

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

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

Plaintiffs,)

vs.)

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

Defendants.)

Case Number:
5:11-cv-02484-SLB

RT. REV. HENRY N. PARSLEY, JR., in his)
official capacity as Bishop of the Episcopal)
Church in the Diocese of Alabama; *et al.*)

Plaintiffs,)

vs.)

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

Defendants.)

Case Number:
5:11-cv-02736-SLB

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

STATE OF ALABAMA; GOVERNOR)
ROBERT J. BENTLEY,)

Defendants.)

Case Number:
2:11-cv-02746-SLB

**STATE DEFENDANTS’ RESPONSE TO CHURCH LEADERS’
AMENDED MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM IN SUPPORT (DOC. 99)**

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STATE DEFENDANTS' RESPONSE TO CHURCH LEADERS'
AMENDED MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM IN SUPPORT (DOC. 99)

Governor Bentley, Attorney General Strange, and District Attorney Broussard (the State Defendants) respectfully respond to the *Plaintiffs' Amended Motion for Preliminary Injunction and Memorandum in Support* filed by the Church Leaders. Doc. 99.¹

I. BACKGROUND

A. ACT NO. 2011-535

To the extent applicable, the State Defendants incorporate their BACKGROUND section on ACT NO. 2011-535 from the *State Defendants' Response to Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support* (“*Response*”), as if fully set forth herein. Doc. 82 at 2-6.

B. PROCEDURAL HISTORY

On August 1, 2011, Rt. Rev. Henry N. Parsley, Jr., Rev. Dr. William H. Willimon, Most Rev. Thomas J. Rodi, and Most Rev. Robert J. Baker (“Church Leaders”) filed suit against Governor Robert Bentley, Attorney General Luther Strange, and Madison County District Attorney Robert L. Broussard, in their official capacities, challenging Act No. 2011-535. *Parsley*, doc. 1. The Complaint

¹ The State Defendants will reference documents filed in the master case by docket number only, and documents filed in the consolidated cases by both case name and docket number. Page numbers in record citations are those assigned by the Court’s CM/ECF system.

alleged that, on its face, Act No. 2011-535 violates various federally protected rights and should be enjoined in its entirety. *Id.* at ¶¶ 78-105, *id.* at *Prayer for Relief*. Specifically, however, the Church Leaders focused on Section 13 (which creates State crimes related to concealing, harboring, shielding, encouraging, inducing, or transporting illegal aliens), Section 27 (which concerns contracting), and Section 25 (which concerns solicitation, attempt or conspiracy to commit any crime created by the Act). *Id.* at ¶¶ 57-68.

On August 5, 2011, the Church Leaders filed a motion for preliminary injunction. *Parsley*, doc. 15. On August 10, 2011, the Church Leaders filed an amended motion. Doc. 99. The motion requests that Sections 13 and 27 be preliminarily enjoined. *Id.* at 2, 12. (Any injunction aimed at Sections 13 and 27 would cut the legs out from under Section 25 for the Church Leaders' purposes, and so no injunction as to that provision would be required; presumably, this is the reason none is sought.)

On August 11, 2011, the Church Leaders filed amended complaints, which added two new Plaintiffs: the Benedictine Sisters of Cullman, Alabama, Inc. (Benedictine Sisters) and the Benedictine Society of Alabama (Benedictine Monks). *Parsley*, doc. 48 at ¶¶ 42-49; *Parsley*, doc. 50 at ¶¶ 45-53.

II. PRELIMINARY MATTERS

The Church Leaders have filed a sweepingly broad lawsuit which attempts to assert the rights of third parties and makes non-textually-based assumptions about how Act No. 2011-535 will be implemented. It is helpful to start by assessing (A) which parties are moving for this preliminary injunction and (B) on which claims.

A. BISHOP PARSLEY, BISHOP WILLIMON, ARCHBISHOP RODI, AND BISHOP BAKER ARE THE PLAINTIFFS SEEKING A PRELIMINARY INJUNCTION.

The motion for preliminary injunction was filed by Bishop Parsley, Bishop Willimon, Archbishop Rodi, and Bishop Baker before the Benedictine Sisters and the Benedictine Monks were added in the amended complaints. *Compare* Doc. 99 (filed August 10, 2011) *with Parsley*, doc. 48 (filed August 11, 2011) and *Parsley*, doc. 50 (filed August 11, 2011). Additionally, the motion itself incorporates the original *Complaint* into its *Facts* section. Doc. 99 at 5 n.2. Accordingly, any claims or facts relevant to the Benedictine Sisters and the Benedictine Monks are not relevant to the pending motion for preliminary injunction.

