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

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

HISPANIC INTEREST COALITION OF ALABAMA, *et al.*, Plaintiffs, v. ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama, *et al.*, Defendants.	Case Number: 5:11-cv-02484-SLB
RT. REV. HENRY N. PARSLEY, JR., in his official capacity as Bishop of the Episcopal Church in the Diocese of Alabama, *et al.*, Plaintiffs, v. ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama, *et al.*, Defendants.	Case Number: 5:11-cv-02736-SLB
UNITED STATES OF AMERICA, Plaintiffs, v. STATE OF ALABAMA; GOVERNOR ROBERT J. BENTLEY, Defendants.	Case Number: 5:11-cv-02746-SLB

PLAINTIFFS HISPANIC INTEREST COALITION OF ALABAMA *ET AL.'S* SUPPLEMENTAL SECTION 28 BRIEFING REGARDING: (1) CLASSIFICATIONS; (2) LEVEL OF SCRUTINY; AND (3) WHETHER THE STATE HAS SATISFIED ITS BURDEN

Plaintiffs Hispanic Interest Coalition of Alabama, *et al.*, hereby submit supplemental briefing regarding: (1) which classifications section 28 creates; (2) what level of scrutiny would apply to these classifications; and (3) whether Defendants' stated interests withstand scrutiny.

I. CLASSIFICATIONS: Section 28 Creates Three Impermissible Classifications: (1) A Classification of Children Born Outside the United States; (2) A Classification of Children Whose Parent(s) are Aliens not Lawfully Present; and (3) A Classification of Children Who are Assumed to Lack Lawful Presence

Section 28 places new requirements on students when they enroll in kindergarten or any grade in public school. HB 56 § 28(a)(1). Every student must produce an original or certified copy of her birth certificate at the time of enrollment. § 28(a)(2). When the birth certificate is produced, the school determines that the child was born in the United States and that neither of the child's parents are "alien[s] not lawfully present in the United States," the inquiry ends. §§ 28(a)(1)-(3). Additional proof of immigration status of the child is required in two circumstances: if the school determines that the student is "born outside the jurisdiction of the United States," or if the school determines that the student "is the child of an alien not lawfully present in the United States." §§ 28(a)(1), (3). Additional proof of the child's immigration status is also required if the child does not produce an original or certified copy of her birth certificate. § 28(a)(3).

Within 30 days, the child must submit additional proof of status, in the form of "both" an original or notarized copy of documents showing the child's status, and an attestation by the parent made under penalty of perjury that the document shows the child's true identity. § 28(a)(4).[1] A student who does not provide proof of lawful immigration status, or who admits to lacking lawful status, is presumed to be an alien not lawfully present in the United States. §§ 28(a)(4) (soliciting information), (a)(5) (presumption of unlawful status if no information received).

Section 28 thus creates three classifications relevant to this proceeding:

- First, it creates a classification of children born outside the United States; these children are subject to additional documentation requirements of section 28;

- Second, it creates a classification of children who are presumed to be unlawfully present, who are subject to reporting requirements by school officials to both federal and state officials;[2] and

- Third, it creates a classification of children whose parent or parents are not lawfully present in the United States; these children are subject to additional documentation requirements of section 28.

II. LEVELS OF SCRUTINY

A. First Classification: Section 28's classification of children born outside the United States must satisfy strict scrutiny to be upheld

[1] *See also* § 28(a)(4)(b) (providing that if the required official documentation is not available, the parent may submit a declaration under penalty of perjury).

[2] For a detailed description of the reporting requirements of section 28, see Plaintiffs' Motion for Preliminary Injunction at 3-5, 48-53 (Doc. 37) and Plaintiffs' Reply at 36-42 (Doc. 109).

The first classification is based on whether a person was born abroad. This classification must satisfy strict scrutiny to be upheld. *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977).

The term "alien" is defined as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). By definition, all aliens must be born abroad, for any person born within the United States is automatically a citizen. U.S. Const. amend. XIV, § 1. By focusing on students' place of birth, the Legislature is seeking to identify aliens, albeit via an over-inclusive category—some students born abroad will be U.S. citizens through naturalization, others will be citizens through birth.[3] Nevertheless, this place-of-birth inquiry is clearly a proxy for determining alienage, and specifically for whether the student is lawfully present. *See* HB 56 §§ 28(a)(1), (3) (requiring foreign-born students to clarify alienage and lawful status). The fact that the classification is over-inclusive does not alter its purpose. *See Faruki v. Rogers*, 349 F. Supp. 723, 727 (D.D.C. 1972) (finding alienage classification where naturalized citizens treated differently from native-born citizens; applying strict scrutiny and invalidating statute).

