of such filing to all counsel of record.

__/s/ Samuel L. Brooke_____
Counsel for HICA Plaintiffs

Exhibit C

State Defendants' Motion for Dissolution of the Preliminary Injunction Against Section 8 of Act No. 2011-535 Based on Changed Circumstances, or in the Alternative, Motion to Stay the Injunction, *HICA v. Bentley*, No. 11-2746 (N.D. Ala. filed May 24, 2012)

Submitted in Support of HICA Plaintiffs' Response to June 25, 2012, Order

FILED
2012 May-24 AM 11:37
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

HISPANIC INTEREST COALITION OF ALABAMA; *et al.*,	)	
Plaintiffs,	)	
vs.	)	Case Number: 5:11-cv-02484-SLB
	)	TIME SENSITIVE
ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; *et al.*,	)	OPPOSED
Defendants.	)	

STATE DEFENDANTS' MOTION FOR DISSOLUTION OF THE PRELIMINARY INJUNCTION AGAINST SECTION 8 OF ACT NO. 2011-535 BASED ON CHANGED CIRCUMSTANCES, OR IN THE ALTERNATIVE, MOTION TO STAY THE INJUNCTION

Defendants Governor Robert Bentley, Attorney General Luther Strange, Superintendent Dr. Thomas R. Bice, Interim Chancellor Susan Price, and District Attorney Robert L. Broussard, sued in their official capacities ("State Defendants"), request that the Court dissolve its injunction of September 28, 2011 against Section 8 of Act No. 2011-535 (doc. 138, ¶¶ 1-2), as the basis for the Court's injunction – the second sentence of Section 8 – has been removed by Act No. 2012-491, which is attached as Exhibit A.[1] In the alternative, the State

[1] Superintendent Dr. Thomas R. Bice and Interim Chancellor Susan Price are substituted as named defendants for their predecessors by operation of law. *See* Fed. R. Civ. P. 25(d).

Defendants request that the Court stay th e injunction against Section 8 while the appeal remains pending.

1. Undersigned counsel contacted opposing counsel to determ ine whether counsel will oppose the motion, and understand that opposing counsel are opposed to the motion.

2. Plaintiffs instit uted this actio n on July 8, 2011, seeking inj unctive relief against enforc ement of Act No . 2011-535, also known as the Beason-Hammon Alabama Taxpayer and C itizen Protection Act, or H.B. 56. On July 21, 2011, Plaintiffs fi led a m otion for preliminar y injunction. O ne of t he sections of the Act Plaintiffs sought t o enjoin was S ection 8, the central provisi on of which stated that "[a]n alien who is not lawfull y present in the United States shall not be permitted to enroll in or a ttend any public postsecondary education institution" in Alabama. *See* doc. 37 (Plaintiffs' Mot. for Pre lim. Inj.) at 55-57; Act No. 2011-535, § 8.[2]

3. In its Opinion dated Septembe r 28, 2011, that accom panied the Preliminary-Injunction Order, the Court recognized that Alabam a could exclude unlawfully present aliens from enrolling in and attending the State's postsecondary public education institutions, consistent w ith federal law. The Court noted that

[2] Citations to documents filed with the Court are to docket entries as "Doc . __", and citations to page num bers for such docum ents are to th e page numbers electronically printed on the document by the CM/ECF system.

"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. *See Equal Access Education v. Merten*, 305 F. Supp. 2d at 601-08." Doc. 137 (Opinion) at 44 n. 13.

4. What Alabama could not do "without conflicting with federal law," according to the Court, was "exclude unlawfully-present aliens from its postsecondary institutions if its definition of unlawfully-present aliens conflicts with Congress's definition." *Id.* The Court read the second sentence of Section 8 – "An alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq." – as conflicting with Congress's definition for unlawfully present aliens, and therefore preempted. *Id.* at 43-44 ("Section 8 closes Alabama's public postsecondary institutions to aliens who are not lawfully present in the United States ***and*** to lawfully-present aliens who do not have lawful permanent resident status or a nonimmigration visa. This 'classification' of aliens for purposes of determining who is eligible to attend Alabama's public postsecondary institutions is preempted as only Congress may classify aliens. Therefore, Section 8 is preempted.") (emphasis in original).

5. On this preemption basis, the Court enjoined enforcement of Section 8 in its entirety. Doc. 138, ¶¶ 1-2 (Preliminary-Injunction Order). The State

Defendants appealed that order, arguing that at most, the Court should have simply enjoined the problematic sentence, not the entire Section.

6. Section 8 of Act No. 2011-535 was codified as Ala. Code § 31-13-8. That Section of the Code was amended by Act No. 2012-491, which passed the Legislature on May 16, 2012, and was signed by the Governor on May 18, 2012. Act 2012-491 became effective immediately upon approval by the Governor on May 18, 2012. *See* Act No. 2012-491, § 10 ("This act shall become effective immediately following its passage and approval by the Governor, or its otherwise becoming law.").

7. Section 1 of Act No. 2012-491 amended Ala. Code § 31-13-8 (Section 8 of Act No. 2011-535 as codified) by removing the second sentence – "An alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq."

