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

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	
v.	**Case No. 2:11cv 02746-SLB**
STATE OF ALABAMA & GOVERNOR ROBERT J. BENTLEY,	
Defendants.	

PLAINTIFF'S MOTION FOR AN INJUNCTION PENDING APPEAL OR, ALTERNATIVELY, A TEMPORARY INJUNCTION PENDING ADJUDICATION OF AN EMERGENCY MOTION TO THE COURT OF APPEALS FOR AN INJUNCTION PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 62(c), Plaintiff, the United States, hereby moves for an order enjoining enforcement of Sections 10, 12(a), 18, 27, 28, and 30 of Alabama's H.B. 56, pending adjudication of the appeal from this Court's September 28, 2011 Order. In the alternative, the United States moves for an order temporarily enjoining enforcement of these Sections of Alabama's H.B. 56, to permit the Eleventh Circuit to consider whether to grant an injunction pending appellate review.

It is not disputed that the federal government's authority in matters of immigration is plenary and exclusive. Pursuant to that authority, Congress has enacted a comprehensive statutory scheme regarding aliens unlawfully in the United States, including procedures for deportation and for seeking asylum and other forms of relief from removal. Apart from those provisions for removal of aliens, Congress imposed restrictions on employers who knowingly

hire unauthorized aliens, but has not otherwise restricted contracts or commercial dealings with them.

These enactments, and Congress's vesting of the authority to enforce them in Executive Branch officials, reflect a congressional determination to bring about the removal of illegally present aliens through the immigration laws. They also demonstrate a recognition that the means of enforcement, as under all federal laws, are committed to the judgment and discretion of Executive officials, and must be informed by a variety of considerations, including the rights of persons lawfully in the United States and the impact of immigration policy on the Nation's dealings with other nations. In enforcing the immigration laws, federal officials must likewise determine priorities and exercise discretion consistent with those priorities and the broader concerns reflected in immigration policy.

One of the principal purposes of the adoption of the United States Constitution was to vest authority and responsibility for the United States foreign relations and dealings with other nations and their citizens in the national government. Under the Constitution, immigration, no less than other aspects of the Nation's foreign relations and foreign commerce, requires uniform regulation, and cannot be subject to a patchwork of state measures. *Chy Lung v. Freeman*, 92 U.S. 277, 279-280 (1876). Alabama thus has no authority to regulate in the area of immigration. Nevertheless, the state has enacted a scheme of regulation, and one that is at odds with the letter and spirit of federal policy. The Alabama statute "departs from our traditional policy of not treating aliens as a thing apart[.]" *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941). Taken together, the Alabama provisions do not merely expose aliens to "the possibility of inquisitorial practices and police surveillance," *id.* at 74, but make unlawful presence a criminal offense, and render

unlawfully present aliens a unique class who cannot lawfully obtain housing, enforce a contract, or send their children to school without fear that enrollment will be used as a tool to seek to detain and remove them and their family members. Notwithstanding the State's claim that its actions will further common goals, the challenged provisions, if implemented, would institute fundamental disuniformity and serve only to undermine federal enforcement of the immigration laws and to create difficulties in the conduct of foreign policy — consequences for the whole Nation, including people of the other States.

This case has required the Court to address issues of great importance, some of them novel and complex. The Court temporarily enjoined the implementation of the Alabama law pending its own consideration of the law and the numerous issues it raised before the law went into effect. The Court should now afford the Court of Appeals the same opportunity. That is especially so because with respect to key features of the Alabama statute, this Court's ruling is at odds with the decisions of district court and court of appeals in the *United States v. Arizona* case. Indeed, the Alabama statute goes even further than did the Arizona statute in "treating aliens as a thing apart" and preventing undocumented aliens from lawfully engaging in activities essential to daily life. Thus, notwithstanding the Court's partial denial of our motion for a preliminary injunction, it is appropriate to maintain an injunction pending appeal to allow the Eleventh Circuit to consider the issues presented fully. The United States will seek expedited briefing in the court of appeals to minimize any delay in resolution. The injunction will avoid implementation of measures with potentially far-reaching implication for federal interests and of the Nation as a whole, as well as persons lawfully in the United States. Alabama has demonstrated no comparable harm. No harm resulted from this Court's prior injunction, and

none will result by allowing the court of appeals to review the same issues.

ARGUMENT

A. Rule 62(c) permits this court to enter an injunction pending appeal of an order granting or denying a preliminary injunction. *See* 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."). The standard for obtaining such an injunction is similar to the four-part test for obtaining a preliminary injunction: "to secure a stay or an injunction pending appeal, the moving party must demonstrate (1) a strong showing of the likelihood of success on the merits; (2) that the moving party will be irreparably injured absent the relief; (3) that the issuance of the stay or injunction will not substantially injure the other parties interested in the proceeding; and (4) that the public interest will not be adversely affected by the requested relief." *Sierra Club v. United States Army Corps of Eng'rs*, 2007 U.S. Dist. LEXIS 7230, at *5 (M.D. Fla. Feb. 1, 2007); *see also SunAmerica Corp. v. Sun Life Assurance Co. of Can.*, 890 F. Supp. 1559, 1584 (N.D. Ga. 1995) (same).