State classifications based on alienage are "'inherently suspect and subject to close judicial scrutiny.'" *Nyquist*, 432 U.S. at 7 (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)). Such classifications cannot stand unless "the

[3] Citizenship of individuals born abroad is defined by Congress. *See, e.g.*, Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631.

governmental interest claimed to justify the discrimination is . . . legitimate and substantial" and "the means adopted to achieve the goal are necessary and precisely drawn." *Nyquist*, 432 U.S. at 7 (internal quotation marks omitted).

As explained in Part III below, section 28 cannot survive this heightened review. Nor, for that matter, could this classification satisfy intermediate scrutiny under *Plyler v. Doe*, 457 U.S. 202, 220 (1982), as described below in the Second Classification.

B. Second Classification: Section 28's classification of children who are assumed to lack lawful presence must satisfy intermediate scrutiny to be upheld

Section 28's second classification applies to all children who are assumed to lack lawful presence. These children's presumed status will be recorded in the school's records along with the children's identities. Schools will report this information to the State Board of Education, and will be subject to HB 56's reporting requirements described *supra* at 2 n.2. This classification is subject to intermediate scrutiny because it infringes upon an undocumented child's right to a public education. *Plyler*, 457 U.S. at 230.

In *Plyler*, the Court acknowledged that undocumented immigrants are not a suspect class. *Plyler*, 457 U.S. at 219 n.19. But the Court stressed that access to education is "important" because it "has a fundamental role in maintaining the fabric of our society," and its deprivation would have a "lasting impact . . . on the

life of the child." *Id.* at 221, 222. It acknowledged that undocumented children are necessarily "innocent . . . victims" of legislation targeting them because of their immigration status, for minor children "can affect neither their parents' conduct nor their own status." *Id.* at 220, 224. It thus concluded that intermediate scrutiny is warranted, and the State must show that any regulation that impacts children's access to a free public education based on their immigration status is "justified by a showing that it furthers some substantial state interest." *Id.* at 230.

As explained in Part III below, the State cannot meet its burden.

C. Third Classification: Section 28's classification of children whose parent(s) are aliens not lawfully present must satisfy intermediate scrutiny to be upheld

Section 28's third classification is of children whose parent or parents are deemed to be not lawfully present in the United States. These children are subject to section 28's additional documentation requirements, and their parents' identities are subject to the reporting requirements of HB 56. This classification must withstand intermediate scrutiny because it is targeting U.S. citizen children as a result of the conduct of their parents. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (discrimination based on parents' nonmarital status); *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001) (discrimination based on parents' immigration status).

This classification is necessarily singling out U.S. citizen children on the

basis of parentage. It is targeting U.S. citizen children in particular[4] because section 28 is already making separate inquiries into the status of any child who was born abroad, which will encompass *all* non-citizen and "unlawfully present" children. Thus, by creating a separate classification for children whose *parents* are unlawfully present, section 28 creates a classification that is targeting U.S. citizen children based on parentage.

A child has no control over her place of birth, the immigration status of her parents, or her parents' decision to reside in the United States. As the Supreme Court articulated in *Plyler* and in numerous nonmarital children cases, targeting a child for a parent's perceived misdeeds "does not comport with fundamental conceptions of justice." *Plyler*, 457 U.S. at 220. As the Court explained:

> Visiting condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the child is an ineffectual—as well as unjust—way of deterring the parent.

Id. (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)) (alterations omitted).

Thus, in analyzing statutes that punished children because their parents were

[4] Although some children of undocumented parents are themselves undocumented, the majority of children whose parents lack immigration status—82%—are U.S. citizens. A mere 18% are themselves foreign-born and undocumented. Pew Hispanic Center, *Unauthorized Immigrant Population: National and State Trends, 2010*, 13 (Feb. 1, 2011), *available at* http://pewhispanic.org/files/reports/133.pdf.

not married when they were born, the Supreme Court has consistently applied an intermediate level of scrutiny rather than rational basis review. The Court acknowledged that U.S. citizen children are not a suspect class, but they nevertheless deserve protection when they are discriminated against based on "a characteristic determined by causes not within [their] control . . . , [which] bears no relation to the individual's ability to participate in and contribute to society." *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). Burdening children for the conduct of their parents "is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth . . . ." *Id.* (quotation omitted).