8. As the basis of the Court's injunction against Section 8 was the second sentence, which the Court read to be a state "classification" of aliens preempted by Congress's classifications, and as that second sentence has been removed by Act No. 2012-491, the basis for the Court's injunction against Section 8 no longer exists.

9. As the Court has already determined 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 at 44 n. 13, and as that is all Section 8 (codified at Ala. Code § 31-13-8), as amended by Act No. 2012-491, currently does, the injunction against Section 8 is due to be dissolved. *See* doc. 137 at 36 (quoting Section 8) ("For the purposes of this section, a public postsecondary education institution officer may seek federal verification of an alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A public postsecondary education institution officer or official shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States."); Act No. 2012-491, § 1 (retaining this provision).

10. This Court's Preliminary-Injunction Order is on appeal. *See* docs. 149 (Plaintiffs' Amended Notice of Interlocutory Appeal) and 150 (State Defendants' Notice of Cross-Appeal). However, pursuant to Federal Rule of Civil Procedure 62(c), this Court may modify its Preliminary-Injunction Order. Fed. R. Civ. P. 62(c) ("While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights."). *See also Decatur Liquors, Inc. v. District of Columbia*,

2005 WL 607881, *2 (D.D.C. March 16, 2005) (a district court "may properly entertain a motion to dissolve an interlocutory order that has been appealed" when there is a "change in circumstances").

11. This Court may prefer to stay the Preliminary-Injunction Order with respect to Section 8 pending appeal, and to issue an order informing the Eleventh Circuit that in light of the amendment, upon remand this Court would dissolve the Preliminary Injunction against Section 8. *See Wyatt by and through Rawlins v. Rogers*, 92 F.3d 1074, 1080, n. 14 (11th Cir. 1996) (district court stayed the preliminary injunction because it found the need for the preliminary injunction was moot, and it informed the court of appeals that upon remand it would dissolve the preliminary injunction).

12. A similar procedure, often called an indicative ruling, is embodied in Federal Rule of Civil Procedure 62.1, which provides that "[i]f a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending," the district court may "(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." Fed. R. Civ. P. 62.1(a). "The district court may decide the motion if the court of appeals remands for that purpose." Fed. R. Civ. P. 62.1(c). Under Eleventh Circuit Rule 12.1-1(c), "[i]f the motion filed in the district court requests substantive relief from the order or judgment under appeal, such as a

motion to modify a preliminary injunction . . .," and if "the district court determines that the motion should be granted, the district court should enter an order stating that it intends to grant the motion if [the court of appeals] returns jurisdiction to it." 11th Cir. R. 12.1-1(c)(2). The Eleventh Circuit then may decide to remand the case for the district court to enter an order granting the motion. *Id.*

13. The equities favor dissolution, as enforcement of the State's validly enacted statutes is at stake. Such statutes "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." *Atkin v. Kansas*, 191 U.S. 207, 223 (1903). Indeed, "the public interests imperatively demand" this result. *Id.* For this reason, "the harm which would result" from a continued injunction barring enforcement of Section 8 "tips in favor of [State] 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).

WHEREFORE, the State Defendants respectfully request that the Court dissolve its Preliminary Injunction of September 28, 2011 against Section 8 of Act No. 2011-535, codified at Ala. Code § 31-13-8, (doc. 138, ¶¶ 1-2). In the alternative, the State Defendants request that the Court stay the Preliminary-

Injunction Order with respect to Section 8 pending the appeal, and to issue an order with an indicative ruling inform ing the El eventh Circuit that upon remand this Court would dissolve the Preliminary Injunction against Section 8.

Respectfully submitted,

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Exhibit D

Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Dissolution of the Preliminary Injunction Against Section 8 of Act No. 2011-535 Based on Changed Circumstances, or in the Alternative, Motion to Stay the Injunction, *HICA v. Bentley*, No. 11-2746 (N.D. Ala. filed June 7, 2012)

Submitted in Support of
HICA Plaintiffs' Response to
June 25, 2012, Order

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

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

HISPANIC INTEREST COALITION OF ALABAMA, et al., Plaintiffs,	)	
vs.	)	Case No. 5:11-cv-02484-SLB
GOVERNOR ROBERT BENTLEY, et al., Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR DISSOLUTION OF THE PRELIMINARY INJUNCTION AGAINST SECTION 8 OF ACT NO. 2011-535 BASED ON CHANGED CIRCUMSTANCES, OR IN THE ALTERNATIVE MOTION TO STAY THE INJUNCTION

Plaintiffs oppose State Defendants'[1] Motion for Dissolution of the Preliminary Injunction Against Section 8 of Act No. 2011-535 Based on Changed Circumstances, or in the Alternative, Motion to Stay the Injunction (Doc. No. 159). State Defendants' Motion seeks to have the Court lift the preliminary injunction enjoining Section 8 of H.B. 56, granted on September 28, 2011, or, in the alternative, to stay the injunction. Plaintiffs oppose this motion because the Court lacks jurisdiction to dissolve the injunction since Section 8 is under active review

[1] The motion was filed by Defendants Governor Robert Bentley, Attorney General Luther Strange, Superintendent Dr. Thomas R. Bice, Interim Chancellor Susan Price, and District Attorney Robert L. Broussard. They are referred to collectively as "State Defendants."

by the Court of Appeals for the Eleventh Circuit, which held oral arguments on March 1, 2012.[2] Staying the injunction would also be inappropriate because the amendments to Section 8 do not eliminate constitutional questions presented by Section 8. Finally, it would be improper to issue an indicative ruling pursuant to Federal Rule of Civil Procedure 62.1 at this time.

