UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

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.	)	
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.	)	**Case Number: 5:11-CV-2484-SLB**
ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama,	)	
Defendants.	)	
UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	
STATE OF ALABAMA; GOVERNOR ROBERT J. BENTLEY,	)	
Defendants.	)	

PLAINTIFFS' REPLY TO STATE DEFENDANTS' RESPONSE TO AMENDED MOTION FOR PRELIMINARY INJUNCTION

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PLAINTIFFS' REPLY TO STATE DEFENDANTS' RESPONSE TO AMENDED MOTION FOR PRELIMINARY INJUNCTION

In further support of their Motion for Preliminary Injunction against Defendants Governor Robert Bentley, Attorney General Luther Strange and Madison County District Attorney Robert Broussard (hereinafter collectively, the "State") enjoining them and all persons acting in active concert with them, including law enforcement officers, from enforcing Sections 13 and 27 of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Act No. 2011-535 of the 2011 Regular Session of the Alabama Legislature (hereinafter, the "Act"), the leaders of the Episcopal, Methodist and Roman Catholic churches in Alabama ("Church Leaders") hereby submit this Memorandum Reply to State Defendants' Response (Doc. 107) to Church Leaders' Amended Motion for Preliminary Injunction and Memorandum In Support (Doc. 99). In support thereof, Church Leaders say as follows:

INTRODUCTION

In the Episcopal, Methodist and Roman Catholic religions, as well as many other faith traditions, the Word of God as communicated through the Bible mandates that followers show hospitality to strangers. The Bible offers clear admonitions, compelling followers to "love the alien, giving him food and clothing;" to "love the alien as yourself;" and to "treat the stranger

as a native born." Deuteronomy 10:18; Leviticus 19:34. The Church Leaders and their members follow these biblical commands by providing food, housing, transportation, and places to worship as well as administering the covenants of marriage, baptism and other religious sacraments without seeking confirmation of immigration status. Similarly, the Church Leaders and their members enter into contracts with others for food, lodging and other services without confirming immigration status.

While the Church Leaders understand and appreciate the necessity for comprehensive immigration reform, the Church Leaders ask this Court to enjoin Sections 13 and 27 of the Act and allow them to legally continue practicing acts of ministry mandated in Scripture and incumbent on every church, Christian clergy, and individual Christian in Alabama. The Church Leaders do not want to be forced to choose between following the Law of God or the Law of Alabama.

Specifically targeting Sections 13 and 27 allows the Church Leaders, their clergy and their members to tightly focus on the precise areas of the Act that prohibit them from following the biblical mandate to welcome and care for all people without regard to immigration status. Section 13 specifically criminalizes the mission of the Church Leaders and their members to engage in works of mercy to feed, shelter and clothe anyone in

need without first having to verify the immigration status of persons they know or reasonably suspect to be undocumented. Section 13 also criminalizes the constitutional right to freedoms of association and assembly because those conducting and those attending Sunday worship or other services and activities sponsored by the church will be deterred for fear of being arrested and subjected to imprisonment. Further, the prohibitions contained in Section 13 of the Act serve to hinder and diminish the ministries of the Church Leaders, their clergy, and members in such a manner as to violate their rights to free speech.

Section 27 attacks the ability of the Church Leaders, their clergy and their members to enter into contracts, including the covenants of marriage, baptism, confirmation, the Eucharist, reconciliation, and other religious sacraments.[1] It further inhibits the ability of these denominations to provide housing, day care, camping and other educational resources to those whom they know or have reason to suspect are undocumented or associated with undocumented immigrants.

Although the Church Leaders are not seeking the enjoinment of Sections 5 and 6 of the Act, it is important to note that those sections mandate that every official and agency of the state, including courts, fully

[1] Indeed, in the Roman Catholic faith attendance at Mass is an obligation that may not be ignored.

enforce both federal and state immigration laws.[2] These sections establish criminal penalties for any person working for the State who fails to report violations of the Act[3], and establish civil enforcement actions on behalf of private citizens.[4] The combination of these enforcement provisions ensures that the Church Leaders, their clergy and their members will be placed in the untenable position of electing whether to practice freely their religion, assemble and speak freely or face the significant prospect of substantial civil or criminal penalties, or both.

As set out below and in the Evidentiary Submission in Support of Plaintiffs' Amended Motion for Preliminary Injunction (Doc. 111), the Act has already caused significant irreparable harm to the Hispanic and other

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[2] "Every person working for the State of Alabama or a political subdivision thereof, including, but not limited to, a law enforcement agency in the State of Alabama or a political subdivision thereof, shall have a duty to report violations of this act. Any person who willfully fails to report any violation of this act when the person knows that this act is being violated shall be guilty of obstructing governmental operations as defined in Section 13A-10-2 of the Code of Alabama 1975." Act No. 2011-535, Sec. 5(f).

[3] *Id.*

[4] "A person who is a United States citizen or an alien who is lawfully present in the United States and is a resident of this state may bring an action in circuit court to challenge any official or head of an agency of this state or political subdivision thereof, including, but not limited to, an officer of a court in this state, that adopts or implements a policy or practice that is in violation of 8 U.S.C. Section 1373 or 8 U.S.C. Section 1644. If there is a judicial finding that an official or head of an agency, including, but not limited to, an officer of a court in this state, has violated this section, the court shall order that the officer, official, or head of an agency pay a civil penalty of not less than one thousand dollars ($1,000) and not more than five thousand dollars ($5,000) for each day that the policy or practice has remained in effect after the filing of an action pursuant to this section." Act No. 2011-535, Sec. 5(d).

outreach programs of the Church Leaders' denominations. Absent an immediate court order restraining the State from enforcing these key sections of the Act, the Church Leaders, their clergy and their members will suffer additional immediate and irreparable harm for which there is no adequate remedy at law. The Church Leaders have at least a substantial likelihood of success on the ultimate merits of their argument that the Act is unconstitutional under the First and Fourteenth Amendments. The hardship imposed on the State by a preliminary injunction will not unreasonably outweigh the benefit accruing to the Church Leaders, their clergy and their members: namely, to exercise freely their religious duties to peaceably assemble, and to speak freely the Word of God to all His people. If issued, the requested injunction would not be adverse to the public interest.