The children targeted by section 28 are analogous to those in the nonmarital children cases. Each is being categorized by the state based on "a characteristic determined by causes not within [her] control," particularly circumstances related to the child's parent. And in each case the issues at stake are substantial. *Compare id. with Plyler*, 457 U.S. at 119-223 (emphasizing importance of education). Intermediate scrutiny is warranted for this final classification in section 28, and the State must establish that its regulation is substantially related to an important governmental objective. *See Clark*, 486 U.S. at 461; *Lewis*, 252 F.3d at 591.

As explained in Part III below, the State cannot meet this standard of review.

III. DEFENDANTS' INTERESTS DO NOT WITHSTAND SCRUTINY

To justify the inquiry into both students' and parents' immigration statuses, Defendants identify four interests. First they argue that these inquiries are being made to "help determine if the student qualifies for assignment to an English as Second Language ["ESL"] class." Defs.' Opp. to DOJ at 45-46 (Doc. 110).[5] Second, they assert the State has "has an economic interest in the data collection and reporting," to permit accurate projection of "costs and services." *Id.* at 46. Third, they assert that the State has an interest in

> identify[ing] the effects upon the standard or quality of education provided to students who are citizens of the United States residing in Alabama that may have occurred, or are expected to occur in the future, as a consequence of the enrollment of students who are aliens not lawfully present in the United States.

Id. at 45-46. Finally, they argue that they have an interest in asking these questions in case the State needs "to supply courts with evidence in future lawsuits addressing the manner in which Alabama runs its education system." *Id.*at 46. None of these interests justify the classifications or inquiries being made.

A. The State's Interests Do Not Withstand Strict or Intermediate Scrutiny to Justify The First and Second Classifications

The first interest—ESL enrollment—cannot satisfy strict or intermediate scrutiny because the questions being asked about immigration status and place of

[5] Although this filing was not made in response to HICA Plaintiffs' Motion for Preliminary Injunction, it cited additional rationales for section 28. *Compare* Defs.' Opp. to HICA at 124-25 *with* Defs.' Opp. to DOJ at 45-47. Plaintiffs herein address all the rationales for section 28 proffered by the State in both the HICA and DOJ cases.

birth are irrelevant to ESL enrollment. Schools already determine eligibility for ESL classes by focusing on the child's fluency in the English language. *See* Tony Miller Decl. ¶ 18 (providing detailed data on Alabama schools' ESL enrollment) (Doc. 2-3 in Case No. 11-cv-2746). Under federal law, "students are required to be placed in [English Learners] programs based on their individual English language proficiency, and not whether they were born in the United States or on the legal status of their parents." *Id.* ¶ 22. Basing ESL enrollment on immigration status, citizenship status, or place of birth of the child or parent "has no basis in educational law or policy as it relates to the identification of [English Learners] students," i*d.* ¶ 23, for not every child who lacks immigration status is in need of ESL instruction, and many children who are U.S. citizens and lawful aliens do require ESL instruction. *See id.* ¶¶ 18 (noting that 18,633 students receive ESL instruction and funding from the federal Department of Education ("DOE"); of these, only 1,053 are "immigrant students"[6]).[7] Indeed, the U.S. Department of

[6] The term "immigrant student" includes all students born abroad who have been in school for not more than three academic years, and who therefore may need special ESL assistance. Miller Decl. ¶ 14. This term includes all children who lack immigration status, and some who are here with lawful status. This data is compiled *not* by asking questions at enrollment, but by utilizing data from the American Community Survey. *Id.*

[7] The numbers Miller provides establish that some "immigrant children" do not require ESL instruction. A total of 20,674 students receive ESL instruction, and 18,633 are served under Title III, implying that 2,041 are not served under Title III. Miller Decl. ¶ 18. There are also 3,647 immigrant students, and only 1,053 of these are served under Title III, meaning that 2,596 are not. *Id.* Of these 2,596, Miller does not specify how many immigrant students receive ESL instruction not funded through Title III, but many of them do not given that only 2,041 of the 20,674 students enrolled in ESL are not funded through Title III. *Id.* Thus at least 555 immigrant students are not receiving ESL.

Education has "consistent[ly] . . . advised State Educational Agencies" that they may not lawfully make such inquiries into immigration status. *Id.* ¶ 14 (explaining that in "determining eligibility for [ESL instruction] . . . inquiries raising the issue of the legal presence of parents or their children should not be made because of the chilling effect it would have."). Thus asking about immigration status and place of birth does not further the interest of ESL enrollment, *Plyler*, 452 U.S. at 230, and is not necessary or precisely drawn to achieve that interest, *Nyquist*, 432 U.S. at 7.