I. BACKGROUND

Section 8 of H.B. 56, which is codified as Section 31-13-8 of the Alabama Code, prohibits certain categories of immigrants from enrolling in or attending Alabama public postsecondary institutions. Section 8 originally stated as follows:

> An 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 this state. An alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq. For the purposes of this section, a public postsecondary education institution officer may seek federal verification of an alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A public postsecondary education institution officer or official shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States. Except as otherwise provided by law, an alien who is not lawfully present in the United States shall not be eligible for any postsecondary education benefit, including but not limited to, scholarships, grants, or financial aid.

[2] During oral argument, the Court of Appeals stated that it likely would wait to rule on the appeal until the Supreme Court issues a decision in *Arizona v. United States*, No. 11-182 (U.S. 2012), which is expected by or before the end of the Supreme Court's term on June 25, 2012. *See* Samuel Brooke Decl. ¶ 13.

Ala. Code § 31-13-8 (2011). This Court preliminarily enjoined Section 8 on September 28, 2011, finding that Section 8 constituted an impermissible state-based classification of alienage. *Hispanic Interest Coal. of Ala. v. Bentley* ("*HICA*"), No. 5:11-CV-2484-SLB, 2011 WL 5516953, at *19-24 (N.D. Ala. Sept. 28, 2011). State Defendants appealed this ruling. *See* State Defs.' Notice of Cross-Appeal (Doc. No. 150). Argument was heard on March 1, 2012, and the appeal remains pending at the Eleventh Circuit.

Subsequent to the preliminary injunction order, Governor Bentley signed into law a new provision, Act 2012-491 ("H.B. 658"), on May 18, 2012. This new law amended Section 8 by eliminating the section's second sentence, which originally read as follows: "An alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et. seq." *See* Act 2012-491 § 1 (Doc. No. 159-1 at 18-19[3]). H.B. 658 left the rest of Section 8 unchanged. The change to Section 8 went into effect immediately upon signature of Governor Bentley. Act 2012-491 § 10 (Doc. No. 159-1 at 63).

In their motion, State Defendants assert that the elimination of the second sentence of Section 8 ensures that college enrollees and applicants will not be

[3] Page references to docket entries refer to the page reference of the PDF header assigned through the CM-ECF system, which is not necessarily the same page number that appears in the actual document.

subjected to an impermissible state-created immigration classifications when Section 8 is enforced. *See* State Defs.' Mot. at 3-5 (Doc. 159). As a result, State Defendants now seek to have the injunction of Section 8 dissolved pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, or alternatively, to have it stayed while an indicative ruling is issued pursuant to Rule 62.1. *Id.* at 5-8. Plaintiffs herein oppose these requests.

II. ARGUMENT

State Defendants' motion should be denied. The Court is currently divested of jurisdiction over Section 8, which is on appeal before the Eleventh Circuit Court of Appeals. As such, the Court lacks jurisdiction to dissolve the injunction. Furthermore, a stay of the injunction under Rule 62(c) would be imprudent at this stage because the state-created classification issues are not resolved by eliminating the second sentence of Section 8. For the same reason, and for reasons of judicial economy, Plaintiffs submit the Court should not issue an indicative ruling under Rule 62.1 at this time.

A. The Court Lacks Jurisdiction to Dissolve its Section 8 Injunction.

The Court is currently divested of jurisdiction to dissolve its injunction of Section 8 because the case is on appeal. State Defendants appealed the issuance of this injunction to the Eleventh Circuit on October 7, 2011, and the appeal is still pending. *See HICA v. Bentley*, No. 11-14535 (11th Cir. filed Oct. 7, 2011). The

filing of the appeal was "an event of jurisdictional significance—it confer[red] jurisdiction on the court of appeals and divest[ed] the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *see also United States v. Brown*, 438 F. App'x 871, 872 (11th Cir. 2011) ("Under our precedent, the filing of a notice of appeal acts to divest the trial court of jurisdiction over the matters at issue in the appeal, except to the extent that the trial court must act in aid of appellate review.") (citations omitted).

The Eleventh Circuit has recognized limited exceptions to this rule. One exception is for situations when a district court "must act in aid of appellate review." *Brown*, 438 F. App'x at 872. This exception applies, for example, where a court of appeals directs a trial court to resolve a motion, *see id.*, or where a lower court "reduce[s] its oral findings to writing" after a notice of appeal is filed contesting the oral ruling, *see In re Mosley*, 494 F.3d 1320, 1328 (11th Cir. 2007). State Defendants' motion, however, does not even address, much less satisfy these exceptions. Indeed, granting State Defendants' request to dissolve the injunction while the appeal is pending would detract, rather than aid, the appellate court's jurisdiction, especially where, as here, the court of appeals has held its ruling in abeyance until the Supreme Court issues a decision in *Arizona v. United States*,

which could affect the outcome of some of the provisions in the appeal. *See supra* note 2.

