IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 11-14535

HISPANIC INTEREST COALITION OF ALABAMA, *et al.*,
Appellants/Plaintiffs,
v.
ROBERT BENTLEY, *et al.*,
Appellees/Defendants.

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

PLAINTIFFS/ APPELLANTS' RESPONSE TO DEFENDANTS' TIME-SENSITIVE OPPOSED MOTION TO STAY APPEALS AND CROSS-APPEALS

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Appellants hereby certifies, pursuant to Eleventh Circuit Rule 26.1-1, that the list of interested parties contained in Appellees' Time-Sensitive Opposed Motion to Stay Appeal and Cross-Appeal is complete.

The undersigned attorney further certifies, pursuant to Federal Rule of Appellate Procedure 26.1, that Plaintiffs/Appellants have no parent corporations and that no corporation directly or indirectly holds 10% or more of the ownership interest in any of the Appellants.

Respectfully submitted,

/s/ Kristi L. Graunke
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PLAINTIFFS/ APPELLANTS' RESPONSE TO DEFENDANTS' TIME-SENSITIVE OPPOSED MOTION TO STAY APPEALS AND CROSS-APPEALS

Plaintiffs/Appellants Hispanic Interest Coalition of Alabama, *et al.* ("HICA"), oppose the Time-Sensitive Motion to Stay Appeals and Cross-Appeals filed on December 15, 2011 by Defendants / Appellees Governor Bentley, Attorney General Strange, Interim State Superintendent Craven, State Chancellor Hill, and District Attorney Broussard ("State Defendants") to the extent State Defendants seek a stay of the litigation without a stay of enforcement of Sections 12, 18, 27, and 30 of Act 2011-535 / H.B. 56 ("H.B. 56"). If these provisions were to be enjoined pending the outcome of *Arizona v. United States*, in addition to the two provisions already enjoined pending appeal by this Court and the seven provisions preliminarily enjoined by the district court,[1] the HICA Plaintiffs would have no opposition, for the *status quo* could then be maintained. But so long as Sections 12, 18, 27, and 30 of H.B. 56 remain in effect, the HICA Plaintiffs and the members of the class they seek to represent will continue to suffer substantial irreparable injury, and therefore the HICA Plaintiffs object to any delay. Denying

[1] The district court enjoined (1) Section 8 (prohibiting public postsecondary enrollment to classes of immigrants); (2) Section 11(a) (criminalizing work by immigrants who lack federal work authorization); (3) Section 11(f) and (g) (criminalizing work by day laborers regardless of immigration status); and (4-7) Sections 13(a)(1)–(4) (criminalizing harboring, encouraging/inducing, transporting, or renting). The district court also enjoined the final sentences of Sections 10(e), 11(e), and 13(h).

a stay will not cause any substantial hardship to State Defendants. As such, a stay of the litigation is unwarranted and should be denied.

I. LEGAL STANDARD

A stay of proceedings is an extraordinary request, especially where the issue on appeal is whether to affirm or reverse the denial of a preliminary injunction. Granting a stay while an appeal of a denial of a preliminary injunction is pending is tantamount to a temporary affirmation of the denial of the preliminary injunction—but without any consideration of the merits of the case. *Cf. Hines v. D'Artois*, 531 F.2d 726, 730 (6th Cir. 1976) ("[I]t has been held that a stay order is appealable when it is the practical equivalent of a denial of a motion for a preliminary injunction."). Especially where, as here, there is already a substantial body of case law on the issues in contention, there is no obligation to await a Supreme Court decision. *See Johnson v. Mortham*, 915 F. Supp. 1529, 1549-50 (N.D. Fla. 1995).

Because ongoing harms to the parties denied the injunction will necessarily continue, a request for a stay should be scrutinized carefully. The Court should "weigh competing interests," including the "economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *cf. In re Fed. Grand Jury Proceedings re Klausner*, 975 F.2d 1488, 1492 (11th Cir. 1992) (stay pending appeal requires showing of likelihood of success, irreparable injury, no substantial harm to opposing party, and no harm to public).