The State's second interest—financial planning—is misplaced for the same reason. Although sound budgeting is important, the State's projected costs for various programs do not vary by the immigration status of students or their parents, but rather by the total number of students needing these services. Nor does knowing the current numbers of students (or parents) who were born abroad, who are non-citizens, or who lack immigration status help to predict future demand. The only rational way to achieve sound financial planning is to focus on the number of students utilizing resources—not by focusing on the immigration status of a subset of those students.[8] Thus asking about immigration status and place of birth does not further the interest of financial planning, *Plyler*, 452 U.S. at 230, and is not necessary or precisely drawn to achieve that interest, *Nyquist*, 432 U.S. at 7.

[8] If Defendants are attempting to imply that immigration status is relevant because of some prospect that these children would be removed from the country, this is too speculative to be of any use, as described in detail *infra* at 12-13.

The State's third and fourth interests—to calculate the effect undocumented students have on U.S. citizen students, and "to supply courts with evidence in future lawsuits addressing the manner in which Alabama runs its education system"—cannot withstand intermediate scrutiny under *Plyler* nor strict scrutiny under *Nyquist*. Defendants cannot establish that they have a sufficient interest in collecting data on undocumented children, especially when section 28 is viewed in the context of HB 56, which mandates reporting of this information to immigration and state officials. *See supra* at 2 n.2. To prevail, Defendants must establish *now* that they have a substantial interest in deterring undocumented children from enrolling; claiming that they must collect data *now* that will have a deterrent effect on enrollment and school attendance, in order to determine *later* whether they can credibly claim to have a substantial interest in driving children from school, is quintessentially putting the cart before the horse.

Defendants misread *Plyler*. In Section V of that opinion, the Court focused on and rejected three possible justifications for a statute that permitted charging tuition to, or outright prohibiting the enrollment of, undocumented students. 457 U.S. at 227-30. The first involved a purported interest of the state to "protect itself from an influx of illegal immigrants." *Id.* at 228. Defendants wisely are not arguing they have such an interest, for as the *Plyler* Court explained, charging tuition or denying enrollment in public schools would have no meaningful impact

on the overall economy of any state. *Id.*at 228-29.[9]

Defendants focus on the second justification examined by the Court: that excluding undocumented students from state-funded schools would "improve the overall quality of education in the State." *Id.* at 229. The Court rejected this claim in part because Texas failed to establish that exclusion would improve the quality of education for others, but the Court went on to note that:

> even if improvement in the quality of education were a likely result of barring some number of children from the schools of the State, the State must support its selection of this group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are basically indistinguishable from legally resident alien children.

Id. (quotation marks and citations omitted). This point is especially true for Alabama's schools. DOE calculates the number of "immigrant students" enrolled in public schools, and this definition necessarily includes any child who is here without lawful status and in need of special resources. *See supra* at 9 n.6. DOE prepares this data by relying on the American Community Survey, *not* by asking questions at the time of enrollment. Miller Decl. ¶ 14. For the last year data was available, 2009-2010, there were 3,647 immigrant students in Alabama, *id.* ¶ 18,

[9] As Defendants concede, the undocumented population in Alabama is quite small, between 1.6% and 3.3% of the total state population. *See* Defs.' Opp. to DOJ at 2 (noting estimate is 75,000 to 160,000) (Doc. 110); U.S. Census Bureau, *Alabama Quick Facts* (noting state population of 4,779, 736), *available at* http://quickfacts.census.gov/qfd/states/01000.html.

out of a total system population of 741,115.[10] This constitutes less than 0.5% of statewide enrollment. The notion that excluding this small number could have any material effect on the overall school budget is hard to fathom. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 n.56 (1973) (disputing but not resolving whether quality of education could be tied directly to money spent on students).[11]

Defendants' argument is further diminished by the fact that many of the costs they itemize are subsidized by the federal government on a per-student basis. For example, Defendants note a concern over "the fiscal costs to the state and political subdivisions thereof of providing . . . free or discounted school meals," but free and discounted school meals are federally subsidized.[12] Excluding *any* subset of children would not save the State money because the federal subsidy

[10] Ala. Dep't of Educ., *State Enrollment by Sex and Race, School Year 2009-2010*, *available at* http://www.alsde.edu/PublicDataReports/Default.aspx.