In other states where similar, albeit less prohibitive, immigration legislation has been enacted, federal courts have enjoined the enforcement of at least portions of those laws. *See, e.g., United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *aff'g* 703 F. Supp. 2d 980 (D. Ariz. 2010); *Georgia Latino Alliance for Human Rights ("GLAIR") v. Deal*, No. 11-CV-1804, 2011 WL 2520752 (N.D. Ga. June 27, 2011); *Buquer, Urtiz, and Adair v City of Indianapolis, et al.*, Case No. 1:11-cv-708-SEB-MJD, pending in the United States District Court for the Southern District of Indiana, Doc. 79

entered June 24, 2011 (Order granting preliminary injunction); *Utah Coalition of La Raza, et al., v. Hebert and Shurtleff*, Case No. 2:11-cv-00401-CW, pending in the United States District Court for the Central Division of Utah, Doc. 45 entered May 11, 2011 (Order granting motion for temporary restraining order). The Church Leaders respectfully suggest that this Court should follow federal courts across the country and closely analyze the Act and its challenged sections in order to determine whether they separately or severally withstand constitutional scrutiny.[5] The Church Leaders believe that upon a strict scrutiny analysis, this Court will determine that the challenged portions of the Act are, in fact, unconstitutional.

FACTS

1. On June 2, 2011, the Alabama legislature passed the Act, which extensively regulates both immigrants and those who associate with, speak to or assist them.

2. Representative Micky Hammon sponsored the anti-immigration bill in the State House of Representatives. Senator Scott Beason introduced a similar omnibus anti-immigration bill in the Senate. The Act is a

[5] This brief focuses on the ecclesiastical issues unique to the Church Leaders and their respective denominations. Thus, while the Church Leaders fully adopt, support, and hereby incorporate herein by reference all arguments of the other plaintiffs in the consolidated cases, they focus their Amended Motion for Preliminary Injunction and this pleading only upon those issues that affect their responsibilities as spiritual and administrative leaders of their respective denominations.

combination of these two measures and became Act No. 2011-535 after signature by Governor Robert Bentley on June 9, 2011.

3. The Act is scheduled to take effect on September 1, 2011, except for Sections 22 and 23 (related to state law enforcement staffing and coordination), which went into effect immediately, and Sections 9 and 15 (related to employment verification), which will go into effect in 2012.

4. Representative Hammon, who sponsored the legislation in the Alabama House, expressly stated that the intent of the Act was to deport undocumented immigrants and to deter them from living in Alabama. Kim Chandler, "Alabama House passes Arizona-style immigration law," *The Birmingham News*, April 5, 2011. "This [bill] attacks *every aspect* of an illegal immigrant's life. They will not stay in Alabama . . . . [T]his bill is designed to make it difficult for them to live here so they will deport themselves." *Id.*

5. Senator Beason, who sponsored the bill in the Alabama Senate, speaking about immigration policy in February 2011, suggested that individuals "empty the clip, and do what has to be done." Charles J. Dean, "Sen. Scott Beason catching flak over 'empty the clip' comment," *The Birmingham News,* February 8, 2011.

6. Since the Act was signed into law, it has significantly curtailed the ability of the Church Leaders and their members to freely practice their faith, and more irreparable harm will occur if the Act is enforced. Specifically:

- The Act is harming the ability of the Church Leaders and their members to practice their faith's mandate to welcome all people, even if they knowingly welcome individuals lacking legal immigration status. (Parsley Aff. Paras. 3 – 7; Willimon Aff. Paras. 3-5; Rodi Aff. Para. 8; Baker Aff. Paras. 3 – 5)].
- The Church Leaders and their members have not and do not plan in the future to refuse to assist any person because they know or suspect he or she lacks legal immigration status. (Parsley Aff. Para. 7; Willimon Aff. Para. 4; Rodi Aff. Paras. 5 – 8; Baker Aff. Para. 6; Afandador-Kafuri Decl. Para. 5; Blackert Decl. Para 6; Comer Decl. Para 4; J. Comer Decl. Para 3; Egan Aff. Para. 4; Johnston Decl. Para 4; Manzella Aff. Para 5; Meagher Aff. Para 6; Romanowicz Decl. Para 3).
- The harm suffered to the Church Leaders and their members because of the Act is irreparable: "To cease to welcome and assist a neighbor, even neighbors who are undocumented, would mean that we would cease to be a church." (Rodi Aff. Para. 8).

- In the Episcopal Church in the Diocese of Alabama, specific ministries where Church Leaders and members are being prohibited from freely exercising their faith under threat of criminal prosecution include, but are not limited to:
    - Community Kitchens, an Episcopal Mission that offers free midday meals to anyone who is hungry at two locations in Birmingham. (Blackert Decl. Paras. 2-3). The 2,500 volunteers from Episcopal, Baptist, Lutheran, Roman Catholic and Jewish faiths who help feed the hungry through Community Kitchens are at risk for criminal prosecution because no identification is required and none will be required for anyone who is hungry to receive a free meal. (*Id.* at Paras. 2 & 7).
    - Beans and Rice Ministry that provides food once a month to anyone even those known to be undocumented, at several Episcopal churches including St. Philip's in Fort Payne, Alabama. (J. Comer Decl. Para. 3). At St. Philips, between 600 and 800 pounds of food are distributed "to whoever comes to the door to receive it." (*Id.*). "I have reason to believe that many of the people who we feed . . . are undocumented." (*Id.*). In addition, St. Philip's church members participate in an

Outreach Ministry that provides funds to anyone in need for utilities, rent, food, medicine, medical equipment and gas; no immigration documentation questions asked. (J. Comer Decl. Para. 4). The church's Bread of Life Ministry also provides 7,200 meals a year to people in need including those who are undocumented. (J. Comer Decl. Para. 5).

- In the North Alabama Conference of the United Methodist Church, specific ministries where Church Leaders and members are being prohibited from freely exercising their faith under threat of criminal prosecution include, but are not limited to:
    - Carpenter's Hand, a ministry that provides affordable housing to low-income families including those who are undocumented. (Willimon Aff. Para. 4).
    - Birmingham Hospitality Network, a ministry that provides temporary housing to homeless families at local churches including Methodist as well as churches from other faiths. (*Id.*). Project ID, a program that secures photo identification for transient individuals throughout Alabama. (*Id.*).
    - Additionally, Methodist churches provide other services that are in jeopardy including Pleasant Hill United Methodist

Church in Bessemer, Alabama, which primarily consists of Latino members, many of whom are undocumented. (Willimon Aff. Para. 5). The Pleasant Hill pastor routinely provides the congregation with food, work for members, monetary assistance, counseling, support with Medicaid application and other social services. (*Id.*). In addition, the pastor (Pastor Christopher Barton Thau) transports members to and from doctors' appointments, work assignments and other places without requiring that they be documented. (*Id.*).