More critically, there are major standing issues here. This Court is well aware of the jurisdictional requirement for the Church Leaders to demonstrate that they have standing as to each and every claim that they bring, which includes demonstrating a particularized—that is, personal—injury to themselves. *See* Doc. 82 at 21-23 (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Davis*

v. Fed. Election Comm'n, 554 U.S. 724 (2008)). Yet the Church Leaders attempt to assert the rights of numerous other persons without any affirmative showing of a legal right to do so.

This problem is apparent in the original complaint. *See, e.g., Parsley*, doc. 1 at ¶ 1 (“The bishops seek this Court’s declaratory and injunctive relief to prevent *irreparable harm to the 338,000 members of Alabama’s Episcopal, Methodist and Roman Catholic churches as well as other residents . . .*”) (emphasis added). And it continues in the current complaint. *See, e.g., Parsley*, doc. 50 at ¶ 1 (same). It is also present in the motion for preliminary injunction. *See, e.g., Doc. 99* at 3 (“[T]he Church leaders *and their members* ask this Court to . . .”). At times, the Church Leaders attempt to assert the rights and injuries of the churches themselves, their members, Alabama’s faith community, Alabama citizens generally, and illegal aliens generally. For instance, Count Four is an Equal Protection claim alleging that Act No. 2011-535 “impermissibly *discriminates against non-citizens* on the basis of immigration status and *deprives them* of equal protection of the laws within the meaning of the Fourteenth Amendment to the U.S. Constitution.” *Parsley*, doc. 50 at ¶ 105 (emphasis added).

It does not matter, for these purposes, that Bishop Parsley has asserted that he is suing in his official capacity, while Bishop Willimon sues in his “individual capacity as Bishop of the North Alabama Conference of the United Methodist

Church,” and Archbishop Rodi and Bishop Baker indicate their titles and “a corporation sole.” While public officials are routinely sued in their official capacities (and may bring suit in the same way), *see* Fed. R. Civ. P. 25(d), the Church Leaders have not asserted that a similar option is available to them. Churches can sue and be sued. *E.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) . Similarly, church members can assert their own rights, or there exists a procedural mechanism which the Church Leaders have not sought to invoke that may allow them to assert those rights. Whether illegal aliens may assert their own rights depends on whether this Court is in agreement with the Northern District of Oklahoma’s resolution of the prudential standing issue. *See* doc. 82 at 24. But whether they can or cannot, the Church Leaders have certainly not demonstrated that they can step into the illegal aliens’ shoes.

Accordingly, in evaluating the arguments made in the Church Leaders’ motion for preliminary injunction, this Court should limit its analysis to the rights and injuries of the four Church Leaders themselves.

B. THE CHURCH LEADERS’ FREE EXERCISE, FREEDOM OF ASSEMBLY, AND CONTRACTS CLAUSE ARGUMENTS ARE THE SUBJECT OF THIS RESPONSE.

It is also important for the Court to focus on which claims the Church Leaders are actually prosecuting in their motion for preliminary injunction. The second amended complaint sets out six counts: Free Exercise of Religion, Freedom of Assembly, and Freedom of Speech, all under the First Amendment; Equal

Protection; Due Process; and, the Contracts Clause, U.S. Const. Art. I § 10. *Parsley*, doc. 50 at ¶¶ 88-114.² By contrast, in the amended preliminary injunction motion, the Church Leaders make no mention of the Equal Protection or Due Process claims.³ Doc. 99 at 9-13. Additionally, while the Church Leaders use the phrase “speak freely” twice in their Argument section, doc. 99 at 9, 10, they fail to develop a Free Speech claim in this motion. The State Defendants thus respond to the Free Exercise claim, the Free Assembly claim, and the Contracts Clause claim.⁴

III. PRELIMINARY INJUNCTION STANDARD

The State Defendants disagree with the articulation of the preliminary injunction standard set out by the Church Leaders, doc. 99 at 8-9; *see also id.* at 4, and incorporate the PRELIMINARY INJUNCTION STANDARD discussion from their previously filed *Response*, as if fully set forth herein. Doc. 82 at 9-12. *See also Northeastern Florida Chapter of Ass’n of Gen. Contractors of America v. City of Jacksonville, Florida*, 896 F.2d 1283, 1285 (11th Cir. 1990) (“[P]reliminary

² The original complaint and the first amended complaint raised the same claims. *Parsley*, doc. 1 at ¶¶ 79-105; *Parsley*, doc. 48 at ¶¶ 87-113.

³ In a footnote attached to the Facts section of their motion, the Church Leaders state that they “incorporate herein the Complaint for Declaratory and Injunctive Relief filed on August 1, 2011 as if fully and completely set out herein.” Doc. 99 at 5 n.2. The State Defendants treat this as an incorporation of the *Facts* only, and do not respond to the claims set out in the *Complaint* but not developed in the motion for preliminary injunction. The Church Leaders bear the burden of demonstrating that they are entitled to a preliminary injunction, *see* doc. 82 at 9-12, and merely incorporating claims from a complaint is insufficient to do so.