A determination that a preliminary injunction is inappropriate does not, however, indicate that an injunction pending appeal should be denied, as the former Fifth Circuit noted in *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).[1] Under Rule 62(c), a plaintiff may thus "secure an injunction pending appeal where the district court has already ruled that a plaintiff's claim for preliminary injunctive relief lacks merit." *See, e.g.*, *Save Our Dunes v. Pegues*, 642 F. Supp.

[1] The Fifth Circuit decided *Ruiz* on June 26, 1981. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

393, 399 n.4 (M.D. Ala. 1985) (citing *Ruiz*).

In determining whether to grant relief pending appeal, "the 'success on the merits factor cannot be rigidly applied,' because if it were 'the district court would have to conclude that it was probably incorrect in its determination on the merits.'" *Protect Our Water v. Flowers*, 377 F.Supp. 2d 882, 884 (E.D.Cal. 2004) (citations omitted). Thus, an injunction is "frequently issued where the trial court is charting a new and unexplored ground and the court determines that a novel interpretation of the law may succumb to appellate review." *Id.* (citation omitted). *See also Peck v. Upshur County Bd. of Educ*., 941 F. Supp. 1478, 1481 (N.D. W. Va. 1996) ("To find that plaintiffs have a strong likelihood of success on appeal, the Court need not harbor serious doubts concerning the correctness of its decision. Otherwise, relief under rule 62(c) would rarely be granted. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained."). Accordingly, "district courts properly 'stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.'" *Id.* (citing, *inter alia, Washington Metro. Area v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977)).

B. This is plainly a case in which the Court's ruling embodies "a novel interpretation of the law may succumb to appellate review." Three of the provisions — Sections 10, 12(a), and 18 — would alter the premises of immigration law and enforcement. They create state criminal penalties for violation of registration provisions of the Immigration and Nationality Act that implement Congress's exclusive authority over immigration, and those state provisions effectively criminalize mere presence in the state. The state provisions also undermine genuine

cooperation between the federal officials responsible for enforcing the federal immigration laws and state and local officials, by depriving state and local officials of the discretion necessary to work cooperatively with federal officials. Sections 10, 12(a), and 18 closely resemble provisions of Arizona law that were held to be preempted in *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), and that decision strongly suggests that an injunction pending appeal is appropriate to allow the Eleventh Circuit to consider whether it finds the reasoning of a sister circuit persuasive.

Other provisions impose such significant burdens on unlawfully present aliens – including aliens whose adjustment of status claims the federal government is in the process of reviewing – so as to infringe upon an exclusively federal power. These provisions will effectively nullify unlawfully present aliens' rights of contract (as well as the rights of third parties to the contract) (Section 27), effectively close the doors of state and local government to unlawfully present aliens (Section 30), and will create a well-founded fear in many children who are U.S. citizens or otherwise lawfully present in the United States, as well as in those children who are here unlawfully, that the State will use their school enrollment or attendance to seek either their arrest or deportation or that of their parent or family member who lacks lawful immigration status (Section 28).[2] In short, these provisions were designed to work together to "attack[] every aspect of an illegal alien's life" in Alabama, *see* United States' Motion for a Preliminary Injunction at 1 (citing sources), and if implemented will achieve that goal, which is contrary to provisions of federal immigration law and one of its core purposes, *i.e.*, to remove

[2] Indeed, it appears that in its first day of operation, Section 28 has already resulted in a significant number of school children either withdrawing from or not attending school. *See* http://blog.al.com/live/2011/09/foley_elementary_students_pare.html.

illegally present aliens through orderly enforcement and lawful processes under federal authority.

Our preliminary injunction motion details the impact of the challenged provisions on the federal government's ability to pursue its priorities in enforcing the immigration laws, on the conduct of foreign policy, and on the conditions of citizens and lawfully present aliens. *See* Preliminary Injunction Motion at 65-72.

In contrast, Alabama has identified no injury that it will suffer as a result of an injunction pending appeal. This Court's August 29, 2011 Order enjoining enforcement of H.B. 56 has not interfered with Alabama's interests or the public interest, and a further injunction pending appeal will not do so either.

C. If the Court determines that an injunction pending appeal is not warranted, we ask, in the alternative, that the Court issue a temporary injunction that would permit the Eleventh Circuit to consider the government's motion for an injunction pending appeal.

CONCLUSION

For the foregoing reasons, the Court should grant the United States' Motion for an injunction pending appeal, or, in the alternative for a temporary injunction pending adjudication of an emergency motion to the Eleventh Circuit for an injunction pending appeal.

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