- In the Roman Catholic Church in the Archdiocese of Mobile and in the Diocese of Birmingham, specific ministries where Church Leaders and members are being prohibited from freely exercising their faith under threat of criminal prosecution include, but are not limited to:
    - Catholic Social Services, an organization that provides a network of agencies across the Diocese of Birmingham, including nine Centers of Concern that offer counseling to families and individuals and adoption and foster care services; Hispanic Catholic Social Services that offers an array of services to Hispanic families and individuals; Apostolate for the Aged that serves the elderly; and other services. (Manzella Aff.

Para. 2). More than 200 volunteers help Catholic Social Services provide assistance to individuals without regard to legal status, race, religion, and ethnicity. (*Id.* at Para 3). All of Catholic Social Services would be criminalized under the Act. (*Id.* at Para. 4). Recently, an undocumented Hispanic mother gave her infant child to Catholic Social Services because she feared being deported. (*Id.* at Para. 5).

- Hispanic Ministry in Montgomery, a ministry targeted at Hispanics, both documented and undocumented, in 11 counties in Alabama to meet religious needs as well as to provide food, clothing, assistance in completing paperwork, transportation, English classes and translation services with law enforcement and the courts. All services of the Hispanic Ministry will be harmed because of the Act but the Ministry has no intention of halting services to undocumented residents. "HB 56 will make me a criminal. I cannot turn my back on these people. I will not turn my back on my God." (Ryan Aff. Paras. 2-4 & 9).

7. The ability of Church Leaders and their members to assemble and encourage assembly is being harmed. Moreover, further harm will occur if the Act is enforced. Specifically:

- Attendance at some church worship services and participation in some ministry activities is dropping, as individuals do not want to risk being found in criminal violation of the Act. (Parsley Aff. Para 7). "Even at this juncture, the Act is having a chilling effect on our ministries by making immigrant persons afraid to be involved in both church and community." (*Id.* at Para. 7).
- At La Gracia Episcopal Church of Birmingham, attendance at the predominantly Hispanic congregation has dropped because members and visitors do not want to be arrested. (Afandador-Kafuri Decl. Para. 5) Individuals also are not participating in other ministry activities for fear of being arrested and deported. (*Id.*).
- At the Catholic Hispanic Ministry in Mobile, Alabama, attendance at Mass is down as well as participation in training classes because individuals fear prosecution. (Robertson Decl. Para 5). The Ministry's purpose is to provide aid to new arrivals in the community and an opportunity for Hispanic residents to worship in their native language at seven different parishes in Mobile. (*Id.* at Para. 3).

8. The right of Church Leaders and their members to speak freely is being denied by enactment of the Act and will further be denied by enforcement of the Act. Specifically:

- The ability of the Episcopal and Roman Catholic Church Leaders to administer the sacraments (Baptism, Confirmation, Eucharist, Reconciliation, Anointing of the Sick, Holy Orders, and Marriage) is being hindered because Church Leaders do not first verify immigration status before administering a sacrament. (Parsley Aff. Para. 7; Rodi Aff. Para. 5). In essence, "this law criminalizes the conduct of our priests, deacons and laity when they are administered to persons without proper documentation." (Rodi Aff. Para 5).
- To refuse someone the Eucharist for anything other than moral reasons is a violation of the vows of Episcopal priests. (J. Comer Decl. Para. 7). "We have members of our congregation who are here illegally. Every Sunday, they receive communion from my hand. That means I would be in violation of the law as I understand it, to give these people communion." (*Id.*).
- The ability of Church Leaders and their members to proselytize is and will continue to be violated because Church Leaders and their

members "follow the Biblical mandate to welcome the stranger and share God's love with others, regardless of their immigration status." (Parsley Aff. Para. 8). In fact, many denominations, including the United Methodist Church, are mandated to "welcome all individuals, regardless of their immigration status." (Willimon Aff. Paras. 4, 6). In the Roman Catholic Church, the Act is criminalizing "the efforts of the Church to bring undocumented immigrants into the fold." (Rodi Aff. Para. 6).

9. The ability of Church Leaders and their members to freely contract is being violated and will be further harmed if the Act is enforced. Specifically:

- Church Leaders and their members do not intend to verify documentation before administering the sacraments. (Parsley Aff. Para. 7; Rodi Aff. Para. 5). "The seven sacraments of the Catholic faith are not based on immigration status, but are the right of every Catholic." (Egan Aff. Para. 7). The sacraments are essentially contracts and under the Law are illegal. (Shoemaker Decl. Para. 6). "As the pastor, I would preside over these sacraments, which under House Bill 56 would be interpreted as contractual agreements I

do not know how I can practice my faith and my duties as a priest without breaking this law." (*Id.*).

- The Episcopal Church's Camp McDowell in Nauvoo, Alabama, routinely enters into contracts with individuals and groups for food and lodging. (Johnston Decl. Para. 3). Camp McDowell also utilizes contracts that contain liability release language, and it is important to Camp McDowell that their contracts be enforced and enforceable. (*Id.*). Camp McDowell is open to all persons including guests who are believed to be undocumented. (*Id.* at 4). "If the Anti-Immigration Law is enforced, our contracts will be in jeopardy." (*Id.* at 3).
- In the Roman Catholic Church, clergy provide spiritual counseling at churches, counseling in preparation for marriages, pregnancy counseling and adoption placement, which can all be criminalized under the Act. (Rodi Aff. Para. 6). The Catholic Church also provides contractual services such as renting apartments to senior citizens, renting nursing home rooms, as well as entering into contracts to manage and obtain enrollment in their parochial school system. (*Id.* at Paras. 6 -7; Baker Aff. Para. 4).

- At St. James Catholic School in Gadsden, Alabama, whose student population is 30 percent Hispanic, school enrollment is down and parents are afraid to register their children for school. (Parker Aff. Para 6).
- At St. Ann School in Decatur, Alabama, where 700 families are Hispanic, students and their parents have already been "stopped, humiliated and asked to produce proof of their immigration status." (Wright Aff. Para. 6). Enrollment at the school is expected to decrease. (*Id.*).

SUMMARY OF THE ARGUMENT

In the State's Response to the Church Leaders' Amended Motion for Preliminary Injunction and Memorandum in Support (Doc. 107), the State raises issues which they claim prevent this Court from reaching the substantive law questions in this lawsuit. The State asserts issues of: (1) standing; (2) ripeness; (3) and the legitimate nature of the statute. (Doc. 107, pp. 4-6, 8-14). As an initial matter, the Church Leaders will address each of these issues, demonstrating they are baseless and in no way serve as a barrier to this Court reaching the underlying merits of this motion or the case-in-chief.

