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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,	)	
vs.	)	Case Number: 5:11-cv-02484-SLB
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-02736-SLB
ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; *et al.*,	)	
Defendants.	)	
UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case Number: 2:11-cv-02746-SLB
STATE OF ALABAMA; GOVERNOR ROBERT J. BENTLEY,	)	
Defendants.	)	

STATE DEFENDANTS' SUPPLEMENTAL BRIEFING ADDRESSING EQUAL PROTECTION CHALLENGE

This Court has requested supplemental briefing as to the Equal Protection challenge to Section 28 of Act No. 2011-535. Section 28 calls for data collection and reporting in public elementary and secondary schools.

The Equal Protection clause prohibits disparate treatment of persons similarly situated. As the United State Supreme Court has stated,

> The Equal Protection Clause of the Fourteenth Amendment, § 1, commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Of course, most laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike. *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). Here, there is no disparate treatment at all. On the contrary, the Act is clear and the evidence is undisputed that the same questions are asked with respect to all children at the time of their enrollment. Doc. 82-3. Moreover, it is undisputed that there is no requirement of an answer. *Id.* There is no evidence that any use will be made of the data collected, other than the compiling of statistics requested by the Alabama Legislature. *Id.* Under these circumstances, the Equal Protection clause is not triggered.

Local, state, and federal governments often collect and compile statistical data, including data that relate to gender, race, and ethnicity. Doing so does not

violate the Equal Protection clause, however, when persons are treated the same in the gathering of the data. It is disparate treatment that warrants scrutiny – not simple information gathering. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

On this point, the State Defendants and the United States are in agreement,[1] and the State Defendants assert the same position advocated by the United States in *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000). In that case, recipients of census decennial questionnaires sued the United States Secretary of Commerce and the Director of the United States Bureau of the Census, alleging that the federal government's asking – and demanding answers to – questions about race and medical conditions, among other things, violated their equal protection rights. 116 F. Supp. 2d at 803. In defense of that litigation, the United States denied that the Equal Protection Clause precludes the compilation of demographic data regarding protected groups, and, as summarized by the Court, asserted the following argument:

> The government's position is that case law is clear that it is differential treatment, not classification, that implicates equal protection, and cites the opinion *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992): "The equal protection clause does not forbid classification. It simply keeps decision makers from treating differently persons who are in all relevant respects alike."

[1] The motion of the United States challenges Section 28, but only on the grounds that its announced interpretation of *Plyler v. Doe*, 457 U.S. 202 (1982), should be given preemptive effect, not on equal protection grounds. *U.S.* doc. 2 at 42.

> The government also cites *Caulfield v. Board of Educ. of the City of N.Y.*, 583 F.2d 605 (2nd Cir.1978), which held "the Constitution itself does not condemn the collection of this data," referring to a local census of the racial and ethnic breakdown of public school employees. *Id.* at 611. *Adarand* [*Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)] held that equal protection guards against government actions based on race, but does not deal with government collection of data on race.

Morales v. Daley, 116 F. Supp. 2d at 813.

The facts in *Morales* were different from this case. In *Morales*, the plaintiffs faced criminal sanctions if they failed to respond to the federal government's census form, *id.* at 812, whereas here, the State Defendants are posing their questions without any threat of prosecution for a failure to comply. Even so, in *Morales*, the United States District Court agreed with the United States, and granted the federal defendants summary judgment on all claims, including the Equal Protection claim. The same reasoning applies here – it is disparate treatment by the government that warrants Equal Protection scrutiny, not simple information gathering. *Nordlinger v. Hahn*, 505 U.S. at 10. Therefore, as a distinct and severable section of the Act, Section 28 withstands an Equal Protection challenge.

The *HICA* plaintiffs have argued, however, that the entire Act must be taken into account in order to measure the full effect of Section 28. (*See, e.g.,* doc. 109 at 40, "Section 28 does not exist in a vacuum, and sections 5, 6, and 10 make the reporting of children and families to the immigration authorities mandatory.") The State Defendants and the *HICA* plaintiffs disagree on what the other sections

of the Act actually require of State employees. Even assuming for a moment that the *HICA* plaintiffs' reading of the Act is the correct one, it does not follow that Section 28 should be enjoined.

According to the *HICA* plaintiffs, when the information gathering under Section 28 is combined with the other sections of the Act, the result will be to deter or "chill students from gaining access to the classroom" – a result that they assert would be unconstitutional under *Plyler*. Doc. 109 at 38. That argument is a novel one, and no support is offered for it, other than the "Dear Colleague" letter from the United States Departments of Justice and Education.

In *Plyler*, the Court did not go so far as the *HICA* plaintiffs suggest. Although the Court held that persons illegally present in the United States are persons under the Equal Protection Clause, 457 U.S. at 210-11, the Court also made it clear that illegal aliens are not a suspect class meriting strict scrutiny. *Id.* at 223; *id.* at 219 n. 19 ("We reject the claim that 'illegal aliens' are a 'suspect class.'"). Illegal aliens are present in this country due to a violation of federal law, which is "not a constitutional irrelevancy." *Id.* at 223; *see also id.* at 219 at n. 19.

Constitutional concerns over the deterrent or chilling effect that a State statute may have arise primarily in the First Amendment context, where the fundamental right of freedom of speech is in jeopardy. *See Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (lack of notice in law that regulates expression "raises

special First Amendment concerns because of its obvious chilling effect on free speech"). Here, the only case cited by the *HICA* plaintiffs in support of their argument makes it clear that there is no fundamental right at stake: "Public education is not a 'right' granted to individuals by the Constitution." *Plyler*, 457 U.S. at 221 (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)). Also, contrary to the *HICA* plaintiffs' assertions, the holding in *Plyler* addressed the denial of education, not imposing a deterrent effect on a fundamental right. *Plyler*, 457 U.S. at 230.

"Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Younger v. Harris*, 401 U.S. 37, 51 (1971). Rather, assuming the analysis applies at all, this Court must weigh the chilling effect of the statute against its plainly legitimate sweep. *Id.* Section 28 – even read as broadly as the *HICA* plaintiffs assert – does not burden a fundamental right.

In sum, Section 28 requires data collection, not disparate treatment, and thus the Equal Protection Clause is not triggered. Even if Equal Protection analysis were warranted here, no more than a rational explanation for Section 28 should be demanded of the State, and the Alabama Legislature has given one in Section 2 of the Act.

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