Furthermore, "the suppliant for a stay *must* make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis*, 299 U.S. at 255 (emphasis added). In the instant case, harm to HICA and class members is clear. *See* HICA Blue Br. at 64-68. State Defendants can point to no hardship or inequity, and consequently their motion should fail. *Landis*, 299 U.S. at 255.

II. HICA PLAINTIFFS AND CLASS MEMBERS CONTINUE TO SUFFER IRREPARABLE HARM EVERY MOMENT SECTIONS 12, 18, 27, AND 30 REMAIN IN EFFECT

The HICA Plaintiffs, as well as the class members they seek to represent, continue to suffer irreparable harm as long as Sections 12, 18, 27, and 30 of H.B. 56 remain in effect. *See* HICA Blue Br. at 64-68.

Sections 12 and 18 mandate immigration status checks during law enforcement encounters, and these provisions are having a day-to-day impact on immigrants, documented and undocumented alike, as well as U.S. citizens who are wrongly subjected to prolonged detentions based on an officer's suspicion of illegal immigration status. As a result, persons are being detained and turned over to federal immigration officers under HB 56's provisions during routine traffic stops. *See* Tom Smith, *Woman detained under new state law*, Times Daily (Oct. 26, 2011) (attached as Exhibit A). The law is also impacting lawfully present foreign nationals, such as a foreign executive from the Mercedes-Benz plant

outside of Tuscaloosa, Alabama, who was arrested under the law, and a managerial employee from the Honda plant in Lincoln, Alabama, who was cited under the law. *See* Associated Press, *Illegal immigration charges dropped against German Mercedes-Benz executive*, al.com (Nov. 23, 2011) (attached as Exhibit B);[2] Associated Press, *Japanese Honda employee ticketed under new immigration law*, al.com (Nov. 30, 2011) (attached as Exhibit C).[3] The risk to Plaintiffs and class members, which includes individuals who are applying for immigration relief from the federal government but who currently lack proof of lawful status, is pervasive whenever they interact in any manner with Alabama law enforcement.

Section 27 is also causing irreparable harm to HICA Plaintiffs and putative class members as it invalidates numerous contracts and "strips an unlawfully-present alien of the capacity to contract except in certain circumstances . . . ." *Hispanic Interest Coal. of Ala. v. Bentley*, No. 11-2484 2011 U.S. Dist. LEXIS 137846, at *147 (N.D. Ala. Sept. 28, 2011). Wage theft and efforts by parties to evade contract obligations in court have followed. *See* Human Rights Watch, *No Way to Live, Alabama's Immigration Law*, at 27–28 (2011) (attached as Exhibit

[2] *Available at* http://blog.al.com/wire/2011/11/illegal_immigration_charges_dr.html.

[3] *Available at* http://blog.al.com/wire/2011/11/honda_employee_arrested_in_tal.html.

D).[4] The risk to Plaintiffs and class members of private discrimination and lack of recourse in the courts due to the implementation of Section 27 is on-going.

Section 30 is also causing irreparable harm as it "puts aliens who are unable to verify their lawful residency between a rock and a hard place." *Cent. Ala. Fair Housing Ctr. v. Magee ("CAFHC")*, No. 11-cv-982, 2011 U.S. Dist. LEXIS 142788, at *15, 2011 WL 6182334, at *3 (M.D. Ala. Dec. 12, 2011). Section 30 makes it a Class C felony for an immigrant without lawful status to even *attempt* to engage in a "transaction" with the State or a political subdivision thereof. H.B. 56 § 30(d). But these same individuals are forced to violate other laws and face criminal penalties because of the law's prohibition of engaging in any transaction. *See* Ala. Code §§ 40-12-255(*l*) (Class C misdemeanor to not renew manufactured home decal);[5] 32-6-51 (misdemeanor to operate vehicle without car tag); 40-12-9 (crime to engage in business without license); *see also No Way to Live* at 11-26 (documenting harms caused by Section 30 throughout the state). This harm is will continue as long as Section 30 remains in effect.

[4] *Available at* http://www.hrw.org/reports/2011/12/14/no-way-live.

[5] Section 30's applicability to Section 40-12-255 of the Alabama Code was preliminarily enjoined in *CAFHC*. 2011 U.S. Dist. LEXIS 142788, at *99.