Similarly, Rule 62(c) of the Federal Rules of Civil Procedure authorizes a district court to "suspend, modify, restore, or grant an injunction" while an interlocutory order is being appealed, but this may be done solely to "maintain the status quo of the parties pending appeal." *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 819 (5th Cir. 1989) (discussing Rule 62(c) and cases). Again, this provision is inapposite to State Defendants' motion, for dissolving the Section 8 injunction would upset, rather than maintain the status quo. This Court's injunction of Section 8 has been in place nearly nine months and is currently under review by the Court of Appeals. Allowing the new Section 8 to take effect would lead to confusion as to the legality and proper administration of the statute as it remains under consideration by the Court of Appeals, and possibly lead to abrupt reinstatement of the injunction or re-litigation of an injunction following the Court of Appeals' ruling.

Moreover, and contrary to State Defendants' argument, the balance of the equities does not favor the lifting of this Court's injunction. *See* Defs.' Mot. at 7 (Doc. 159). Notably, State Defendants do not allege that they face a substantial risk of irreparable harm if the injunction is maintained. As previously explained, the public interest weighs against lifting the stay, as doing so prior to the Eleventh

Circuit's ruling would create confusion as to the legality and proper administration of the statute, encourage additional unnecessary litigation, and expose students to the denial of college enrollment based on impermissible state determinations of immigration status.

The Court should therefore deny the motion to dissolve the injunction on jurisdictional grounds, so as to avoid simultaneous review of Section 8 by two federal courts.

B. State Defendants' Motion Pursuant to Rule 62(c) Fails Because State Defendants Do Not Meet the High Burden for Extraordinary Relief and Have Not Established That They Will Use Federal Standards.

The Court should also deny State Defendants' request to stay the injunction of Section 8, pursuant to Federal Rule of Civil Procedure 62(c). "A motion pursuant to Rule 62(c) seeking to stay an injunction pending appeal is 'extraordinary relief' for which the moving party bears a 'heavy burden.'" *Ruderman ex rel. Schwartz v. Wash. Nat'l. Ins. Co.*, No. 08-23401-CIV, 2012 WL 1470236, at *2 (S.D. Fla. Apr. 27, 2012) ("Such motions are disfavored and granted only in exceptional circumstances.") (quoting *Jaffe v. Bank of Am., N.A.*, 667 F. Supp. 2d 1299, 1323 (S.D. Fla. 2009); *see also Garcia–Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

State Defendants have not met their heavy burden of showing that they are entitled to the extraordinary relief of the dissolution of the current injunction in

place. As described more fully below, the amendment to Section 8 does not eliminate the constitutional problems with this provision, for although the statute purports to rely on a federal determination of immigration status, there is no mechanism available to Alabama's colleges and universities to obtain this verification, and the State Defendants' own policies implementing Section 8 explicitly permit state officials to determine for themselves whether an individual has lawful immigration status. Furthermore, Section 8 does not "adopt a definition of 'not lawfully present' aliens that follows federal law" in this context. *See HICA*, 2011 WL 5516953, at *24 n.13.[4] For all these reasons, individuals will still be subjected to a state-created immigration classification, and as the Court has noted, "[t]he law is well established that [t]he States enjoy no power with respect to the classification of aliens. This power is committed to the political branches of the Federal Government." *Id.* at *21 (citations and quotations omitted).[5]

[4] *See also* Pls.' Mem. of Law in Supp. of Mot. for Prelim. Inj. 19-22 (Doc. No. 37 at 28-31).

[5] As discussed *infra* at 10-12, the most likely mechanism State Defendants would attempt to use to verify immigration status is the Systematic Alien Verification for Entitlements ("SAVE") Program, but they cannot utilize that system at this time because they are not enrolled. The unavailability of a federal mechanism to inquire into status provides a sufficient basis for arguing that the injunction should remain in place. However, Plaintiffs do not concede that enrollment in SAVE would obviate the constitutional problems with Section 8, for the State will still have to engage in its own independent determination of whether the query responses received through SAVE regarding an individuals' immigration status meets the definition for eligibility adopted by the State of Alabama—namely,

Section 8 bans students from higher education in Alabama if they are determined to be "not lawfully present." Ala. Code § 31-13-8. Although Section 8 ostensibly requires that this determination be made by the federal government, *see id.*, at this time there is no mechanism in place that will permit public colleges or universities to obtain such a determination of eligibility for enrollment from the federal government. Moreover, as explained below, State Defendants themselves continue to assert that local officials retain the authority to make a determination of eligibility themselves.

