Nos. 11-14535-CC & 11-14675-CC

In the United States Court of Appeals for the Eleventh Circuit

HISPANIC INTEREST COALITION OF ALABAMA, *ET AL.*
Plaintiffs-Appellants & Cross-Appellees,

v.

ROBERT BENTLEY, GOVERNOR OF ALABAMA, *ET AL.*,
Defendants-Appellees & Cross-Appellants,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, CIVIL ACTION NO. 2:11-2746-SLB, HON. SHARON L. BLACKBURN

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES/CROSS-APPELLANTS IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Hispanic Int. Coalition of Ala. v. Bentley, Nos. 11-14535-CC & 11-14675-CC

The undersigned counsel hereby certifies, pursuant to 11th Cir. R. 26.1-1, that – in addition to those previously identified as having an interest in the outcome of this case – the following **additional** persons have such an interest:

None.

Pursuant to FED. R. APP. P. 26.1, *amicus curiae* Eagle Forum makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: September 20, 2012 Respectfully submitted,

/s/ Lawrence J. Joseph

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982); *Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 263 (1977); and *Plyler v. Doe*, 457 U.S. 202, 223-25 (1982).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: (a) whether expenditure-based claims of standing under *Havens Realty* and its progeny must satisfy prudential limits on standing if the allegedly rights-providing statute does not statutorily eliminate those prudential limits, and (b) whether states may require students to disclosure their immigration status as a condition of matriculating to a public school.

Dated: September 20, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph

Counsel of Record for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Founded in 1981, Eagle Forum has consistently defended American sovereignty before the state and federal legislatures and courts. Eagle Forum promotes adherence to the U.S. Constitution and has repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States. Eagle Forum supports enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens. Eagle Forum also has long defended federalism, including the ability of state and local governments to protect themselves and to maintain order. Finally, the members of Eagle Forum's Alabama chapter face elevated tax and other burdens that the challenged Alabama law seeks to redress. For these reasons, Eagle Forum has a direct and vital interest in the issues presented here.

STATEMENT OF ISSUES

1. **Standing:** Does an organizational plaintiff have standing to challenge state laws based on the plaintiffs' having redirected some of its resources to educating and counseling the public about those laws, even though the laws do not

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

otherwise impact the organization's ability to accomplish its goals, and, if so, is the organization's standing limited to only its own injuries or does it extend to the injuries of third parties?

2. **Equal Protection:** Does ALA. CODE §31-13-27 violate the Equal Protection Clause merely because it requires officials to try to determine the citizenship and immigration status of students who enroll in Alabama's primary and secondary schools, even though no student will be denied an education?

INTRODUCTION AND STATEMENT OF FACTS

Amicus Eagle Forum adopts the facts and statement of the case in the petition for rehearing *en banc* filed by the state defendants-appellees and cross-appellants (collectively, "Alabama"). *See* Pet. at 1-6. As relevant here, none of the various plaintiffs-appellants and cross-appellees (collectively, "Plaintiffs") claims to have suffered injury from Alabama Act 2011-535 (hereinafter, "HB56") before they filed this action, except that some of the Plaintiff associations claim to have diverted resources from their regular activities to advocate and counsel their perceived constituencies about HB56 and particularly about HB56's §28, ALA. CODE §31-13-27, which requires Alabama public schools to collect data on the citizenship of all students.

SUMMARY OF ARGUMENT

Plaintiffs' alleged injuries are speculative and self-inflicted, which cannot

establish standing (Section I.A.1). Moreover, standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), based on costs to counteract statutory violations applies only to the Fair Housing Act or similar statutes, which does not include the Immigration and Naturalization Act ("INA") or the Equal Protection Clause (Section I.A.2). Even if Plaintiff associations had standing, that standing would cover only their rights, not students' or illegal aliens' rights (Section I.B).

On the merits, Plaintiffs' facial challenge cannot negate every application of HB56, particularly Alabama's need to collect information to ensure that non-core educational benefits (*e.g.*, subsidized meals, field trips, and extra-curricular activities) do not go to illegal aliens in violation of 8 U.S.C. §1621 (Section II.A). Collecting information does not deny any student the "basic public education" required by *Plyler v. Doe*, 457 U.S. 202 (1982), and Alabama's compliance with §1621 provides a compelling government interest under *Plyler* (Section II.B).

ARGUMENT AND AUTHORITIES

I. THE PLAINTIFFS LACK STANDING TO CHALLENGE HB56

This Court should grant the petition because the panel deviated from Supreme Court precedents on Article III standing in several important ways. Under Article III, appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the

record." *Renne v. Geary*, 501 U.S. 312, 316 (1991). Parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. at 94 (interior quotations omitted).

