

No. 11-14535-CC and No. 11-14675

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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**HISPANIC INTEREST COALITION OF ALABAMA, ET AL.**

*Appellants/Cross-Appellees,*

v.

**ROBERT BENTLEY, ET AL.,**

*Appellees/Cross-Appellants.*

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

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**SUPPLEMENTAL BRIEF FOR APPELLEES/CROSS-APPELLANTS ON  
*ARIZONA V. UNITED STATES* AND HB658**

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R. Cooper Shattuck  
*Legal Advisor to the Governor*  
**OFFICE OF GOVERNOR OF ALABAMA**  
Legal Office, N103  
600 Dexter Avenue  
Montgomery, AL 36130  
Telephone: (334) 242-7120  
*Counsel for Governor Bentley*

Luther Strange  
*Attorney General*  
John C. Neiman, Jr.  
*Solicitor General*  
**OFFICE OF THE ATTORNEY GENERAL**  
501 Washington Avenue  
Montgomery, Alabama 36130-0152  
Telephone: (334) 242-7300  
Facsimile: (334) 353-8440

*Counsel for Governor Bentley, Attorney  
General Strange, Superintendent Craven,  
Chancellor Hill, and District Attorney  
Broussard*

July 6, 2012

**CERTIFICATE OF INTERESTED PERSONS**

The following is a list of all **additional** known judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly held company that owns 10 percent or more of a party's stock, and other identifiable legal entities related to a party:

[no new entries]

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## ARGUMENT

The State Defendants adopt the arguments regarding Sections 10, 12, 18, 27, 28, and 30 from the State and Governor’s supplemental brief in the United States’ case. *See* Ala. Supp. Br., Nos. 11-14532-CC and 11-14674-CC, at 1-11.<sup>1</sup> This brief addresses the one additional provision, Section 8, for which preemption-related issues are presented in *HICA*. It also addresses the general effect of the *Arizona* decision on the HICA Plaintiffs’ overarching regulation-of-immigration theory.

### **I. Section 8 is not preempted.**

HB658 moots the HICA Plaintiffs’ challenge to Section 8 and requires vacatur of the District Court’s judgment against that provision. *See* Red Br. 64-68.

Section 8 states 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. ALA. CODE §31-13-8. The HICA Plaintiffs’ challenge to this provision was premised on a single sentence. That sentence said “[a]n alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8

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<sup>1</sup> Because the District Court is due to be reversed on the Section 10 issue in the United States’ case, this Court can vacate the District Court’s judgment on Section 10 in the HICA Plaintiffs’ appeal and allow the District Court on remand to deny their motion on that provision as moot, as the District Court did with respect to Section 13.

U.S.C. § 1101, et seq.” *Id.* The District Court preliminarily enjoined the entire provision based on that sentence. It reasoned, correctly, 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 – Pg 44 n. 13 (citing *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 601-08 (E.D. Va. 2004)). But it found that the sentence in question was flawed because it precluded some lawfully present persons from enrolling in and attending postsecondary institutions. *Id.* at 38, 44. On that basis the District Court enjoined the entirety of Section 8. *Id.* Before this Court, the State Defendants argued that the District Court should have enjoined only the sentence, not the whole provision. *See* Red Br. 64-68.

The HICA Plaintiffs’ claims against Section 8 are now moot because HB658 eliminated that sentence. *See* Ala. Act No. 2012-491 §1, at p. 17. The District Court identified only one plaintiff, Esayas Haile, as having standing to challenge Section 8. Doc 137 – Pg 37. Amended Section 8, by its terms, should no longer preclude Haile, who is alleged to be lawfully present, from obtaining a postsecondary education.

Because the HICA Plaintiffs have not argued that a preliminary injunction would be appropriate for any other reason, *see* Yellow Br. 48-51, they no longer

have any argument that the provision is preempted. The federal code specifically authorizes states to deny postsecondary-education benefits to unlawfully present persons. *See* 8 U.S.C. §1621. Section 8 expressly defers to the federal government’s determination as to whether the person is unlawfully present under 8 U.S.C. §1373(c). *See* ALA. CODE §31-13-8. Under the binding former Fifth Circuit decision in *Doe v. Plyler*, a state can “deny illegal aliens its largess,” including educational benefits, without fear of preemption. 628 F.2d 448, 453 (5th Cir. 1980). Nothing in *Arizona* is to the contrary.

The Court thus should vacate the district court’s judgment on Section 8. “Where a law is amended so as to remove its challenged features, the claim for injunctive relief becomes moot as to those features.” *Naturist Soc’y v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992). Because the HICA Plaintiffs offer no other basis for a claim against Section 8, this Court should vacate the judgment and remand with instructions to deny their request for a preliminary injunction as moot.

## **II. *Arizona* refutes the HICA Plaintiffs’ “regulation of immigration” theory.**

One additional point about the HICA Plaintiffs’ particular preemption theory, beyond what is noted in the State and Governor’s supplemental brief in the United States’ case, bears emphasis in light of what the Supreme Court said in *Arizona*.