There are only two methods known to Plaintiffs' counsel for obtaining information about an individual's immigration status from the federal government.[6] The first is the federal government's Law Enforcement Support Center ("LESC"), which is described in detail in the declaration of William M. Griffen, the Acting Unit Chief of LESC. (Doc. 2-7 in *United States v. Alabama*, No. 11-2746 (N.D. Ala. filed Aug. 1, 2011)). As its name suggests, the LESC responds to inquiries by law enforcement entities. *See* Griffin Decl. ¶¶ 2, 4-5 (describing LESC's

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"lawfully present." This process will therefore continue to involve a state determination, and thus, classification.

Plaintiffs will develop this argument more fully through discovery, but this argument is not relevant now since State Defendants are not currently enrolled in SAVE. *See infra* at 10-15.

[6] A determination of removability by an actual immigration court, and a determination of federal work authorization via E-Verify, are inapplicable to Section 8 and therefore are not considered.

"mission" as responding to law enforcement inquiries); *see also Cent. Ala. Fair Hous. Ctr. v. Magee* ("*CAFHC*"), No. 2:11-CV-982-MHT, 2011 WL 6182334, at *7 (M.D. Ala. Dec. 12, 2011) ("Currently, law enforcement officials are the only officials authorized to verify immigration status . . . through [LESC].") (citations omitted); U.S. Dep't of Homeland Security, *Law Enforcement Support Center* ("The LESC is a single national point of contact that provides timely customs information and immigration status and identity information and real-time assistance to local, state and federal law enforcement agencies on aliens suspected, arrested or convicted of criminal activity.") (attached as Ex. 3).[7] Because Alabama colleges and universities are not law enforcement agencies, they will not be able to use LESC to determine whether a student is "not lawfully present" for purposes of Section 8.

The second federal verification system is the Systematic Alien Verification for Entitlements ("SAVE") Program. SAVE is a limited tool used to assess individuals' eligibility for certain benefits. It cannot be used to make final determinations of whether a person is "not lawfully present." Indeed, "[a] Systematic Alien Verification for Entitlements (SAVE) response showing no Service record on an individual or an immigration status making the individual

[7] *Available at* http://www.ice.gov/lesc.

ineligible for a benefit is not a finding of fact or conclusion of law that the individual is not lawfully present." 65 Fed. Reg. 58,301 (Sept. 28, 2000).

Assuming *arguendo* that SAVE could properly be used to enforce Section 8, *but see supra* notes 4-5 and accompanying text, it may not presently fill this function, for no Alabama college or university has been approved to use SAVE. The federal government's list of SAVE user agencies reveals that only seven entities within the entire state of Alabama are currently enrolled in SAVE, and none of them are affiliated with public colleges or universities. *See* Samuel Brooke Decl. ¶¶ 3-8 (authenticating and summarizing SAVE Customer Agency List 05.21.2012.xls); *see also* SAVE Customer Agency List 05.21.2012.xls (attached as Exs. 4-8) (same).[8] Furthermore, enrolling in SAVE is a multi-step and lengthy process. *See* USCIS, *Sign up for SAVE Program* (last visited June 6, 2012) (explaining enrollment process) (attached as Ex. 10).[9] Indeed, State Defendants

[8] The seven agencies are: (1) AL Department of Public Safety; (2) AL Dep't of Human Resources, Family Assistance; (3) AL Medicaid Agency; (4) AL Dep't of Public Human Services; (5) AL Dep't of Industrial Relations; (6) AL ABC Enforcement; and (7) City of Pell City, Revenue Dep't. Brooke Decl. ¶¶ 3-8. The City of Pell City enrolled in SAVE in 2005, and its use of SAVE is "solely for the purpose of determining the eligibility of persons applying for Professional Licenses issued by [the Pell City Revenue Department]." Memorandum of Understanding Between U.S. Dep't of Homeland Security, U.S. Citizenship and Immigration Services, and City of Pell City, Ala., § V (fully executed on April 20, 2005) (attached as Ex. 9).

[9] *Available at* http://www.uscis.gov/portal/site/uscis/menuitem.

seek to dissolve this injunction without so much as a showing that any Alabama state college or university has even applied for SAVE approval. The SAVE approval process requires the federal government to engage in a legal review of the claimed basis for enrolling in SAVE, and to negotiate a memorandum of understanding that specifies the precise purpose for which the state or local agency may utilize SAVE. *Id.*; *see also* Memorandum of Understanding Between U.S. Dep't of Homeland Security, U.S. Citizenship and Immigration Services, and City of Pell City, Ala., § V (fully executed on April 20, 2005) (noting limited purpose of "determining the eligibility of persons applying for Professional Licenses") (attached as Ex. 9). Simply put, until and unless Alabama public colleges and universities enroll in and are approved to utilize SAVE, this verification mechanism is unavailable to them.

The process of enrolling in SAVE has already complicated the enforcement of H.B. 56. For example, the Department of Revenue's ("DOR") Commissioner, Julie Magee, has issued a guidance memorandum directing various county agencies to enroll in SAVE prior to enforcing Section 30 of H.B. 56. Commissioner Magee's memorandum specifically advises:

> [A]fter consultation with the Attorney General's office, please note the following: until you have been granted access to the federal

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> government's SAVE program or can verify an alien's immigration status through some other verification method with the U.S. Department of Homeland Security pursuant to 8 U.S.C. § 1373(c), you should not implement Section 30, and you should not require anyone to demonstrate their U.S. citizenship or lawful presence in the United States.