A. The Plaintiffs Lack Standing to Challenge HB56 Based on Students' Equal-Protection Rights

Constitutional standing presents a tripartite test: cognizable injury to the plaintiffs, causation by the defendants, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). In addition, prudential standing bars review of even some claims where the plaintiff meets Article III's minimum criteria. Prudential standing includes the requirements that the "plaintiff's complaint [must] fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (interior quotations omitted), and that plaintiffs typically "cannot rest [their] claim to relief on the legal rights or interests of third parties." *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) (interior

quotations omitted).[2]

Because it goes to the federal courts' Article III power to hear a case, standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The party invoking federal jurisdiction bears the burden of proof on each step of the standing analysis, *Defenders of Wildlife*, 504 U.S. at 561, and plaintiffs must establish standing *on the merits* to support injunctive relief. *Summers*, 555 U.S. at 497-98. Under these criteria, the Plaintiffs cannot establish standing, either on behalf of the alleged targets of HB56 or on behalf of advocacy groups that voluntarily devote resources to counteract HB56.

1. Plaintiffs Assert Speculative, Non-Imminent Injuries

Facial, pre-enforcement challenges require a "credible threat" of enforcement against the plaintiff. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Future run-ins with authorities are simply too speculative for standing. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). Significantly, when each individual plaintiff lacks a sufficiently credible threat of

[2] In addition to asserting their own injuries, membership groups can establish standing for affirmative relief for at least one *identified* member, provided that the interest protected is germane to the organization and nothing requires the member's participation as a party. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977); *Summers v. Earth Island Institute*, 555 U.S. 488, 497-98 (2009).

imminent injury, an association cannot aggregate their low-probability individual claims into a collectively higher-probability group claim. *Pub. Citizen v. NHTSA*, 489 F.3d 1279, 1296 (D.C. Cir. 2007). Instead, for membership organizations, an identified individual member must establish standing. *Summers*, 555 U.S. at 497-98. No such individual members established injury from HB56 in this litigation.

As a general rule, plaintiffs cannot establish standing through self-inflicted injuries. *Pevsner v. Eastern Air Lines, Inc.*, 493 F.2d 916, 917-18 (5th Cir. 1974); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). As relevant here, unless Plaintiffs have a legally protected right to avoid the effort in question, Plaintiffs' voluntary counseling on HB56 cannot establish standing.

2. The Plaintiff Associations' General Interest in Immigration Cannot Manufacture Standing under *Havens Realty*

Relying on *Havens Realty*, and its Circuit progeny in voting-related cases, the panel found that one Plaintiff association had standing based on HB56's "forcing the organization to divert resources to counteract [HB56]." Slip Op. at 11 (internal quotations omitted). This analysis vastly overstates the standing found in *Havens Realty*.

As this Circuit recognized, the "precise issue in *Havens* was whether the organizational plaintiff had statutory standing to sue under section 812 of the Fair Housing Act." *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 n.14 (11th Cir. 2008). That statute created a right – applicable to

individuals *and associations* – to truthful, non-discriminatory information about housing:

> Section 804(d) states that it is unlawful for an individual or firm covered by the Act "[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," a prohibition made enforceable through the creation of an explicit cause of action in § 812(a) of the Act. Congress has thus conferred on all "persons" a legal right to truthful information about available housing.

Havens Realty, 455 U.S. at 373 (emphasis in original, citations omitted). Moreover, because the *Havens Realty* statute "extend[ed] to the full limits of Art. III, the inquiry into statutory standing collapsed into the question of whether the injuries alleged met the Article III minimum of injury in fact." *Browning*, 522 F.3d at 1165 (*citing Havens Realty*, 455 U.S. at 372) (interior quotations omitted). The plaintiff associations here lack several critical elements of *Havens Realty*.

First, the *Havens Realty* organization had a statutory right (backed by a statutory cause of action) to the truthful information that the defendants denied to it. Because Congress can create rights, the denial of those rights can confer standing. *Warth*, 422 U.S. at 514 ("Congress may create a statutory right … the alleged deprivation of which can confer standing"). Here, the plaintiff associations have no claim to any rights whatsoever under INA or the Equal Protection Clause.

Second, and related to the first issue, the injury that plaintiff associations

claim must align with the other components of their standing, *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996), notably here the allegedly cognizable right. In *Havens Realty*, the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information, in violation of the statute). By contrast, nothing in INA or the Equal Protection Clause even *remotely* relates to the associations' spending.