⁴ While the Free Assembly claim is not developed well, it is mentioned in the section of the *Argument* addressing the Church Leaders’ chance of success of the merits. Doc. 99 at 11. The Free Speech claim is absent there.

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.”).

IV. THE CHURCH LEADERS HAVE NOT ESTABLISHED THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. THE CHURCH LEADERS ARE NOT LIKELY TO PREVAIL ON THEIR FACIAL CHALLENGE BECAUSE THEY ACCEPT THAT ACT NO. 2011-535 HAS LEGITIMATE APPLICATIONS.

The most obvious reason the Church Leaders’ suit fails is procedural: it presents a facial challenge, and it cannot come close to satisfying the standard for having these provisions struck down on their face. *See e.g., Parsley*, doc. 1 at ¶ 78 (“The plaintiffs are entitled to a declaration that [Act No. 2011-535] is unconstitutional on its face and to an order preliminarily and permanently enjoining its enforcement.”) (emphasis added).⁵ “Under *United States v. Salerno*,

⁵ *See also Bowen v. Kendrick*, 487 U.S. 589, 600 (1988) (“Indeed, in that case it was clear that only a facial challenge could have been considered, as the Act had not been implemented.”); *Rice v. Norman Williams Co.*, 458 U.S. 654, 658 n.4 (1982) (“Rather than seeking a private remedy against private parties, respondents in these cases sought to enjoin the enforcement of a [S]tate statute that they contend to be unconstitutional under the Supremacy Clause in its every application. Indeed, because respondents brought this suit prior to the effective date of the statute, respondents did not, and could not, challenge any vertical restraints actually employed by a distiller pursuant to the statute. Instead, respondents challenge the statute on its face without consideration of particular circumstances.”); *id.* at 660 n.6 (“As with the instant case, because the challenged statute had not as yet been put into effect, this Court in [*Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966)] was presented only with a facial challenge to its constitutionality.”).

481 U.S. 739 (1987), a plaintiff can only succeed in a facial challenge by ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’ *i.e.*, that the law is unconstitutional in all of its applications.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (some internal quotation marks and citations omitted). In the very least, “a facial challenge must fail where the statute has a plainly legitimate sweep.” *Id.* (internal quotation marks and citations omitted).⁶

This means that the Church Leaders’ claims fail from the outset. The Church Leaders do not allege that Act No. 2011-535 is invalid “in all of its applications” or that it lacks “a plainly legitimate sweep.” *Washington State Grange*, 552 U.S. at 449 (some internal quotation marks and citations omitted). Instead, they challenge Act No. 2011-535 specifically and solely because it allegedly interferes with their religious conduct. While the Church Leaders do not explicitly concede that Act No. 2011-535 is valid as to some conduct, the concession is implicit in their

⁶ A different standard for facial challenges applies when a free speech overbreadth claim is at issue, but it does not appear that there is such a claim in the Second Amended Complaint, *Parsley*, doc. 50 at ¶¶ 99-102, and none is developed in the motion for preliminary injunction. See *Washington State Grange*, 552 U.S. at 449 n.6 (“Our cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”) (internal quotation marks and citations omitted); *New York v. Ferber*, 458 U.S. 747, 768 (1982) (“The [overbreadth] doctrine is predicated on the sensitive nature of protected expression: persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.”) (internal quotation marks and citations omitted); *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) (“... An overbroad statute might serve to chill protected speech.”).

arguments, and they certainly have not made any showing that Sections 13 and 27 are invalid when applied to non-religious conduct. For this reason, the Church Leaders will not succeed on the merits of their facial challenge, and have certainly not shown that they are likely to do so.⁷

B. EVEN IF THE CHURCH LEADERS' CLAIM AGAINST SECTION 13 WAS A PRE-ENFORCEMENT, AS-APPLIED CHALLENGE, THE CHURCH LEADERS WOULD NOT BE LIKELY TO SUCCEED ON THE MERITS BECAUSE THEY CANNOT DEMONSTRATE RIPENESS IN THE FORM OF A CREDIBLE THREAT OF PROSECUTION.

While the State Defendants believe that the Church Leaders can only present a (doomed) facial challenge in these circumstances because Act No. 2011-535 is not yet effective, the Church Leaders would not even be able to establish this Court's jurisdiction to issue an injunction if they reframed their claims as a pre-enforcement, as-applied challenge to Section 13's criminal provisions once the law becomes effective.⁸ *Cf. Steffel v. Thompson*, 415 U.S. 452, 454-56, 458-60 (1974) (considering Court's jurisdiction when the relevant criminal provision was effective, but had not been enforced against the plaintiff); *Ellis v. Dyson*, 421 U.S. 426, 427-28, 433-35 (1975) (considering the Court's jurisdiction when the relevant criminal provision was effective and had previously been enforced against the

⁷ With respect to the fact that this is a facial challenge, the State Defendants incorporate their prior discussion of the concerns presented by such cases, particularly with respect to their speculative nature. Doc. 82 at 14-18.