Comm'r Magee, *Updated Instructions Concerning Section 30 of Act. No. 2011-535* (Dec. 1, 2011) (hereinafter "Magee Dec. 1, 2011 Memo") (attached as Ex. 11);[10] *see also* Comm'r Magee, *Modification to Prior Instructions Concerning Act No. 2011-535, Immigration Act* (Nov. 28, 2011) (attached as Ex. 12).[11] Prior to the issuance of Commissioner Magee's guidance memoranda, DOR was relying on a state-created list of documents that would establish lawful presence. *CAFHC*, 2011 WL 5878363, at *1-2 & n.2. This list was found to be an impermissible immigration classification conflicting with federal law. *Id.*

Just as the former Section 30 could not be enforced until and unless the affected Alabama agencies successfully obtained approval to use SAVE or some other reliable process to verify immigration eligibility, Section 8 cannot go into effect unless and until Alabama colleges and universities obtain such approval. Both the "well established [law] that '[t]he States enjoy no power with respect to the classification of aliens,'" and the specific requirement in Section 8 that school

[10] *Available at* http://revenue.alabama.gov/documents/Memo - Julie Magee - 11-30-11 sm.pdf.

[11] *Available at* http://revenue.alabama.gov/documents/memo_manuhomes_modification_112011.pdf.

officials may not make such determinations on their own, dictate this result. *HICA*, 2011 WL 5516953, at *21 (citations and quotations omitted); *see* Ala. Code § 31-13-8 ("A public postsecondary education institution officer or official shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States."). Until Alabama public colleges and universities "have been granted access to the federal government's SAVE program or can verify an alien's immigration status through some other verification method with the U.S. Department of Homeland Security pursuant to 8 U.S.C. § 1373(c)," they may not comply with the facial requirements of Section 8. *See* Magee Dec. 1, 2011 Memo.

Nor does the guidance issued by Chancellor Hill on August 5, 2011 demonstrate that State Defendants would be able to comply with the requirement that Alabama's public colleges and universities not make final determinations of immigration status. *See* Chancellor Hill Memorandum, Aug. 5, 2011 (Doc. No. 82-4). The Hill Memorandum defers to local determinations made at each college or university, and suggests that an inquiry with the federal government is warranted only where the local official and the General Counsel for the Department of Postsecondary Education are unable to make a determination themselves. *Id.* This process stands in sharp contrast to what the plain text of

Section 8 requires, and, in any event, cannot be fully completed until a college or university has enrolled in SAVE.[12]

Plaintiffs therefore respectfully submit that State Defendants have failed to establish how Section 8 can be enforced in a manner consistent with federal supremacy over immigration law. The Court should not dissolve or stay its injunction, which was entered to ensure that impermissible state immigration classifications would not be utilized.

C. An Indicative Ruling Pursuant to Rule 62.1 Would Be Improper At this Time.

State Defendants also request an indicative ruling pursuant to Federal Rule of Civil Procedure 62.1(a)(3), advising that the Court would dissolve the injunction if the Court of Appeals for the Eleventh Circuit were to remand the case to it. For the reasons described above, this request should be denied because State

[12] State Defendants also cite *Wyatt by and through Rwalins v. Rogers*, 92 F.3d 1074, 1080 n.14 (11th Cir. 1996), to support their request for a stay, but *Wyatt* is inapposite. In *Wyatt* an injunction regarding the treatment of resident children at the Eufaula Adolescent Center, which became moot because the facility was closed. The district court stayed the injunction because all of the parties involved agreed "that the injunction ha[d] no purpose" after the facility was closed. *Wyatt by and through Rawlins v. Poundstone*, 941 F. Supp. 1100, 1108 (M.D. Ala. 1996). In contrast, and as noted above, Plaintiffs in the instant case do not agree that the Section 8 injunction has no purpose following the revisions of H.B. 56. To the contrary, it is vital that the injunction remain in place to ensure that the State will not immediately commence impermissible state immigration classifications of college students.

Defendants have not established that impermissible state immigration classifications will not occur.

Furthermore, State Defendants' Rule 62.1 request is premature due to the complex procedural history and posture of this case. Three separate orders granting injunctions have already been entered in this case, one by this Court on September 28, 2011, and two more by the Court of Appeals while the appeal has been pending. Oral arguments have been held in the Court of Appeals, and the Court of Appeals has indicated that it will wait to issue a ruling until after the Supreme Court issues its ruling in *Arizona v. United States*. Rather than engaging in piecemeal decision-making, this Court should deny State Defendants' request or at least should defer its consideration of the request, pursuant to Rule 62.1(a)(1)-(2), until the Court and the parties have the benefit of the Court of Appeals' decision.