The HICA Plaintiffs' overarching theory is that HB56 as a whole, and particularly Sections 10 and 12, amounts to an unconstitutional regulation of immigration. *See* Blue Br. 33-34, 36-38. That theory is incompatible with the way the Supreme Court analyzed the Arizona statute. The Supreme Court did not hold that Arizona's version of Section 10 was preempted because it regulated immigration; it instead held that the provision was preempted because Congress has occupied the particular field of alien registration. *See Arizona v. United States*, No. 11-182, \_\_\_ U.S. \_\_\_, \_\_\_ S. Ct. \_\_\_, 2012 WL 2368661, at \*8-\*10 (June 25, 2012). Likewise, the Supreme Court rejected the argument that Arizona's version of Section 12 was facially preempted. *See id.* at \*15-\*17. Under HICA's sweeping theory, both of those provisions would have been facially invalid on the theory that they were regulations of immigration. The Supreme Court's approach thus makes clear that HICA was mistaken to suggest that all state laws that "place[] special burdens on" unlawfully present persons are unconstitutional regulations of immigration. Blue Br. 33.

### **III. *Arizona* and HB658 shed no light on the non-preemption issues.**

HICA's appeal also presents Fourteenth Amendment issues relating to Section 28, and the State Defendants' cross-appeal presents Sixth Amendment issues under Sections 10(e), 11(e), and 13(h). The cross-appeal as to Sections 10(e)

and 11(e) appear to be moot because *Arizona* means that Section 10 and Section 11(a) are preempted. *See* Ala. Supp. Br., Nos. 11-14532-CC and 11-14674-CC, at 3. But the cross-appeal as to Section 13(h) remains ripe, and neither HB658 nor *Arizona* affects the analysis on this point. The Court should resolve those constitutional claims in the State Defendants' favor for the reasons set forth in the briefs. *See* Red Br. 49-64; Gray Br. 1-3.

Also, for the first time in this appeal, the HICA Plaintiffs have argued in their supplemental brief that Section 19 is preempted. *See* HICA Supp. Br. 5-7. This provision is not the subject of this appeal, and that portion of the HICA supplemental brief should be stricken.

### CONCLUSION

This Court should do the following:

- (1) affirm the District Court's judgment on Sections 12, 18, 27, 28, and 30;
- (2) reverse the District Court's judgment on Section 13(h); and
- (3) vacate the District Court's judgment on Sections 8, 10, 10(e), and 11(e) and remand with instructions to deny the request for a preliminary injunction on these provisions as moot.

Respectfully submitted,

LUTHER STRANGE (ASB-0036-G42L)  
*Attorney General*

BY:

s/John C. Neiman, Jr.

John C. Neiman, Jr. (ASB-8093-O68N)  
*Solicitor General*

**OFFICE OF THE ALABAMA ATTORNEY GENERAL**  
501 Washington Avenue  
Montgomery, Alabama 36130-0152  
Telephone: 334.242.7300  
Facsimile: 334.353.8440  
[jneiman@ago.state.al.us](mailto:jneiman@ago.state.al.us)

*Counsel for Governor Bentley, Attorney General  
Strange, Superintendent Craven, Chancellor Hill, and  
District Attorney Broussard*

OF COUNSEL:

R. Cooper Shattuck  
*Legal Advisor to the Governor*

**OFFICE OF GOVERNOR OF ALABAMA**  
Legal Office, N103  
600 Dexter Avenue  
Montgomery, AL 36130  
(334) 242-7120  
[cooper.shattuck@governor.alabama.gov](mailto:cooper.shattuck@governor.alabama.gov)

*Counsel for Governor Robert Bentley*

**CERTIFICATE OF COMPLIANCE**

I certify this brief complies with the applicable page limitation under this Court's order. I prepared this brief in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point, Times New Roman font.

s/ John C. Neiman, Jr.  
OF COUNSEL

**CERTIFICATE OF SERVICE**

On July 6, 2012, I filed and served this brief via PACER. On that same day, I dispatched this brief to Federal Express for delivery to the Court within three business days. I served the following attorneys for the United States by electronic mail:

Mary Bauer (ASB-1181-R76B)  
Samuel Brooke (ASB-1172-L60B)  
SOUTHERN POVERTY LAW  
CENTER  
400 Washington Ave.  
Montgomery, Alabama 36104  
T: (334) 956-8200  
*mary.bauer@splcenter.org*  
*samuel.brooke@splcenter.org*

Michelle R. Lapointe  
Kristi Graunke  
Naomi Tsu  
Daniel Werner  
SOUTHERN POVERTY LAW  
CENTER  
233 Peachtree St., NE, Suite 2150  
Atlanta, Georgia 30303  
T: (404) 521-6700  
*michelle.lapointe@splcenter.org*  
*kristi.graunke@splcenter.org*  
*naomi.tsu@splcenter.org*  
*daniel.werner@splcenter.org*

Sin Yen Ling  
ASIAN LAW CAUCUS  
55 Columbus Avenue  
San Francisco, California 94111  
T: (415) 896-1701 x 110  
*sinyenL@asianlawcaucus.org*