⁸ Section 13 contains criminal provisions; Section 27, the other subject of the Church Leaders' suit, does not. Doc. 1-2 at 36-39, 57-58. Accordingly, a pre-enforcement challenge of the sort discussed in the text is not an option as to Section 27.

plaintiffs; the Supreme Court viewed the case as one about whether there might be future prosecutions).

A case involving a pre-enforcement, as-applied challenge to a criminal provision requires the court to apply the ripeness doctrine, which “keeps federal courts from deciding cases prematurely, and protects [them] from engaging in speculation or wasting their resources through the review of potential or abstract disputes. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *United States v. Rivera*, 613 F.3d 1046, 1050 (11th Cir. 2010) (internal quotation marks and citations omitted; alteration by the Court).

So, to establish ripeness in a pre-enforcement case, plaintiffs must demonstrate “a *genuine threat* of enforcement of a disputed criminal statute.” *Steffel*, 415 U.S. at 475; *see also id.* at 476 (Stewart, J. concurring) (“The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an *actual concrete controversy* between himself and the agents of the State. He has, therefore, demonstrated ‘a *genuine threat of enforcement* of a disputed state criminal statute’)” (quoting Majority Opinion at 1223; ellipsis by Justice Stewart; footnote omitted; emphasis added); *Ellis*, 421 U.S. at 432-33, 434 (repeating “genuine threat of enforcement” language and recognizing that it goes to a showing of an Article

III controversy). A “genuine threat of enforcement” establishes that the matter is fit for judicial review, while the threat of criminal prosecution is a serious matter for the plaintiff.⁹ *Compare Rivera*, 613 F.3d at 1050 (“In deciding whether a case is ripe, we look primarily at two considerations: the hardship to the parties of withholding court consideration and the fitness of the issues for judicial decision.”) (internal quotation marks and citation omitted).

In *Babbitt v. United Farm Workers National Union*, the Court watered down the *Steffel* standard a bit, finding a credible threat where the plaintiffs sought to engage in activities that were prohibited by an effective statute and the government did not “disavow[] any intention of” prosecution. 442 U.S. 289, 298-99, 302 (1979). Most recently, the Supreme Court dealt with a pre-enforcement challenge to “18 U.S.C. § 2339B, which makes it a federal crime to ‘knowingly provid[e] material support or resources to a foreign terrorist organization.’” *Holder v. Humanitarian Law Project*, 561 U.S. ___, 130 S. Ct. 2705, 2712 (2010) (alteration by the Court). In concluding that a genuine threat of prosecution did exist, the Court again considered the government’s failure to disavow prosecution, as it had done in *Babbitt*, but it also relied on a record of similar prosecutions:

⁹ See *Steffel*, 415 U.S. at 459 (“petitioner has alleged threats of prosecution that cannot be characterized as ‘imaginary or speculative’”) (internal citation omitted); *id.* (“In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.”).

One last point. Plaintiffs seek preenforcement review of a criminal statute. Before addressing the merits, we must be sure that this is a justiciable case or controversy under Article III. We conclude that it is: Plaintiffs face “a credible threat of prosecution” and “should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” *Babbitt v. Farm Workers*, 442 U.S. 289, 298, (1979) (internal quotation marks omitted). *See also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007).

Plaintiffs claim that they provided support to the PKK and the LTTE before the enactment of § 2339B and that they would provide similar support again if the statute’s allegedly unconstitutional bar were lifted. See 309 F.Supp.2d, at 1197. *The Government tells us that it has charged about 150 persons with violating § 2339B, and that several of those prosecutions involved the enforcement of the statutory terms at issue here.* See Brief for Government 5. *The Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do.* Cf. Tr. of Oral Arg. 57-58. *See Babbitt, supra*, at 302. *See also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. ----, ----, ----, 130 S.Ct. 1324, 1330-1331, 1340 (2010) (considering an as-applied preenforcement challenge brought under the First Amendment). Based on these considerations, we conclude that plaintiffs’ claims are suitable for judicial review (as one might hope after 12 years of litigation).

130 S. Ct. at 2717 (emphasis added).

In this case, the Church Leaders assume that Section 13 will be enforced against them in the conduct of religious activities. They make this assumption without any record of prosecutions (since Section 13 is not yet effective). Moreover, and as discussed further below, Section 13 was drafted to match the terms of a similar federal law, nearly verbatim, and is likely to be interpreted in a manner consistent with federal law, except insofar as the Alabama Constitution might actually provide *greater* protections. Yet the Church Leaders have provided

no evidence of federal prosecutions of their on-going activities. Nor do they seem to fear federal prosecution, since they have not sued any federal officials. For these reasons, the Church Leaders have not demonstrated a genuine threat of prosecution, such that a pre-enforcement challenge to Section 13 should be deemed ripe, and so they cannot show, as they must, that they are likely to succeed on the merits.

