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 the injunction against Section 8 while the appeal remains pending.

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

2. Plaintiffs instituted this action on July 8, 2011, seeking injunctive relief against enforcement of Act No. 2011-535, also known as the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, or H.B. 56. On July 21, 2011, Plaintiffs filed a motion for preliminary injunction. One of the sections of the Act Plaintiffs sought to enjoin was Section 8, the central provision of which stated that "[a]n 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 Alabama. *See* doc. 37 (Plaintiffs' Mot. for Prelim. Inj.) at 55-57; Act No. 2011-535, § 8.[2]

3. In its Opinion dated September 28, 2011, that accompanied the Preliminary-Injunction Order, the Court recognized that Alabama could exclude unlawfully present aliens from enrolling in and attending the State's postsecondary public education institutions, consistent with federal law. The Court noted that

[2] Citations to documents filed with the Court are to docket entries as "Doc. __", and citations to page numbers for such documents are to the 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 informing the Eleventh Circuit that upon remand this Court would dissolve the Preliminary Injunction against Section 8.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 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 the following counsel of record:

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