Moving to the merits of the Church Leaders' motion, this brief will next address the appropriate standard the Court must apply in deciding whether a preliminary injunction prohibiting enforcement of Sections 13 and 27 should issue. In this section of the brief, Church Leaders will make a clear showing to the Court that an injunction is demanded by the Constitution, specifically by the free exercise, free assembly, and free speech prongs of the First Amendment, as well as by the contracts clause of Article I, section 10. Finally, the Church Leaders will illustrate to this Court why this case and these constitutional claims are more appropriately resolved in federal district court than through certification to the Alabama Supreme Court.

ARGUMENT

I. THE STATE FAILS TO PRESENT ANY COMPELLING REASON FOR THIS COURT TO IGNORE THE SUBSTANTIVE CONSTITUTIONAL ISSUES PRESENTED BY THIS CASE.

The State contends that this Court need not reach the crux of the Church Leaders' claims because of certain "preliminary matters" and other issues. (Doc. 107 at 4-11; 8-14). First, the State questions and seeks to diminish the Church Leaders' right to proceed as plaintiffs in this matter. (*Id.* at 4-6). Next, the State argues that the Church Leaders are unlikely to succeed on the merits because they cannot demonstrate ripeness. (*Id.* at 10).

Finally, the State asserts that the Church Leaders are not likely to succeed in their efforts because they accept that the Act has legitimate applications. (*Id.* at 14). Each of these arguments fails. The Church Leaders will address each argument in turn.

A. The Church Leaders Enjoy Standing as Plaintiffs.

The State questions the standing of the Church Leaders to seek this motion for preliminary injunction. (*Id.* at 4). The State alleges that the Church Leaders are "attempt[ing] to assert the rights of numerous other persons without any affirmative showing of a legal right to do so," *(Id.* at 11), and asserts that this Court should "limit its analysis to the rights and injuries of the four Church Leaders themselves." *(Id.* at 6).

As an initial matter, the State incorrectly asserts that the Church Leaders are trying to "step into the illegal aliens' shoes" *(Id.* at 6); quite the contrary, the Church Leaders are clearly speaking on behalf of themselves as well as the members of their respective faith communities. In contending that the Church Leaders have failed to make an affirmative showing of a legal right to assert the rights of those members, the State apparently disregards the following assertions made in the Church Leaders' Second Amended Complaint:

- "In his role, Bishop Parsley represents all 33,000 members of the Alabama diocese." (Doc. 50 at 7).
- "In his role, Bishop Willimon oversees 744 churches with more than 152,000 members in Alabama." (Doc. 50 at 10).
- "Together, Archbishop Rodi and Bishop Baker represent 159 Roman Catholic churches in Alabama with 153,000 parishoners." (Doc. 50 at 12).

Additionally, Bishops Parsley and Willimon are the "spiritual and administrative leader[s]" of their respective faith communities. (Parsley Aff. at Para. 2; Willimon Aff. at Para. 2). Archbishop Rodi is the Catholic Archbishop for the Archdiocese of Mobile, and under both Canon law and civil law, is the head of the Roman Catholic Church for that particular geographic region. (Rodi Aff. at Para. 3). Bishop Baker is the head of the Roman Catholic Church for the Diocese of Birmingham in Alabama. (Baker Aff. at Para. 2). As to Archbishop Rodi and Bishop Baker, their claims are brought in the name of the incorporated church. As demonstrated by the attached incorporation documents, both the Archdiocese of Mobile and the Diocese of Birmingham are incorporated under Alabama Code Sec. 10-4-1 et. seq., now codified as Alabama Code Sec. 10A-20-1.01 et. seq., and this action is brought in the name of the incorporated entity. *See* Exs. A. and B,

attached hereto. As the State correctly notes, "[c]hurches can sue and be sued." (Doc. 107 at 6). These leaders are seeking protection for themselves as well as their congregations, and are within their authority to do so.

Turning to the State's legal argument, "[s]tanding is the threshold question in every federal case, determining the power of the Court to entertain the suit." *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir.2006) (citation omitted). As the State recognized, the Church Leaders must show each of the following in order to meet the constitutional elements of standing: "(1) an injury in fact, meaning an injury that is concrete and particularized, and actual or imminent, (2) a causal connection between the injury and the causal conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *Bill Salter Adver., Inc. v. City of Brewton, Ala.*, 486 F. Supp. 2d 1314, 1334 (S.D. Ala. 2007) (quoting *Granite State Outdoor Advertising, Inc. v. City of Clearwater, Fla.*, 351 F.3d 1112, 1116 (11th Cir. 2003). Because the Church Leaders satisfy each and every one of these elements, their standing to bring this action is secured.

i. ***The Church Leaders can show an injury in fact that is concrete, particularized and imminent.***

The Church Leaders accept and embrace the reality that they, as challengers of certain section of the Act, "must demonstrate a realistic

danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). Indeed, "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Younger v. Harris*, 401 U.S. 37, 42 (1971). However, the law does not require that the Church Leaders wait until the Act takes effect before they can seek relief from this Court. Indeed, "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). One is not required to "first expose himself to actual arrest or prosecution to be entitled to [the] statute that he claims deters the exercise of his constitutional rights." *Babbitt* at 298, (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). "Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate-as opposed to a merely conjectural or hypothetical-threat of future injury." *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994).

As is set out in the affidavits and declarations filed with this Court on August 17, 2011, which are incorporated by reference herein and extensively

cited and quoted from in the "Facts" section *supra*, the Church Leaders have demonstrated a real and immediate threat of future injury. Even if this Court accepts the argument of the State and "limit[s] its analysis to the rights and injuries of the four Church Leaders themselves" (Doc. 107 at 6), the affidavits submitted on August 17, 2011 reflect those rights and injuries.

ii. ***There is a causal connection between this injury in fact and the causal conduct.***

"Causation in the standing context is a question of fact unrelated to an action's propriety as a matter of law. To establish causation a plaintiff need only demonstrate, as a matter of fact, 'a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant.'" *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (quoting *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003 (11th Cir. 2004)).

Far from being a mere traceable connection, the injuries to the Church Leaders are directly tied to the State's complained-of conduct. It is the threat of criminal prosecution for "harboring," "sheltering," "transporting," or "encouraging" aliens to remain in the state that has caused injury to the personal ministries of the Church Leaders and other ministries as outlined in the supporting affidavits and declarations (*see supra* "Facts"). The language of the Act itself that criminalizes the actions undertaken by the Church

Leaders in furtherance of their faith; the causal connection between the two could not be clearer.

iii. ***The injury in fact would be redressed by this Court ruling in favor of the Church Leaders.***

Should this Court rule in favor of the Church Leaders, through first enjoining the contested sections of the Act and then declaring those sections to be unconstitutional, the injury in fact set out above would be redressed. The contested sections of the Act would not be able to be enforced against the Church Leaders or the members of their faith communities, and they would be free to speak, assemble, and exercise religious and contractual rights without fear of criminal prosecution or civil liability.