If the Court nevertheless decides to issue an indicative ruling, it should state only that the amendment to Section 8 raises a "substantial issue" related to the injunction, rather than ruling on the motion. As explained by the Advisory Committee on the Federal Rules of Civil Procedure, a motion for an indicative ruling,

> may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. *In such circumstances the district court may prefer to state that the motion raises a substantial*

> *issue*, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. *The district court is not bound to grant the motion* after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Advisory Comm. note to Fed. R. Civ. P. 62.1 (emphasis added). Plaintiffs contend that the complexity of the procedural posture of this case warrants no action by the Court at this time, but if the Court disagrees, noting a "substantial issue" would be preferable to issuing a substantive indicative ruling.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny State Defendants' request to dissolve and/or stay the injunction granted against Section 8, and that it deny State Defendants' request to issue an indicative ruling on the same.

Respectfully submitted,

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I hereby certify that on June 7, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Samuel Brooke

Exhibit E

State Defendants' Reply in Support of Time-Sensitive Motion to Dissolve or Stay Pending Appeal the Preliminary Injunction Against Section 8 of Act No. 2011-535 / Ala. Code § 31-13-8, *HICA v. Bentley*, No. 11-2746 (N.D. Ala. filed June 11, 2012)

Submitted in Support of
HICA Plaintiffs' Response to
June 25, 2012, Order

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

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

HISPANIC INTEREST COALITION OF ALABAMA; *et al.*,	)	
Plaintiffs,	)	
vs.	)	Case Number: 5:11-cv-02484-SLB
	)	OPPOSED
ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; *et al.*,	)	TIME-SENSITIVE
Defendants.	)	

STATE DEFENDANTS' REPLY IN SUPPORT OF TIME-SENSITIVE MOTION TO DISSOLVE OR STAY PENDING APPEAL THE PRELIMINARY INJUNCTION AGAINST SECTION 8 OF ACT NO. 2011-535 / ALA. CODE § 31-13-8

Defendants Governor Robert Bentley, Attorney General Luther Strange, Superintendent Dr. Thomas R. Bice, Interim Chancellor Susan Price, and District Attorney Robert L. Broussard, sued in their official capacities ("State Defendants"), respectfully submit this reply brief in support of their motion (doc. 159) to dissolve or stay the injunction against Section 8 of Act No. 2011-535, codified at Ala. Code § 31-13-8.

I. This Court has jurisdiction to modify or stay the injunction, or to enter an indicative order.

Plaintiffs erroneously argue that this Court has no authority to modify or stay its preliminary injunction while an appeal of that injunction is pending.

However, the State Defendants cited to Rule 62(c), which permits modification while an appeal is pending; Rule 62.1, which permits an indicative ruling which the parties may then present to the appellate court; and circuit case law which permits a stay of the injunction, *see Wyatt by and through Rawlins v. Rogers*, 92 F.3d 1074, 1080 n.14 (11th Cir. 1996). *See also Pacific Ins. Co. v. General Dev. Corp.*, 28 F.3d 1093, 1096 n.7 (11th Cir. 1994) (noting that a district court's modification of an injunction during pendency of appeal "arguably was proper under rule 62(c)"); *In re Guantanamo Bay Detainee Litigation*, 706 F.Supp.2d 120, 123 (D.D.C. 2010) ("The Eleventh Circuit appears to be in agreement with the D.C. District Court, suggesting that a court may vacate an injunction pursuant to Rule 62(c)."") (citing *Pacific Ins. Co.*, *supra*).

There is no doubt that under Rule 62(c), this Court at least has authority to stay the injunction during the appeal. Indeed, the HICA Plaintiffs themselves effectively asked for equivalent relief from this Court, after they filed their appeal, when they asked the Court to enjoin other provisions of the statute during the appeal. The only jurisprudential question here is whether the Court has jurisdiction to dissolve the injunction *permanently* at this point. On this point, admittedly, the authorities are split. Wright & Miller, however, properly observe that the Court does have this power. They note that the District's Court's authority to amend or dissolve an injunction that is on appeal is supported by the fact that the District

Court remains free to reach the merits of the case, including dismissal of the action. Federal Practice & Procedure § 3921.2. The rules permit this Court to act, and common sense confirms that the District Court which has heard the evidence is in the best position to first address a change in circumstances. *Id*.

But in the very least, this Court has unambiguous power to stay the injunction during the appeal under Rule 62(c). Likewise, Rule 8(a) of the Federal Rules of Appellate Procedure provides that an application "for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court." Fed.R.App.P. 8(a). It makes no sense to require State Defendants to come here first if this Court has no authority to act. Indeed, this is the procedure Plaintiffs followed when they filed their motion for injunction pending appeal. *See* doc. 140. Thus, in the very least, this Court should stay the injunction during the pendency of the appeal to the Eleventh Circuit.

II. Plaintiffs have presented no valid reason to keep the injunction in place when the basis for the injunction no longer exists.

Plaintiffs' only non-jurisdictional argument is their rather ironic assertion that the injunction should remain in place in spite of the change in the statute because the relevant state agencies are not yet registered in the SAVE program, which is one way to confirm a person's immigration status with the federal

government.[1] To be clear, the statute expressly says that status determinations will be made solely "pursuant to 8 U.S.C. § 1373(c)," and SAVE is *one* way for the State to make inquiries under 8 U.S.C. § 1373(c). But even assuming, for sake of this motion, that the SAVE program is the *only* permissible way to confirm immigration status under 8 U.S.C. § 1373(c), that is no basis to keep the injunction in place.