Andre Segura  
Elora Mukherjee  
Omar C. Jadwat  
Lee Gelernt  
Michael K. T. Tan  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
125 Broad Street, 18th Floor  
New York, New York 10004  
T: (212) 549-2660  
*asegura@aclu.org*  
*ojadwat@aclu.org*  
*lgelernt@aclu.org*  
*mtan@aclu.org*  
*emukherjee@aclu.org*

Cecillia D. Wang  
Katherine Desormeau  
Kenneth J. Sugarman  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
IMMIGRANTS' RIGHTS PROJECT  
39 Drumm Street  
San Francisco, California 94111  
T: (415) 343-0775  
*cwang@aclu.org*  
*kdesormeau@aclu.org*  
*irp\_ks@aclu.org*

Erin E. Oshiro  
ASIAN AMERICAN JUSTICE  
CENTER, MEMBER OF THE ASIAN  
AMERICAN CENTER FOR  
ADVANCING JUSTICE  
1140 Connecticut Ave., NW  
Suite 1200  
Washington, DC 20036  
T: (202) 296-2300  
*eoshiro@advancingequality.org*

Foster S. Maer  
Ghita Schwarz  
Diana S. Sen  
LATINOJUSTICE PRLDEF  
99 Hudson St., 14<sup>th</sup> Floor  
New York, New York 10013  
T: (212) 219-3360  
*fmaer@latinojustice.org*  
*gschwarz@latinojustice.org*  
*dsen@latinojustice.org*

G. Brian Spears  
1126 Ponce de Leon Ave., N.E.  
Atlanta, Georgia 30306  
T: (404) 872-7086  
*bspears@mindspring.com*

Chris Newman  
Jessica Karp  
NATIONAL DAY LABORER  
ORGANIZING NETWORK  
675 S. park View St., Suite B  
Los Angeles, California 90057  
T: (213) 380-2785  
*newman@ndlon.org*  
*jkarp@ndlon.org*

Linton Joaquin  
Karen C. Tumlin  
Shiu-Ming Cheer  
Melissa S. Keaney  
NATIONAL IMMIGRATION LAW  
CENTER  
3435 Wilshire Boulevard, Suite 2850  
Los Angeles, California 90010  
T: (213) 639-3900  
*joaquin@nilc.org*  
*tumlin@nilc.org*  
*cheer@nilc.org*  
*keaney@nilc.org*

Tanya Broder  
NATIONAL IMMIGRATION LAW  
CENTER  
405 14<sup>th</sup> Street, Suite 1400  
Oakland, California 94612  
T: (510) 663-8282  
*broder@nilc.org*

Herman Watson, Jr. (ASB-6781-  
O74H)  
Eric J. Artrip (ASB-9673-I68E)  
Rebekah Keith McKinney (ASB-3137-  
T64J)  
Watson, McKinney & Artrip, LLP  
203 Greene Street  
P.O. Box 18368  
Huntsville, Alabama 35804  
T: (256) 536-7423  
*watson@watsonmckinney.com*  
*mckinney@watsonmckinney.com*  
*artrip@watsonmckinney.com*

Allison Neal (ASB 3377-I72N)  
AMERICAN CIVIL LIBERTIES  
UNION OF ALABAMA  
FOUNDATION  
207 Montgomery St., Suite 910  
Montgomery, Alabama 36104  
T: (334) 265-2754 x 203  
*aneal@actualabama.org*

Freddy Rubio (ASB-5403-D62R)  
Cooperating Attorney, ACLU of  
Alabama Foundation  
Rubio Law Firm, P.C.  
438 Carr Avenue, Suite 1  
Birmingham, Alabama 35209  
T: 205-443-7858  
*frubio@rubiofirm.com*

Ben Bruner (ASB-BRU-001)  
THE BRUNER LAW FIRM  
1904 Berryhill Road  
Montgomery, Alabama 36117  
T: (334) 201 0835  
*brunerlawfirm@gmail.com*

J.R. Brooks  
Taylor P. Brooks  
LANIER FORD SHAVER  
& PAYNE, P.C.  
P.O. Box 2087  
Huntsville, AL 35804  
*jrb@lfsf.com*  
*tpb@lanierford.com*

Victor Viramontes  
Martha L. Gomez  
MEXICAN AMERICAN LEGAL  
DEFENSE AND EDUCATIONAL  
FUND  
634 S. Spring Street, 11<sup>th</sup> Floor  
Los Angeles, California 90014  
T: (213) 629-2512 x 133  
*vviramontes@maldef.org*  
*mgomez@maldef.org*

Nina Perales  
MEXICAN AMERICAN LEGAL  
DEFENSE AND EDUCATIONAL  
FUND  
110 Broadway, Suite 300  
San Antonio, Texas 78205  
T: (210) 224-55476 x 206  
*nperales@maldef.org*

Amy Pedersen  
MEXICAN AMERICAN LEGAL  
DEFENSE AND EDUCATIONAL  
FUND  
1016 16<sup>th</sup> Street NW, Suite 100  
Washington, DC 20036  
T: (202) 293-2828 x 12  
*apedersen@maldef.org*

s/ John C. Neiman, Jr.  
OF COUNSEL