B. The Underlying Issues Are Ripe for Adjudication.

In arguing that this case is not ripe for adjudication (Doc. 107, pp. 10-14), the State concedes the applicability of *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 298 (1979), and the crucial importance of a governmental disavowal of any intention of prosecuting those who violate the challenged legislation. (Doc. 107, pp. 18-19). The State also quotes *Holder v. Humanitarian Law Project,* 561 U.S. ___, 130 S. Ct. 2705, 2712 (2010), for the same proposition. Despite its recognition that a disavowal of

an intent to prosecute the Church Leaders would bolster its lack of ripeness argument, the State has clearly avoided making such a disavowal.

In addition to the lack of an affirmative disavowal of an intent to prosecute, this case is ripe for adjudication for three additional reasons: first, the record evidence shows the Church Leaders, their clergy and members are presently suffering immediate harm. (*See* Para.. 7, *supra*). Second, the temporal proximity of the effective date of the statute (September 1, 2011) is such that it is already having its intended effect. (*Id.; see also,* Para. 4, *supra*). And third, once implemented, it is clear this legislation mandates the prosecution of anyone and everyone in violation of the statute, thus contrary to the State's contention (Doc. 107 at p. 13), the Church leaders need not make any showing of any record of prosecutions: the very statute at issue requires them.

The State argues:

> 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.

(Doc. 107 at p. 11).

There is nothing "potential or abstract about this statute." (Doc. 107 at p. 11). Sections 5 and 6 of the Act both empower and obligate state agents and private citizens to enforce this statute by both criminal and civil means. By its very terms, the statute not only ". . . demonstrate[s] 'a genuine threat of enforcement of a disputed criminal statute . . ." it guarantees it by every means allowed under law, and it takes effect in only thirteen (13) days. A draconian statute such as this is ripe for adjudication.

Moreover, the legislative history of the Act confirms this conclusion. While fair-minded State Senators offered and indeed passed exceptions for religious organizations, that exception was ultimately excluded (Bedford Aff. at Paras. 4, 8-9), while exceptions for casual domestic help were made law. *See, e.g.*, Act, Sections 3(b)(4); 3(b)(5), and 15(a).

When the State adopts laws that favor wealthy Alabamians who employ undocumented domestic help, yet mandate state employees and agencies to prosecute and report to the fullest extent possible under the law undocumented workers, no rational person could infer anything but that the State intends fully to prosecute criminally and civilly persons who violate the law, whether or not they are exercising federally-protected rights.

Under these circumstances the Court must conclude that the constitutional issues presented by this case are ripe for adjudication.

C. The Act[6] is Overbroad As It Applies to First Amendment Activities and Is Therefore Unconstitutional.

Success on a facial challenge requires a plaintiff to "establish[] 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." *Wash. State Grange v. Wash. State Republication Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (internal quotation marks omitted). An exception to this requirement exists, however, when a plaintiff asserts that a statute is overbroad. Overbreadth assertions require a plaintiff to establish only that a "substantial number" of the statute's "applications are unconstitutional [when] judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 769–71 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)) (internal quotation marks omitted). Admittedly, the overbreadth doctrine is limited and does not

[6] The State asserts that Section 13 is "nearly identical to, and modeled after [8 U.S.C. § 1324(a)(1)(A)]," argues that because the federal law has not been interpreted to cover ministry activities, there is no reason to think that Alabama's Act would be. (Doc 107 at 21). Although § 1324 does have similarities to Section 13, notable differences exist. For example, the federal statute does not contain any provisions comparable to Section 13's prohibition against entering into rental agreements with illegal immigrants. Moreover, the federal statute allows nonprofit religious organizations to encourage and assist aliens who are "present in the United States to perform the vocation of a minister or missionary" by providing them with lodging and basic living expenses. Thus, Section 13 is not "identical to" 8 U.S.C. § 1324(a)(1)(A) and the Court should not categorically interpret or apply it in the same manner as § 1324(a)(1)(A).

become relevant merely because a plaintiff "conceive[s] of a single impermissible [statutory] application." *Id.* at 747–48 (quoting *Broadrick*, 413 U.S. at 630) (internal quotation marks omitted). Nevertheless, the doctrine does exist to protect First Amendment expression and becomes relevant when "sweeping and improper applications" of a statute threaten to deter constitutionally permissible activity. *Id.* at 747 & n.26, 768; *see also Bigelow v. Virginia*, 421 U.S. 809, 817 (1975).

Here, potential improper application of the Act is "substantial." As detailed below, enforcement of the Act threatens to prohibit the Church Leaders and their members from freely exercising their faith, freely expressing their beliefs, and freely associating with other believers. Accordingly, the Act is overbroad as it applies to the Church Leaders' exercise of their First Amendment rights, and should be deemed unconstitutional.

II. AS THE CHURCH LEADERS HAVE MET THE REQUIRED ELEMENTS FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION, SAID INJUNCTION IS DUE TO ISSUE FROM THIS COURT IN ORDER TO MAINTAIN THE *STATUS QUO*.

The primary purpose of injunctive relief is to maintain the *status quo* (*Collum v. Edwards*, 578 F.2d 110, 113 (5th Cir. 1978)); "to preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Maintenance of

the *status quo*, in this scenario, necessitates that the Act be held in abeyance until such time as this Court can hold a trial on the merits of the constitutionality of the Act. Without an order from this Court, the Church Leaders and their members will be subject to civil and criminal prosecutions under the Act. Indeed, both public and private citizens and agencies will be obligated under the Act to criminally and civilly prosecute the Church Leadership, their clergy and their members for continuing to participate in numerous ministry services throughout the state. In addition, the ability of the Church Leaders, their clergy and their members to assemble freely in worship activities of all varieties, speak freely about their religious faith and experience, encourage others to associate, assemble and join with them in religious fellowship, enter into contracts for various services, including counseling, day care, camp and other educational services, and to administer religious covenants such as marriage, baptism and other religious sacraments, may under the Act be subject to attack both criminally and civilly, by both public and private entities or individuals.