C. THE CHURCH LEADERS' CONCERNS ABOUT WHAT RELIGIOUS ACTIVITIES FALL WITHIN THE SCOPE OF SECTION 13 AND SECTION 27 ARE EXAGGERATED.

Even if the Church Leaders could establish that this Court has jurisdiction to hear their claims, they would not be able to show that they are likely to succeed on the merits. That is so because, as an initial matter, they have not shown that the activities about which they are concerned are actually covered by the Act. Part of the problem here is that the Church Leaders are vague about what activities they believe are covered, and why they believe the Act's language covers those activities. That is so both as to Section 13 and Section 27, the two provisions on which they focus in their motion.

1. Section 13: Section 13 is nearly identical to, and modeled after, a federal statute, 8 U.S.C. § 1324(a)(1)(A). *See* doc. 82 at 77-78 (comparing Section 13 with 8 U.S.C. § 1324(a)(1)(A) and noting that the former “was drafted to precisely match the terminology and scope of” the latter). Even accepting *arguendo* small

differences in the two provisions, Section 13 duplicates currently in-force federal law in substantial part, and it will likely be interpreted consistently therewith, *cf. Ex parte Phillips*, 900 So.2d 412, 417 (Ala. 2004) (recognizing that the Supreme Court of Alabama “attempt[s] to weave a consistent pattern with our interpretations of our rules of civil procedure, which were patterned after the federal rules of civil procedures,” though it is not always done). The Church Leaders apparently do not view their activities as violating federal law, and they have failed to point to a single federal prosecution under the federal law – which again was the basis for Alabama’s statute – for any type of ministry activities. The federal law has not been interpreted so broadly, and there is no reason to think that the same language in Alabama’s statute will be. (In fact, with Alabama’s Religious Freedom Amendment, Ala. Const. Art. I, § 3.01, it is even *less* likely that Alabama’s statute would be interpreted to cover religious activities or ministry.) The Church Leaders have also failed to specify in what ways they believe that their specific activities could be interpreted to violate the provisions of Section 13.

Additionally, subsections (a)(1) through (a)(4) each contain a scienter element that the defendant “knows or recklessly disregards” either that the alien is unlawfully present or that the federal immigration laws have been or will be violated. This is a high standard. In the ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES), the instructions for 8 U.S.C.

§ 1324(a)(1)(A)(iii), which is the harboring and concealing provision upon which Section 13(a)(1) is modeled, and 8 U.S.C. § 1324(a)(1)(A)(ii), which is the transporting provision upon which Section 13(a)(3) is modeled, each explain:

To act with ‘reckless disregard of the fact’ means *to be aware of but consciously and carelessly ignore facts and circumstances clearly indicating* that the person . . . was an alien who had entered or remained in the United States illegally.

ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) at 96.2, 96.3 (2010), available at <http://www.ca11.uscourts.gov/documents/jury/CriminalJury2010.pdf>, last visited August 13, 2011 (emphasis added).

The manual further references *United States v. Zlatogur*, wherein the Eleventh Circuit approved of a district court adopting the following standard from the Tenth Circuit:

The phrase “reckless disregard of the fact,” as it has been used from time to time in these instructions, means *deliberate indifference* to facts which, if considered and weighed in a reasonable manner, indicate the *highest probability* that the alleged aliens were in fact aliens and were in the United States unlawfully.

271 F.3d 1025, 1029 (11th Cir. 2001) (*quoting United States v. Uresti-Hernandez*, 968 F.2d 1042, 1046 (10th Cir. 1992) (emphasis added)).

Moreover, it is clear that the Eleventh Circuit would apply the same interpretation to 8 U.S.C. § 1324(a)(1)(A)(iv), which is the encouraging and

inducing provision upon which Section 13(a)(2) is modeled.¹⁰ Similarly, the federal definition of reckless disregard should be viewed as incorporated throughout Section 13(a).

Act No. 2011-535 also defines “knows or knowingly” in a way that makes clear that the person must truly know, as that term is commonly used. Section 3(9)(a) (“A person acts knowingly or with knowledge with respect to . . . [t]he person’s conduct . . . when the person is aware of the nature of the person’s conduct”), doc. 1-2 at 10; *id.* (“A person acts knowingly or with knowledge with respect to . . . attendant circumstances when the person is aware . . . that those circumstances exist.”).