[11] Furthermore, Defendants have proffered that schools will ascertain immigration status only once, at time of "initial enrollment." Morton Mem. (Doc. 82-3). Even assuming schools adhere to this limited implementation policy, Defendants still cannot show that their actions meet intermediate or strict scrutiny. Immigration status is fluid and changes over time, making ambiguous any data collected, and further undermining the notion that it will be substantially related to the State's purported interest. *See Plyler*, 457 U.S. at 230 ("many of the undocumented children disabled by this classification will remain in this country indefinitely, and . . . some will become lawful residents or citizens of the United States.").

[12] For example, the National Student Lunch Program is a federally subsidized program. *See* ALSDE, *Child Nutrition FAQs* (noting National School Lunch Program available in state schools), *available at* http://www.alsde.edu/html/sections/faqs.asp?section=53&footer=sections; *see also* USDA, *National School Lunch Program* ("School districts and independent schools that choose to take part in the lunch program get cash subsidies and donated commodities from the U.S. Department of Agriculture (USDA) for each meal they serve."), *available at* http://www.fns.usda.gov/cnd/lunch/AboutLunch/NSLPFactSheet.pdf

paying for that meal would be correspondingly reduced.

Finally, the *Plyler* Court dismissed any argument that undocumented children could be "appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State." *Id.* at 229-30. The Court stressed this would be impossible to quantify, both because all children, regardless of status, regularly cross state boundaries and there is no way the State can predict who would stay and who would go. *Id.* at 230. And as the Court noted in 1982, "the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States." *Id.* at 230. That fact remains true today. As Department of Homeland Security Secretary Napolitano observed this past Friday,

> The President has said on numerous occasions that it makes no sense to expend our enforcement resources on low-priority cases, such as individuals like those you reference in your letter, who were brought to this country as young children and know no other home. From a law enforcement and public safety perspective, DHS enforcement resources must continue to be focused on our highest priorities. Doing otherwise hinders our public safety mission—clogging immigration court dockets and diverting DHS enforcement resources away from individuals who pose a threat to public safety.

Letter of Secretary Napolitano to Senator Durbin (Aug. 18, 2011) (Doc. 113-1). The risk of "promoting the creation and perpetuation of a subclass of illiterates

within [Alabama's] boundaries, surely adding to the problems and costs of unemployment, welfare, and crime," cannot possibly serve any state interest, let alone a substantial one. *Plyler*, 457 U.S. at 230.

The Supreme Court in *Plyler* foreclosed the possibility of discriminating against undocumented children in the provision of free public education. Any effort to inquire into immigration status or place of birth at the time of enrollment, where the risk of deterrence is paramount, is prohibited under *Plyler*, and Defendants cannot possibly justify such inquiry here.[13] Nor can Defendants establish that these inquiries are necessary or precisely drawn. *Nyquist*, 432 U.S. at 7.

B. The State's Interests Do Not Withstand Intermediate Scrutiny to Justify The Third Classification

Assuming *arguendo* that any of the Defendants' four articulated interests were important state objectives, the State cannot establish that deterring enrollment of or even collecting data on U.S. citizen children whose parents are not lawfully present has any connection whatsoever to these goals, much less that this is substantially related. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001). As described above (at pages 4-6), the children affected by this classification are U.S. citizens. Inquiry into the status of the

[13] *See also* "Dear Colleague" Letter from the U.S. Dep't of Justice and U.S. Dep't of Educ., May 6, 2011, at 1 (emphasizing concern over chilling effect), *available at* http://www.justice.gov/crt/about/edu/documents/plylerletter.pdf.

child's *parent* serves no purpose, for all of the data being collected under section 28 relates to the status of the student *child*, not the *parent*. *See* HB 56 § 28(d). As such, this classification cannot be characterized as being "substantially related" to the interests asserted and data being collected.

This classification clarifies the true intent of section 28: to deter enrollment by families who have undocumented members, even if the children are U.S. citizens. There is no other reason to make this inquiry. Because of the deterrent impact this inquiry will have, and because of the reporting requirements that are in place, *see supra* at 2 n.2, this classification is impermissible under *Clark*.

* * *

As articulated above, section 28 creates three classifications which cannot withstand intermediate scrutiny, much less strict scrutiny. As such, Plaintiffs respectfully request that section 28 be enjoined pending a full adjudication of this case.

Dated August 21, 2011

Respectfully Submitted,

/s/ Samuel Brooke
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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record who have registered through CM/ECF.

/s/ Samuel Brooke
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