A. The Church Leaders Have Met the Required Elements for Issuance of a Preliminary Injunction.

Incredibly, the State appears to be urging this Court to disregard two of the requirements for issuance of a preliminary injunction articulated by

the United States Court of Appeals for the Eleventh Circuit and the Church Leaders because the Supreme Court, in the State's view, "would likely reject" the formulation. (Doc. 107 at p. 7, incorporating Doc. 82 at p. 10). Of course, this Court is not free to disregard Eleventh Circuit standards in the absence of contravening Supreme Court authority. A year after the authority relied on by the State in the incorporated document (Doc. 82), *Winter v. Natural Res. Def. Council,* 555 U.S. 7, 20 (2008), the Eleventh Circuit reiterated the standard which the State urges this Court to reject. *See ACLU of Florida, Inc. v. Miami-Dade County School Board,* 557 F.3d 1177, 1198 (11th Cir. 2009).[1] As set out below, the Church Leaders' request for preliminary injunctive relief satisfies each of these requirements.

i. The Church Leaders have a substantial likelihood of success on the merits of their case.

The Free Exercise Clause provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The guaranty of the Establishment

[1] "A district court may grant [preliminary] injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits, (2) the irreparable injury will be severe unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injury may cause the opposing party, and (4) if issued, the injunction would not be adverse to the public interest."

Clause of the First Amendment is protected against state infringement by the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1939). The First Amendment protects not only against state interference with religious beliefs, but also against state interference with religious activity. *See Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990) ("[T]he exercise of religion often involves not only belief and profession but the performance of . . . physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing . . . .") (internal quotations omitted); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) ("[T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions . . . ."). "The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

The State contends that the Church Leaders "have not shown that the activities about which they are concerned are actually covered by the Act." (Doc. 107 at 20). In an interesting turn of events, the State asserts that "[p]art 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." (*Id.*). In reality, it is in part the vague and

undefined language utilized in the Act that has given rise to the constitutional violations of which the Church Leaders complain. The Act fails to define terms such as "harbor," "conceal," "encourage," and "transport." Accordingly, the Church Leaders are left with no choice but to assume the normal dictionary definitions of those words. Employing those definitions, the activities and ministries of the Church Leaders and their congregations outlined above and in the Amended Motion for Preliminary Injunction fall within the terms and thus, the prohibitions of the Act. Sections 13 and 27 of the Act not only directly violate the ability of the Church Leaders, their clergy and their members to freely practice their faith, but the sections also infringe on the right to freely assemble, spread the Good Word and freely contract as guaranteed by the United States Constitution. These prohibitions on the First Amendment and contractual rights of the Church Leaders are what place this matter properly before this Court for adjudication.

Section 13 of the Act violates the ability of the Church Leaders, their clergy and their members to freely practice their faith because the section criminalizes church ministry activities when a Church Leader or member provides food, shelter, or transportation or otherwise encourages an undocumented person to come to or reside in this state. Section 13(a)(4)

specifically attacks the Church Leaders' freedom to exercise their faith by making it a state crime to "[h]arbor an alien unlawfully present in the United States by entering into a rental agreement, as defined by Section 35-9A-141 of the Code of Alabama 1975, with an undocumented person to provide accommodations, if the person knows or recklessly disregards the fact that the undocumented person is unlawfully present in the United States." Act, Section 13(a)(4).

Section 27 prohibits the ability of Church Leaders to freely contract. Section 27 prevents Alabama state courts from enforcing the terms or conditions of any contract to which an unlawfully present undocumented person is a party if the other party had direct or constructive knowledge that the undocumented person was unlawfully present at the time the parties entered into the contract.

Whether the Church Leaders are likely to succeed on the merits of their claims may well be dependent on the level of scrutiny this Court determines is appropriate to apply when evaluating whether the Act is constitutional. As discussed *infra*, the Act is not a facially neutral law because it creates classifications of enforcement and targets religion; therefore it must withstand a "strict scrutiny" or "compelling interest" analysis in order to be constitutional. "The strict scrutiny test requires the

state to show that the law that burdens the protected right advances a compelling state interest and is narrowly tailored to serve that interest." *Republican Party of Minnesota v. White*, 416 F.3d 738, 749 (8th Cir. 2005) (citations omitted). Strict scrutiny is a high standard; "it is the rare case in which . . . a law survives strict scrutiny." *Burson v. Freeman*, 504 U.S. 191, 211 (1992). As the State cannot meet their burden under a strict scrutiny analysis, the Church Leaders are likely to succeed on the merits of their claims. However, even if this Court determines the Act to be a facially neutral law, the Church Leaders are still likely to succeed on the merits of their claims because this case presents the "free exercise plus" hybrid contemplated by *Smith*. 494 U.S. at 882.

1. The Act is not facially neutral and does not survive the corresponding strict scrutiny analysis.

The State argues that the Act is facially neutral, and accordingly "need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (Doc. 107 at 21 (quoting *City of Hialeah*, 508 U.S. at 531)). In making this argument, the State is clearly disregarding the exemptions that are built into the Act for certain classifications of individuals:

- Exempted from definition of "employer:" "This term shall not include the occupant of a household contracting with another

person to perform casual domestic labor within the household." Act, Section 3(b)(5).

- Exempted from definition of "employee:" "This term shall not include casual domestic labor performed in a household on behalf of the occupant of the household or the relationship between a contractor and the employees of a subcontractor performing work for the contractor." Act, Section 3(b)(4).

- Section 15 "(a) No business entity, employer, or public employer shall knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Alabama. Knowingly employ, hire for employment, or continue to employ an unauthorized alien means the actions described in 8 U.S.C. Section 1324a." (l) "does not apply to the relationship between a party and the employees of an independent contractor performing work for the party and does not apply to casual domestic labor performed within a household." Act, Section 15(a).

These exemptions allow those wealthy enough to enjoy the assistance of "casual domestic labor" to escape the criminal and civil penalties outlined in the Act, while those attempting to live out their Christian faith by providing aid and comfort to the stranger are subjected to the risk of criminal prosecution. Such a disparate result, apparently rooted in classifications of economic strata, prevents the Act from being facially neutral.

Additionally, the State contends that the Church Leaders' Free Exercise claims fail under *Smith* because neither the challenged portions of the Act "nor the circumstances surrounding their passage indicate that they in any sense 'discriminate[] against some or all religious beliefs.'" (Doc. 107 at 20-21) (quoting *City of Hialeah*, 508 U.S. at 534). In making this

argument, the State neglects the reality that what it is faced with defending is the exact situation it contends does not exist: the circumstances surrounding the passage of the Act make clear that "some or all religious beliefs" are being discriminated against by the Act.