Plaintiffs appear to argue, in Catch-22 fashion, that the reason the Section 8 injunction cannot be lifted is because the State Defendants have not taken every step necessary to enforce Section 8. It is not at all clear that Alabama's Department of Postsecondary Education could register for SAVE while the injunction is in place. In order to register, an agency must provide the "[s]ection of law authorizing your agency to administer the benefit or license or engage in another activity for which your agency will be verifying immigration status," as well as the "[s]ection of law requiring or authorizing the verification of immigration status." *See* online SAVE registration instructions, available at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d283c2ec0c7c8110VgnVCM1000004718190aRCRD&vgnextch

[1] Ala. Code § 31-13-8 provides, "For purposes of this section, a public postsecondary education institution officer may seek federal verification of an alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c)." This federal statute provides, "The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." 8 U.S.C. § 1373(c).

annel=d283c2ec0c7c8110VgnVCM1000004718190aRCRD (last visited June 8, 2012). So long as Section 8 is enjoined, it does not require or authorize anyone to verify immigration status.

It is thus the height of irony for the HICA Plaintiffs to argue that the injunction must remain in place because the pertinent agencies have not registered for SAVE. The primary reason these agencies are not registered for SAVE is that the Plaintiffs sought and obtained this injunction. By arguing that the agencies should register for SAVE in order to comply with the law, Plaintiffs are actually making a powerful equitable argument as to why the injunction should be lifted as soon as possible, to allow state officials to begin complying with what Plaintiffs concede to be the law.

The Court should also keep in mind that Plaintiffs brought a facial challenge. The burden is not on the State to show that every instance of enforcement will be permissible; rather, the burden is on the Plaintiffs to prove that there is no possible circumstance under which the statute can be enforced consistently with federal law. They plainly have not done so. If Plaintiffs are correct, then the State simply must register with SAVE (and the State Defendants can represent that the Department of Post-Secondary Education intends to do so). *Even if* registration is a necessary step before enforcement can begin, that is no basis for an injunction that bars enforcement in all circumstances.

The memo from former Chancellor Hill, issued under the prior version of Section 8, changes nothing. As Plaintiffs point out, the State indicated that with respect to other sections not enjoined, it will not enforce those sections until the applicable agency has registered with SAVE. *See* doc. 162 at 12-13. This guidance was given well after the out-of-date Hill memorandum.

The bottom line is that Plaintiffs argue that Section 8 should remain enjoined in all circumstances because the State has not yet registered for a program that is unavailable to the State while the injunction is in place. The law of preemption does not require such a result.

Finally, Plaintiffs argue that even the use of SAVE will not permit a lawful application of Section 8 because state officials still must interpret the federal government's responses to State inquiries, and state officials still must determine whether a person is "lawfully present." Doc. 162 at 8-9, n.5. Not so. Section 8 specifically provides that "[a] public postsecondary education institution or officer or official shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States." Ala. Code § 31-13-8. Moreover, the SAVE program does not purport to provide *clues* to immigration status, but instead provides a means for "[v]erifying immigration status." *See* "About the SAVE Program" (available at

http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e112feb9a2ca8210VgnVCM100000082ca60aRCRD&vgnextchannel=e112feb9a2ca8210VgnVCM100000082ca60aRCRD (last visited June 8, 2012). According to the U.S. Citizenship and Immigration Services, SAVE enables government officials to "[c]omply[] with legislative mandates to verify applicants' immigration status and ensure that only entitled applicants receive federal, state, or local public benefits and licenses." *Id.* And 8 U.S.C. § 1621 says that unlawfully present aliens are not eligible for "state and local public benefits," including "postsecondary education" benefits. Congress's statutes thus expressly contemplate that state and local governments will cooperate with the federal government, via 8 U.S.C. § 1373(c), in making these determinations for these purposes.

Assuming, then, that the State can only enforce Section 8 after registering for SAVE, that is indeed something that the Department of Postsecondary Education intends to do; it is not something that *can* be done while the injunction is in place; and when done, it will permit Section 8 to be enforced in a manner wholly consistent with federal law. Whether the State is registered at this moment is not relevant to a facial challenge, where Plaintiffs must show that there are no possible circumstances under which enforcement is permissible.

The HICA Plaintiffs are thus stalling, and their opposition—filed two weeks after the State Defendants filed their time-sensitive motion—offers no basis for keeping the injunction in place. The simple fact is that the sentence no longer exists in Section 8 that led this Court to enter a preliminary injunction. As the State may "exclude unlawfully-present aliens, as determined by federal law, from enrolling in and attending its public secondary educational institutions" there is no reason for the injunction to stand. Doc. 137 at 44 n. 13. This is particularly so as "preliminary injunctions of legislative enactments – because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits – must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts." *Id.* 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 (11th Cir. 1990).

For all the above reasons, and as stated in the State Defendants' motion, the preliminary injunction against Section 8, codified at Ala. Code § 31-13-8, should be dissolved or at least stayed pending appeal.

Respectfully submitted,

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