The Eleventh Circuit’s pattern jury instructions are helpful too with respect to Section 13(a)(3), which prohibits only that transportation which is “in furtherance of the unlawful presence of the alien in the United States.” Doc. 1-2 at 36. As to 8 U.S.C. § 1324(a)(1)(A)(ii), the jury instructions explain:

For transportation to further an alien’s unlawful presence, there must be *a direct and substantial relationship* between the Defendant’s act of transportation and the furthering of the alien’s presence in the

¹⁰ See *United States v. Perez*, 443 F.3d 772, 781 (11th Cir. 2006) (“We find our interpretations of the same ‘reckless disregard’ terminology in §§ 1324(a)(1)(A)(ii) and (iii)—both in our Pattern Jury Instructions and in *Zlatogur*—instructive to our instant analysis of § 1324(a)(2)(B)(iii). *Indeed, it is a well-established canon of statutory interpretation that identical words used in the same statute are intended to have the same meaning.* *United States v. DBB, Inc.*, 180 F.3d 1277, 1285 (11th Cir.1999). Accordingly, we interpret subsection 1324(a)(2)(B)(iii)’s ‘reckless disregard’ terminology by reference to our interpretation of the same words in subsection 1324(a)(1)(A)(ii) and (iii).”) (emphasis added).

United States. The act of transportation must be *something more than merely incidental* to furthering the alien's presence.

ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) at 96.2 (2010), available at <http://www.ca11.uscourts.gov/documents/jury/CriminalJury2010.pdf>, last visited August 13, 2011 (emphasis added). The Annotations and Comments go on to explain that “[t]he Circuits look to the purpose for which transportation is provided to an illegal alien to determine whether this law was violated.” *Id.*

2. Section 27: This Section directs that the State courts not “enforce the terms of, or otherwise regard as valid” a contract in which one party is an illegal alien, if the other party “had direct or constructive knowledge that the alien was unlawfully present in the United States at the time the contract was entered into, and the performance of the contract required the alien to remain unlawfully present in the United States for more than 24 hours after the time the contract was entered into or performance could not reasonably be expected to occur without such remaining.” Doc. 1-2 at 57. Certain exceptions apply. *Id.*

First, to be clear, Section 27 does not establish a crime. Any suggestion to the contrary is mistaken. *See* doc. 99 at 7. Second, the Church Leaders can rest assured that Section 27 does not reach the covenants of baptism or marriage, doc. 99 at 13, or other religious sacraments, *id.* at 3-4 . The State Defendants cannot conceive of the manner in which someone would file suit in State Circuit Court to

enforce a baptism or other religious sacrament; it is not a matter for the Courts. As to marriages specifically, the State court routinely deal with marriage and divorce, but only insofar as the civil legal status—not religious status—is concerned. For instance, a court will sometimes award someone a divorce when a church will not. Additionally, the fact that Act No. 2011-535 does not purport to interfere with the fundamental right to marriage is evident in Section 30, doc. 1-2 at 70. Generally speaking, Section 30 prohibits illegal aliens from conducting business transactions with the State or with local government, and requires everyone else to demonstrate citizenship or lawful presence. *Id.* But critically for present purposes, specifically exempted is “applying for a marriage license.” *Id.*

D. IN THE EVENT THAT THE COURT REACHES THE UNDERLYING SUBSTANTIVE LAW QUESTIONS, THE CHURCH LEADERS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

Even if the Church Leaders had established that the Act covers the conduct about which they are concerned, they have not established a substantial likelihood that in those circumstances the Act would be unconstitutional. The Church Leaders offer essentially no legal analysis establishing a “substantial likelihood” that they will succeed on the merits of those claims. *Scott v. Roberts*, 612 F.3d 1287, 1290 (11th Cir. 2010). In particular, they provide no meaningful explanation of how courts have interpreted the constitutional provisions on which they rely (*i.e.*, Free Exercise Clause, Assembly Clause, and Contracts Clause)—let alone in a manner

that would support the requested injunction. *See, e.g.*, doc. 99 at 10-11. Because the burden of establishing a likelihood of ultimate success is the Church Leaders' burden to bear, *see* doc. 82 at 9-12, this deficiency alone is reason to deny the injunction. *Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994) (“Because we conclude that the plaintiffs failed to establish a substantial likelihood of success on the merits, we will not address the three other prerequisites of preliminary injunctive relief.”).

But in the event that the Court reaches these constitutional questions, precedent either forecloses the Church Leaders' claims or, in the very least, raises serious doubts about their ability to prevail with respect to each constitutional provision on which they rely.

1. Free Exercise: The Supreme Court has explained that the Free Exercise Clause “embraces two concepts[—]freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.” *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). Here, the Church Leaders' claim concerns restrictions on conduct and is squarely foreclosed by established precedent.