On March 23, 2011, State Senator Scott Beason introduced SB 256 in the Alabama State Senate ("Beason Bill"). (Bedford Aff. at Para. 3). As introduced, the Beason Bill did not exempt the actions of religious organizations undertaken as a part of their ministries from being criminalized. (*Id.*). On April 21, 2011, State Senator Roger Bedford offered an amendment to SB 256 to protect certain actions of religious organizations from being criminalized by Beason's Bill ("Bedford Amendment"). (*Id.* at Para. 4). The Bedford Amendment provided that on page 30, after line 2, after "law" the following new language would be inserted into the Beason Bill: "Nothing in this subdivision shall be construed to prevent a bona fide religious organization from transporting persons to and from church functions." (*Id.*). Senator Bedford testified through affidavit that he "offered the Bedford Amendment to make it very clear that it would not be against the law for a church to go out into the community and bring people in for a religious event or take them back after that event was over. I wanted to ensure that there was no gray area where a church could get into trouble for

reaching out to the lost." (*Id.* at Para. 5). On April 21, 2011, the Bedford Amendment was adopted by Roll Call 339. (*Id.* at Para. 6).

On May 24, 2011, the Beason Bill, as amended, was referred to the House of Representatives Committee on Public Safety and Homeland Security. (*Id.* at Para. 7). When the Beason Bill left the Alabama Senate, it contained the Bedford Amendment, which would have permitted a bona fide religious organization to transport persons to and from church functions without fear of criminal prosecution. (*Id.*).

Upon arrival in the Alabama House, the Beason Bill was referred to a Conference Committee. (*Id.* at Para. 8). When the Beason Bill reappeared from the Conference Committee on June 2, 2011, the protections provided by the Bedford Amendment were conspicuously absent from the first Substitute that was offered by the Committee. (*Id.*). Later on June 2, 2011, Senator Beason moved to Concur In and Adopt the first Substitute; through Roll Call 1035, the first Substitute was concurred in and adopted by the Alabama Senate. (*Id.*). Senator Bedford states: "Despite my efforts to insert language into the Beason Bill that would have protected our churches and church members from fear of criminal prosecution from doing their Christian duty to love their neighbor, the final Beason-Hammon Alabama

Taxpayer and Citizen Protection Act does not include such protections." (*Id.* at Para. 9).

The consideration, adoption, and subsequent removal of protections for churches and church members evidences the true intentions of the legislators involved in drafting the Act: far from being protected, churches and church leaders are in fact targeted under the Act. Accordingly, the Act is not facially neutral, targets religion, and is subject to a strict scrutiny review.[7]

Employing a strict scrutiny analysis, the Act can be constitutional only if it is the least restrictive means of advancing a compelling government interest. *See, e.g., Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1258 (11th Cir. 2005). As recognized by the State, the reasons for the Act, as articulated by its enactors, are "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. 107 at 28 (quoting Act, Section 2)). The State

[7] "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *City of Hialeah*, 508 U.S. at 546.

does not even attempt to construe these reasons as the type of compelling government interest that would withstand a strict scrutiny analysis, and instead contends that they meet the lesser legitimate interest standard. (*Id.*). It is not enough that the State meet this lesser standard.

"[I]n circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *City of Hialeah*, 508 U.S. at 537 (Souter, J., concurring in part and concurring in the judgment). Because the State has not – and cannot – produce evidence of such a compelling reason not to extend the protections contemplated by the Bedford Amendment (much less that the Act employs the least restrictive means to accomplish that compelling reason), the Act must fail under a strict scrutiny analysis.

2. Even if this Court finds the Act to be facially neutral, this Court should still find the Act to be unconstitutional.

In *Smith*, the Supreme Court went against prior jurisprudence and held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U.S. at 879 (internal quotation marks

omitted). The *Smith* Court found that Native Americans who ingested peyote for religious purposes were not exempt from the state's law providing employment discharge due to drug use was misconduct barring the receipt of unemployment compensation benefits. *Id.* at 882-883. Importantly, the *Smith* Court noted that "it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." *Id.* at 882 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed")). In short, the *Smith* Court suggested that if a law is otherwise constitutional in its application to those who engage in the specified act for nonreligious reasons, then the First Amendment would not bar the law's application to those who engage in the specified act for religious reason **unless** the Free Exercise Clause **and** other constitutional protections are invoked (i.e., Freedom of Speech, Freedom of Assembly, etc.). This "free exercise plus" hybrid contemplated by the *Smith* Court is precisely the situation currently before this Court. Accordingly, this Court should employ

the strict scrutiny analysis set out *supra*, which will result in the Act being deemed unconstitutional.

Here, the Act's interference with church activities goes beyond interference with free exercise of religion and also impacts the fundamental freedoms of free speech and freedom of association as well. There can be no doubt that much of what the Church Leaders and their churches do is protected as free speech. "[T]he church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 632 (1943). When the State prohibits the Church Leaders and their churches from giving undocumented aliens access to those fundamental symbols, the State is impermissibly interfering with First Amendment right of free speech of the Church Leaders. Moreover, the very acts which the Church Leaders and their churches are trying to protect – acts of charity, of feeding the hungry, welcoming the stranger – are a form of expression, a means of preaching and teaching the Gospel by following its commands before all the world.

Likewise, when the State prohibits the Church Leaders and their churches from welcoming undocumented strangers, the State is interfering with the fundamental right of freedom of association inherent in the First Amendment right of free speech. "Effective advocacy of both public and

private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (citing *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) and *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958). "Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Patterson*, 357 U.S. at 460-461.

Thus, the Act interferes not just with the free exercise of religion, but with the rights of the Church Leaders and their churches and members to free speech and freedom of assembly as well, and should be subject to strict scrutiny by this Court.

As there is a substantial likelihood that the Church Leaders will ultimately prevail on the merits, the Church Leaders have satisfied the first requirement for the issuance of a preliminary injunction.

ii. Without a preliminary injunction, the Church Leaders, their clergy and congregates will suffer immediate and irreparable harm.

A preliminary injunction is issued to prevent irreparable harm. "An injury is irreparable if it cannot be undone through monetary remedies" or "if damages would be difficult or impossible to calculate." *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (internal quotation marks and citations omitted). "It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983) certified question answered, 450 So. 2d 224 (Fla. 1984) (quoting *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. Unit B 1981)); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (stating "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Butler v. Alabama Judicial Inquiry Comm'n*, 111 F. Supp. 2d 1224, 1239 (M.D. Ala. 2000) (observing that "[i]n short, irreparable harm is not difficult to establish when the impairment of First Amendment rights is at issue.").