Third, and perhaps most critically, the *Havens Realty* statute statutorily eliminated prudential standing. *Browning*, 522 F.3d at 1165 (*citing Havens Realty*, 455 U.S. at 372). Here, the plaintiff associations have no claim whatsoever that INA or the Equal Protection Clause eliminates prudential standing, and it is fanciful to suggest that INA or the Equal Protection Clause puts the plaintiff associations and their private spending in the relevant zone of interests or enables these organizations to enforce the rights (if any) of third parties.

At bottom, the plaintiff associations' diverted resources are simply self-inflicted injuries, which cannot manufacture a case or controversy. *See* Section I.A.1, *supra*. If mere spending could manufacture standing, any private advocacy or welfare organization could establish standing against any government action, which clearly is not the law. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (organizations lack standing to defend "abstract social interests"); *Nat'l Taxpayers Union, Inc. v. U.S.*, 68 F.3d 1428, 1433-34 (D.C. Cir. 1995) (same). *Havens Realty*

simply did not eviscerate Article III.

B. Even If They Had Standing in Their Own Right, the Associations Would Lack Standing to Assert Students' Rights

Assuming *arguendo* that the Plaintiff association has standing, it nonetheless lacks standing to assert the anti-discrimination rights of third-parties. Under *Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 263 (1977), an entity like a development agency "[c]learly [meets] the constitutional requirements … [for] standing to assert its own rights … [f]oremost among [which] is [the] right to be free of arbitrary or irrational [government] actions." In pursuing that type of action, however, the entity "has no racial identity and cannot be the direct target of the [defendants'] alleged discrimination":

> Clearly [the entity] has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is [the entity's] right to be free of arbitrary or irrational zoning actions. *See Euclid v. Ambler Realty Co.*; *Nectow v. City of Cambridge*; *Village of Belle Terre v. Boraas*. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, [the entity] has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons. *Warth v. Seldin*.

Id. (citations omitted). Here, the Plaintiff association does not assert student's

individualized rights to be free from discrimination; it simply alleges that HB56 imposes costs on it. Under *Arlington Heights*, the Plaintiff association must assert its own rights.

Indeed, for a plaintiff to assert the rights of absent third parties, *jus tertii* (third-party) standing prudentially requires that the plaintiff have its own constitutional standing and a "close" relationship with the absent third parties and that a sufficient "hindrance" keeps the absent third parties from protecting their own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004). The Plaintiff association cannot make this showing and therefore must proceed under its own rights, thereby removing – as in *Arlington Heights* for racial minorities – any claim to heightened scrutiny for students' rights or illegal aliens' rights.

II. PLAINTIFFS CANNOT PREVAIL ON THE MERITS

Assuming *arguendo* that this Court has jurisdiction to consider the merits of Plaintiffs' Equal-Protection claims, this Court should grant the petition because the panel deviated from Supreme Court precedents in several important ways, both with respect to the timing of review and the substance of Plaintiffs' claims. Most obviously, however, Alabama is simply collecting information, without depriving students of the "basic public education" at issue in *Plyler*.

A. Pre-Enforcement Facial Challenges Cannot Succeed Unless HB56 Is Unconstitutional in All Applications

A "facial challenge to a legislative Act is … the most difficult challenge to

mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). "The fact that [the law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* Further, facial invalidation runs counter to the judicial duty not to "nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). Under the circumstances, *amicus* Eagle Forum submits that future Circuit panels will find HB56 constitutional *as applied* to any and all future plaintiffs. But the question here is whether even one valid application exists as to *any* potential plaintiff.

Under 8 U.S.C. §1621, state and local government may not extend benefits to illegal aliens except "through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility." 8 U.S.C. §1621(d). Although the forbidden benefits do not include the "basic public education" covered by *Plyler, see* 8 U.S.C. §1643(a)(2), Alabama's schools dispense numerous benefits beyond basic education. For example, Birmingham extends financial benefits for charged meals in school cafeterias, Birmingham Bd. of Educ., *Charged Meal Policy*, POLICY MANUAL, ¶8081 (June 2012).[3] To comply with

[3] Birmingham's POLICY MANUAL is available online at http://www.bhamcityschools.org/domain/3838 (last visited Sept. 20, 2012). While the panel made much of Alabama's suggestion that the collected data may not be

§1621(a), Birmingham needs HB56's information to avoid extending these benefits to illegal aliens without meeting §1621(d)'s criteria. Schools across Alabama likely need the same information to avoid granting illegal aliens hardship- or need-based waivers of participation fees for non-core activities such as field trips, athletics, or other extra-curricular activities.