III. STATE DEFENDANTS HAVE NOT ESTABLISHED ANY HARDSHIP OR INEQUITY CAUSED BY PROCEEDING

State Defendants do not cite any hardship or inequity that would befall them if this Court were to continue to maintain the current briefing schedule and to hear arguments as scheduled. Nor can they—the State has no interest in enforcing a law that is unconstitutional. *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010). State Defendants instead point to more generalized "interests of justice and judicial economy." Defs.' Br. at 4. Neither interest is assured by a stay.

State Defendants do not assert that a decision by the Supreme Court in *Arizona v. United States*, No. 11-182 (S. Ct.), will affect all the provisions of H.B. 56 at issue in the instant appeal; they merely assert that a decision may affect the analysis of *some* provisions. This argument is speculative and of limited import. First, while the law at issue in *Arizona* inspired the legislative sponsors of H.B. 56, H.B. 56 contains numerous provisions that have no counterpart in the *Arizona* appeal. The HICA Plaintiffs have raised challenges to six sections of H.B. 56 in this appeal, but only two of the six have an analogous provision being considered by the Supreme Court in *Arizona*—Section 10, a new Alabama state alien registration offense, and Section 12, requiring local and state officers to investigate immigration status during stops, arrests and detentions. A future decision in.

Arizona cannot be expected to dispose of consideration of the other four provisions of HB 56 that this Court will consider in the instant appeal.[6]

Second, State Defendants presume that "it is highly unlikely that this Court could or should issue a decision on the validity of those provisions before the Supreme Court issues the decision in *Arizona*." Defs.' Br. at ¶ 9. But Defendants cite no authority to support the notion that when Plaintiffs have put forward ample evidence of an irreparable injury that will occur absent preservation of the status quo, a court should delay preliminary injunctive relief merely because the Supreme Court has granted certiorari in a case that may be relevant. Furthermore, this Court already saw fit to set this matter for an expedited oral argument, and granting a stay will delay the Court's consideration of the appeal and extend the harm to Plaintiffs. Finally, to the extent that any eventual decision by the Supreme Court affects this case, the parties may address it when the time comes.

Third, there is already well-developed federal jurisprudence on preemption issues, including Supreme Court precedent, for the Court to apply to this appeal.

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[6] Assuming State Defendants raise in their cross appeal the seven provisions enjoined by the district court, *see supra* n.1, only one of these seven has an analogous provision being considered by the Supreme Court in *Arizona:* Section 11(a), a new state crime to criminalize the solicitation of work by persons lacking federal work authorization. Thus in total, ten of thirteen provisions that will be raised in this appeal have no analog in *Arizona v. United States*. Furthermore, the district court based part of its preliminary injunction on the First Amendment (enjoining Sections 11(f) and (g)), the Equal Protection Clause (enjoining Section 8), and the Sixth Amendment (enjoining final sentence of Sections 10(e), 11(e), and 13(h)), which are distinct legal theories from the claims presented in *Arizona*.

See, e.g., *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (conflict and field preemption); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374 (2003) (same); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 120 S. Ct. 2288 (2000) (same); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 112 S. Ct. 2374 (1992) (same); *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933 (1976); (regulation of immigration, conflict and field preemption); *Hines v. Davidowitz,* 312 U.S. 52, 61 S. Ct. 399 (1941) (same). Where, as here, substantial premption jurisprudence already establishes an "adequate analytical framework to evaluate plaintiffs' claims . . . the public welfare will be better promoted by immediate consideration" of the claims despite a pending Supreme Court case on similar issues. *Johnson v. Mortham*, 915 F. Supp 1529, 1549-50 (N.D. Fla. 1995).

* * *

For the foregoing reasons, the HICA Plaintiffs contend that State Defendants have failed to carry their burden in establishing that a stay is warranted, absent a contemporaneous order enjoining Sections 12, 18, 27, and 30 of H.B. 56. The HICA Plaintiffs respectfully request this Court maintain the existing schedule and deny State Defendants' motion to stay, or alternatively, grant the stay but also enjoin Sections 12, 18, 27, and 30 of H.B. 56 while the stay remains in effect.

Dated: December 19, 2011

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Dated: December 19, 2011

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