The State Defendants assume the Church Leaders' Free Exercise claim is directed at both Section 13 and Section 27. Each claim will fail under the Supreme

Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith (Smith II)*, 494 U.S. 872 (1990). That is so because each of these Sections constitutes "a law that is neutral and of general applicability," and so it "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith II*, 494 U.S. 872 (1990)). See also *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-595 (1940) ("Conscientious scruples" cannot "relieve[] the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."); *Reynolds v. United States*, 98 U.S. 145 (1878) (rejecting Free Exercise challenge to polygamy laws).

Neither the text of these Sections nor the circumstances surrounding their passage indicate that they in any sense "discriminate[] against some or all religious beliefs." *City of Hialeah*, 508 U.S. at 532, 534. Nor are Section 13 or Section 27 triggered "only when [the harboring, shielding, contracting *etc.* are] engaged in for religious reasons" or "only because of the religious belief they display." *Smith II*, 494 U.S. at 877; accord *City of Hialeah*, 508 U.S. at 532 ("the protections of the Free Exercise Clause pertain if the law at issue . . . regulates or prohibits conduct *because* it is undertaken for religious reasons.") (emphasis added).

As a result, Sections 13 and 27 are “presumed constitutional” and, under *Smith II*, need only be “rationally related to a legitimate government interest.” *First Vagabonds Church of God v. City of Orlando, Fla.*, 610 F.3d 1274, 1285 (11th Cir. 2010), *rehearing en banc granted and opinion vacated by*, 616 F.3d 1229 (11th Cir. 2010) (*en banc*), *opinion reinstated in part by*, 638 F.3d 756 (11th Cir. 2011) (*en banc*). These Sections easily meet this standard. As set out in Section 2 of Act No. 2011-535, the Alabama Legislature found “that illegal immigration is causing economic hardship and lawlessness in this [S]tate,” and that “certain practices currently allowed in this [S]tate impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Alabama.” Doc. 1-2 at 6-7, doc. 82 at 2-3. These are sufficient for Section 13 and Section 27 to withstand the Church Leaders’ Free Exercise challenge.

There is another reason why the Church Leaders are unlikely to succeed on the merits as to Section 13. As previously noted, Section 13 is similar to a federal statute, 8 U.S.C. § 1324(a)(1)(A). The predecessor to that federal statute has itself been upheld against Free Exercise challenges and been recognized as serving a legitimate government interest. *E.g., United States v. Merkt*, 794 F.2d 950, 954-55 (5th Cir. 1986) (upholding the predecessor federal statute against a Free Exercise challenge as a neutral law preventing circumvention of federal border control

laws). Section 13 not only complements the federal interest in border security and the enforcement of federal immigration law, but also addresses the Alabama Legislature's concerns about economic hardship, lawlessness, and the restriction of privileges and immunities of the citizens of Alabama.

2. Assembly: The Church Leaders do not develop their Freedom of Assembly claim, and this Court should deny the requested injunction for that reason. *See* doc. 82 at 9-12; *see also Church*, 30 F.3d at 1342. What they do, instead, is assert that they “will suffer irreparable harm because members will be deterred from assembling to worship for fear of being arrested.” Doc. 99 at 10; *see also id.* at 3. That is, they speculate about how others will behave, presumably in response to Section 13's provisions. *See* doc. 82 at 14-18 (facial challenges are disfavored, in part because of speculative nature). To the extent that the Church Leaders are attempting to assert the alleged injuries of other persons whom they speculate will be deterred from assembling, the claim fails for lack of standing. *See* Section II(A), *supra*.

To the extent that the Church Leaders believe that their own rights will be violated, Section 13 does not prevent the Church Leaders' from “assembling.” The First Amendment assembly right has been understood as a right to gather together for “lawful discussion.” especially “in respect to public affairs.” *De Jonge v. Oregon*, 299 U.S. 353, 364, 365 (1937). Section 13 prohibits only certain forms of

aid to illegal aliens, and then only with the requisite knowledge that the aliens are unlawfully present in the United States. It does not prohibit, or even mention, assembling for worship or any other purpose—and the Church Leaders have identified no authority to support their theory that the right to assemble can unconstitutionally be “chilled.” See doc. 99 at 10 (“members will be deterred from assembling to worship for fear of being arrested.”). See also *Comm. in Solidarity with People of El Salvador v. F.B.I.*, 770 F.2d 468, 477 (5th Cir. 1985) (“[T]he statute does not prevent simple peaceable assembly for the purpose of lawful discussion, which of course, cannot be made a crime”).

Moreover, the First Amendment right of assembly cannot include the right of “assembling to worship” with persons the federal government has determined to have no right to be present. Cf. *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904) (“It is, of course, true, that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country; but that is merely because of his exclusion therefrom.”). This makes sense, first, as a textual matter. The “right of the people peaceably to assemble,” U.S. Const. Amend. I, most logically refers to the right of the people to assemble with one another, and prior decisions of the Supreme Court support the proposition that “the people” does not include illegal aliens. See *United States v. Verdugo-Urquidez*, 494 U.S.