Of course, denying participation in these non-core activities provides no "countervailing costs" to warrant departing from standard rational-basis review to require "some substantial goal of the State." *Plyler*, 457 U.S. at 223-24. Specifically, non-participation in these non-core activities creates no "stigma of illiteracy" from which *Plyler* shields the children of illegal aliens. *Plyler*, 457 U.S. at 223. But Alabama has the *obligation* under federal law not to provide these benefits to those children without meeting §1621(d)'s criteria. Under *Plyler*, "the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens," but the *Plyler* Court could not "find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education." *Plyler*, 457 U.S. at 224-25. Here, Alabama has done no more than collect the information needed to

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highly accurate for aggregate statewide data, Slip Op. at 24, the collected data will be accurate enough at each school.

meet its federal obligations, without depriving anyone of anything.

B. HB56 Does Not Violate the Equal Protection Clause

In this section, *amicus* Eagle Forum demonstrates that both the Plaintiff association and a hypothetical student lack a viable equal-protection claim against HB56. Because neither claim is viable, this Court should rehear this case *en banc* and reverse the panel's decision.

Even assuming *arguendo* that the Plaintiff association has standing at all, *but see* Section I.A, *supra,* the Plaintiff association lacks standing to assert *students'* equal-protection rights. *See* Section I.B, *supra.* As such, the panel should have resolved this matter under the rational-basis test applicable to the *Plaintiff association's* claims, not the heightened scrutiny that the panel found applicable to students' claims. *Id.* Under the rational-basis test, Alabama easily prevails both for the interest outlined in Section II.A – namely, the collection of information needed to comply with 8 U.S.C. §1621 – and for the states' unquestionable "power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns." *Plyler,* 457 U.S. at 228 n.23. As in *Arlington Heights,* however, the question here is not whether the Plaintiff association can overcome HB56 under its own rights (it cannot) but whether it can prevail under the heightened rational-basis review of *Plyler.*

The panel's analysis (Slip Op. at 16-17, 23) conflates strict scrutiny under fundamental-rights cases with the heightened rational-basis test that *Plyler* employed after finding that denying illegal immigrants a free public education would inflict the "countervailing costs" of a "lifetime hardship" of the "stigma of illiteracy" on blameless children. *Plyler*, 457 U.S. at 223-24. Under this elevated test, "discrimination … can hardly be considered rational unless it furthers some substantial goal of the State." *Id.* at 224. The test, however, remains the rational-basis test modified only by the need for a "substantial goal," not strict scrutiny.

Given the absence of any affected plaintiff, this Court cannot assume that parents will violate Alabama's compulsory-education laws, ALA. CODE §16-28-3, although they may find acceptable church, private, or home school alternatives to public school. *Id.* Or they may leave Alabama. Whatever they do, Alabama's collecting needed information would not deny them education under *Plyler*. Pet. at 13-14. In any event, "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. §1601(6). The Conference Report explains that "it continues to be the immigration policy of the United States that noncitizens within the Nation's borders not depend on public resources," but also notes that "noncitizens … have been applying for and receiving public benefits at increasing rates." H.R. CONF. REP. NO. 104-725, at 378 (July 30, 1996). In response to that development,

Congress found "that it is a compelling government interest to enact new eligibility and sponsorship rules to assure that noncitizens become self-reliant and to *remove any incentive* for illegal immigration." *Id.* (emphasis added).

As Alabama demonstrates with its non-exhaustive list of twenty-three other states that collect similar information in conjunction with enrollment in public schools, *see* Pet. at 14 n.2, the information that Alabama requests is by no means unprecedented. Indeed, given state and local governments' obligations under §1621, *amicus* Eagle Forum respectfully submits the legal question should not be which other states collect this information, but which states *do not.*

CONCLUSION

This Court should grant Alabama's petition for rehearing *en banc.*

Dated: September 20, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Hispanic Int. Coalition of Ala. v. Bentley, Nos. 11-14535-CC & 11-14675-CC

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s and 11th Cir. R. 35-6's type-volume limitation because the brief contains fifteen (15) pages excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) and 11th Cir. R. 35-6 exempt.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: September 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2012, I electronically filed the foregoing *amicus* brief as an exhibit to the accompanying motion for leave to file the brief with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit via the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served, as set forth in the Certificate of Service associated with the accompanying motion.

/s/ Lawrence J. Joseph

Lawrence J. Joseph