If enforced, Sections 13 and 27 of the Act will cause irreparable harm to the Church Leaders and their members by violating their rights to freely exercise their religion, to speak freely, and to assemble as guaranteed by the First and Fourteenth Amendments to the United States Constitution. The Church Leaders and their members will suffer irreparable harm because they will no longer be able to live their faith by operating soup kitchens, providing transportation and providing temporary and permanent housing facilities to all persons without first verifying their immigration status. In addition, the Church Leaders and their members will suffer irreparable harm because members will be deterred from assembling to worship for fear of being arrested. Finally, the Church Leaders and their members will suffer irreparable harm because they will not be able to freely contract without first verifying immigration status. Church Leaders will be unable to perform contracts, including marrying residents and baptizing them, as well as being able to run day cares, thrift stores or other enterprises involving contractual relations with residents who may be undocumented.

Money cannot compensate the Church Leaders and their members for the irreparable harm they will suffer at the hands of the State if Sections 13 and 27 of the Act are enforced. The Church Leaders and their members ask to be able to freely practice their faith to welcome and help any person in

Alabama, as mandated by God's Word in the Bible, without fear of prosecution because they failed to verify immigration status. No dollar amount can compensate the Church Leaders and their members from being denied their constitutional rights to practice their faith, speak freely, freely assemble and freely contract.

As the Church Leaders have demonstrated the risk of immediate and irreparable harm, the Church Leaders have satisfied the second requirement for the issuance of a preliminary injunction.

iii. ***The hardship imposed on the State by the injunction does not unreasonably outweigh the benefits accrued by the Church Leaders.***

The hardship imposed by a preliminary injunction does not impose any undue hardship on the State because it merely preserves the *status quo*. The Act is new legislation, so there is nothing the State would "lose" were the Court to grant a preliminary injunction delaying its enforceability. If this Court enjoins the Act, immigration will remain under the control and authority of the Federal Government. The State merely would incur a delay in the enforceability of its legislation, which does not unreasonably outweigh the benefits accrued by the Church Leaders and their members to be able to continue performing their essential ministry services throughout Alabama.

As the hardship imposed on the State by the issuance of the requested injunction does not unreasonably outweigh the benefits that would accrue to the Church Leaders, the Church Leaders have satisfied the third requirement for the issuance of a preliminary injunction.

iv. The issuance of the injunction does not disserve the public interest.

As the United States District Court for the Central District of Utah observed in granting a temporary restraining order against that state's illegal-immigration act from taking effect:

> The public has an interest in ensuring that laws which govern a society are constitutional and that constitutional rights are protected. Although the public also has an interest in seeing laws take effect that have been signed into law, such interest does not outweigh the interest in ensuring that a law is proper.

Utah Coalition of La Raza, et al., v. Hebert and Shurtleff, Case No. 2:11-cv-00401-CW, pending in the United States District Court for the Central Division of Utah, Doc. 45 entered May 11, 2011 (Order granting motion for temporary restraining order).

This Court should follow the logic of the *La Raza* Court and find that the public's interest is best-served by the issuance of this injunction. Accordingly, the Church Leaders have satisfied the fourth and final requirement for the issuance of a preliminary injunction.

III. THE FUNDAMENTAL SUBSTANTIVE RIGHTS INVOLVED IN THIS CASE ARE OF SUCH CONSTITUTIONAL IMPORTANCE THAT IT IS MORE APPROPRIATELY RESOLVED IN FEDERAL COURT THAN IN THE ALABAMA SUPREME COURT.

Finally, the State argues that "[i]f 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." (Doc. 107 at p. 33). Church Leaders assert that no such certification is necessary as they are the masters of their complaint and the Alabama Religious Freedom Amendment is not a part of their claims. However, to the extent this Court believes certification of certain issues would aid in its disposition of this case, this Court should enter the preliminary injunction in order to maintain the *status quo* while the Alabama Supreme Court considers any certified questions.

A. The Church Leaders are the Masters of their Complaint.

Generally, federal jurisdiction exists "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (emphasis added).

Under this properly or well-pleaded complaint rule, the plaintiff is "the master of the complaint," *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002), meaning plaintiff controls the claims he brings before the court in the complaint. If this rule allows plaintiffs "by eschewing claims based on federal law . . . to have the cause heard in state court,"[8] surely the opposite situation must be permissible under the rule as well. Accordingly, should the Church Leaders choose to proceed under federal claims only in their well-pleaded complaint, they are within their rights as the "masters of the complaint" to do so.

B. If this Court believes any question should be certified to the Alabama Supreme Court, the preliminary injunction should be entered to maintain the *status quo* while any certification question is pending.

In the event this Court believes one or more questions are appropriate for certification to the Alabama Supreme Court, this Court should first enter a preliminary injunction before any such certification. In *Cate v. Oldham*, the United States Court of Appeals certified certain questions to the Florida Supreme Court and entered the requested injunctive relief while the state supreme court was considering the questions. 707 F.2d 1176, 1185 (11th

[8] *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002) (citing *Caterpillar*, 482 U.S. at 398-399).

Cir. 1983)(*see also*, *Virginia Society for Human Life, Inc. v. Caldwell*, 906 F.Supp. 1071 (1996). The *Cate* Court anticipated revisiting the matter upon receiving a response from the state supreme court. *Id.* at 1180. Accordingly, should this Court desire the certification of certain questions to the Alabama Supreme Court, this Court should follow the reasoning of the *Cate* Court and grant Church Leaders' motion for preliminary injunction pending a response from the Alabama Supreme Court on any certified questions.

CONCLUSION

The Church Leaders are entitled to the preliminary injunction of Sections 13 and 27 as requested in their motion. The Church Leaders have met their burden of demonstrating that, without the preliminary injunction, the Church Leaders and the ministry services in which they and their church members engage throughout Alabama will suffer immediate and irreparable injury. In addition, the Church Leaders, their members and other Alabama residents have reason to fear that their rights to speak freely and freely assemble will be violated because persons will be prohibited from attending worship service for fear of criminal prosecution. The Church Leaders will also be prohibited from freely contracting through their ministry services as well as when they administer sacraments, including Baptism and Marriage,

which are essentially contracts as they are covenants between the church and its members. It is clear that the threatened injury to the Church Leaders outweighs whatever damage the proposed injunction may cause the State and, that issuing the injunction would not be adverse to the public interest.

RELIEF REQUESTED

The Church Leaders seek an immediate preliminary injunction enjoining, restraining, and ordering the State and all persons acting in active concert with them, including law enforcement officers, from enforcing Sections 13 and 27 of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Act No. 2011-535, until this matter may be tried upon the merits. The Church Leaders have met their burden under Fed. R. Civ. P. 65(a) for issuance of a preliminary injunction. Accordingly, this Court should grant the requested preliminary injunction and thereby preserve the *status quo* pending a trial on the merits.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Augusta S. Dowd
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