259, 265 (1990) (“While this textual exegesis is by no means conclusive, it suggests that ‘the people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”); *see also United States ex rel. Turner*, 194 U.S. at 292 (an alien “does not become one of the people to whom [protections] are secured by our Constitution by an attempt to enter, forbidden by law”). It also makes sense as a logical matter. A person asserting a right to assemble with an illegal alien stands in the same (inadequate) shoes as one asserting a right to assemble with someone confined in a nearby prison. *See, e.g., Jones v. N. Carolina Prisoners’ Labor Union*, 433 U.S. 119, 125-26 (1977) (incarceration necessarily “entails a restriction on the freedom of inmates to associate with those outside of the penal institution”).

3. Contracts: Section 27’s contract regulations and Section 13(a)(4)’s prohibition of rental agreements with illegal aliens are the only provisions that could conceivably be alleged to raise any issue under the Contract Clause, U.S. CONST. Art. I, §10, cl.1, but here too the Church Leaders are not entitled to relief.

As to their claim against Section 27, the Church Leaders focus almost exclusively on religious covenants, though they mention “being able to run day

cares, thrift stores or other enterprises involving contractual relations with residents who may be undocumented.” Doc. 99 at 3-4, 7, 10, 12. Their merits discussion is limited to the assertion Section 27 “prohibits the ability of Church Leaders to freely contract” and a recitation of what that provision provides, without any analysis or case law explaining any alleged constitutional defect. *Id.* at 12. As to Section 13(a)(4), the Church Leaders simply assert that the prohibition “attacks [their] freedom to exercise their faith.” Accordingly, the Contract Clause claim is inadequately developed and should be denied for that reason. *See* doc. 82 at 9-12; *Church*, 30 F.3d at 1342.

What has been written is focused on religious covenants. Initially, as previously pointed out, the Church Leaders are mistaken to believe that any religious covenants will be invalidated by Section 27. *See* Section IV(C)(2), *supra*.

As to any contracts that would be subject to State court action and as to rental agreements, the Church Leaders have come nowhere close to satisfying their burden of establishing a likelihood of winning a facial Contracts Clause claim. The Contracts Clause is only even implicated if governmental action affects existing contracts. *See Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 234 (1827) (the Contracts Clause “operat[es] upon antecedent[,] existing contracts”). “[T]he Contracts Clause does not limit the ability of the government to regulate the terms of future contracts.” Erwin Chemerinsky, *CONSTITUTIONAL LAW* §8.3, p. 629 (3rd

ed. 2006). Accordingly, the Church Leaders have not established—and cannot establish—that Section 27 and Section 13(a)(4) “[are] unconstitutional in all of [their] applications” or lack “a plainly legitimate sweep.” *Washington State Grange*, 552 U.S. at 449 (some internal quotation marks and citations omitted).

V. CERTIFICATION TO THE ALABAMA SUPREME COURT

If the Court is concerned that either Section 13 or Section 27 violates the U.S. Constitution (on any grounds) when applied to certain religious activities, it would be appropriate to first ask the Supreme Court of Alabama for a construction of whether the Sections do in fact apply to those activities in light of the constraints imposed by the Alabama Religious Freedom Amendment, Ala. Const. Art. I, § 3.01. *See* doc. 94 (*State Defendants’ Motion to Certify Question to the Supreme Court of Alabama*).

The U.S. Supreme Court followed a similar path in the *Employment Division v. Smith* litigation. When the case first arrived in that Court, the Majority determined as follows:

Neither the Oregon Supreme Court nor this Court has confronted the question whether the ingestion of peyote for sincerely held religious reasons is a form of conduct that is protected by the Federal Constitution from the reach of a State’s criminal laws. It may ultimately be necessary to answer that federal question in this case, *but it is inappropriate to do so without first receiving further guidance concerning the status of the practice as a matter of Oregon law.*

Employment Div., Dep't of Human Res. of Oregon v. Smith (Smith I), 485 U.S. 660, 672 (1988) (emphasis added). *See also Smith II*, 494 U.S. at 875-76 (“Being ‘uncertain about the legality of the religious use of peyote in Oregon,’ we determined that it would not be ‘appropriate for us to decide whether the practice is protected by the Federal Constitution.’”). Two years later, following a remand to the State’s Highest Court, the case returned to the Supreme Court with the question squarely presented. This Court should consider the possibility of seeking a construction of Act No. 2011-535 in order to avoid unnecessarily resolving federal questions that are not truly presented.

VI. CONCLUSION

For the foregoing reasons, the Church Leaders' motion for a preliminary injunction should be denied.

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