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

JANE DOE #1, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 2:13-
	)	
RICH HOBSON, *et al.*,	)	
	)	
Defendants.	)	

12(b)(1) facial attack, the court evaluates whether the plaintiff "has sufficiently alleged a basis of subject matter jurisdiction" in the complaint and employs standards similar to those governing Rule 12(b)(6) review. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013).

WR KHDU WKH FDVH RUH QR SUHVXPSWLRQ WUXW

SODLQWLII¶V DOOHJDWLRQV DQG WKH H[LVWHQFH

WKH WULDO FRXUW IURP HYDOXDWLQJ IRU LWVHOI

Here, Defendants' first and second arguments regarding ripeness and standing DUH IDFLDO DWWDFNV RQ WKH SOHDGLQJV &RXUW argument, which implicates mootness doctrine and relies XSRQ 'HIHQGDQW affidavit testimonies, is a factual attack.[1]

III. BACKGROUND

A. Facts

Plaintiffs Jane Doe #1, Jane Doe #2, John Doe #1, and John Doe #2 are residents of Montgomery, Alabama. All of them were born in Mexico and moved WR WKH 8QLWHG 6WDWHV VHYHUDO \HDUV DJR -D Doe #2 is married to John Doe #1. The three Does live together. John Doe #2 is the nephew of Jane Doe #1 and the cousin of Jane Doe #2. Jane Doe #2 lives separately from but near the other Does. All

Plaintiffs went fishing, allegedly without a state license to do so, and were arrested. Jane Doe #1 was detained for approximately two days in county jail DQG GHQLHG EDLO EHFDXVH IHGHUDO ,PPLJUDWLR officers wished to investigate whether she had permission to remain in the United States. The other Plaintiffs were detained in jail for several hours. ICE officials determined that Jane Doe #1 lacked permission to remain in the United States, but exercised their discretion not to keep her in custody or to initiate removal proceedings against her. Plaintiffs appeared in state district court to contest the charges of fishing without licenses. All four were convicted, but they have appealed their convictions to state circuit court. (Doc. #31, at 3-4; see also Docs. #31-1, 31-2, 31-3, 31-4 3O DLQWLIIV ¶) Plaintiffs have not informed the court of further developments in the state court criminal proceedings.

Plaintiffs are suing Defendant Rich Hobson, in his official capacity as $GPLQLVWUDWLYH 'LUHFWRU RI $ODEDPD &RX &´ $GPLQ and Defendant Spencer Collier, in his official capacity as Director of the Alabama Department of Homeland Security[3] $'+6´ now part of the Alabama Law (QIRUFHPHQW $JHQFLHV[2] (Defendants are charged with enforcing various

[2] Mr. Collier is now

provisions of Section 5 R I + R X V H % L O O $ 3 G + D % E D P´D ¶ V O H J L

enacted HB 658 in May, W R D P H Q G V H Y H U D O S U R Y L V L

controversial immigration law commonly called HB 56, which was enacted in 2011. The text of Section 5 is set out in full below.

> (a) The [AOC] shall submit a quarterly report, organized by county, to the [ADHS] summarizing the number of cases in which an unlawfully present alien was detained by law enforcement and appeared in court for any violation of state law and shall include all of the following information in the report:
>
> > (1) The name of the unlawfully present alien.
> >
> > (2) The violation or charge alleged to have been committed by the unlawfully present alien.
> >
> > (3) The name of the judge presiding over the case.
> >
> > (4) The final disposition of the case, including whether the unlawfully present alien was released from custody, remained in detention, or was transferred to the custody of the appropriate federal immigration authorities.
>
> (b) The [ADHS] shall publish on its public website, in a convenient and prominent location, the information provided in the quarterly report from the [AOC]. The display of this information on the G H S D U s W e b s i t e ¶ shall be searchable by county and presiding judge.
>
> (c) For the purposes of this section, the determination of whether a person is an unlawfully present alien shall be verified by the federal government pursuant to 8 U.S.C. § 1373(c).

Ala. Code § 31-13-32.

Plaintiffs allege that Section 5 is unconstitutional under the United States & R Q V W L W X W L R Q \ Plaintiffs allege that Section 5(a) creates a state immigration classification ± ³ X Q O D Z I X O O \ , S U R & H V V R I Q W 31 D 6 W H Q and intrudes into a field reserved exclusively to the jurisdiction of the federal government by attempting to create an alien registration scheme, (Compl., at .63 642.82 Tm -0.11

UHJLVWU\ ³ZLOO DPSOLI\ WKH ´ &RPSO. ¶ DW Acts or other provisions of HB

Further, Plaintiffs allege that Section 5 compromises confidential federal law enforcement information by disseminating it to the public, thereby invading their right to keep their information private and facilitating private discrimination against immigrants and Latinos. If they are able to obtain legal immigration status, Plaintiffs say Section 5 nonetheless ZLOO KDYH ³SHUPDQHQWO\ EU unlawfully present aliens. (Compl., at ¶ 57.) Plaintiffs claim that they will be subjected to various other deprivations and harms. (See Compl., at ¶ 57.)[3]

Mr. Collier has UHSHDWHGO\ DVVHUWHG WKDW no steps to $'+6 implement Section ¶V SURYLVLRQV IRU SXEOLFDWLRQ´ RI'R at 2 (citing Collier Aff.); see also Docs. #33-1 (Collier Supp. Aff.), # 47-1 (Collier Second Supp. Aff.). Having consulted with ICE, Mr. Collier believes that if he complied with Section 5, a public registry would constitute an improper use of federal immigration information.

that he would not enforce the publication aspect of Section 15 because doing so would jeopardize $ ' + 6 ¶ ¶ access to federal immigration data, which it needs for law enforcement purposes. To date, the Alabama Attorney General has taken no

directed the parties to submit supplemental briefing. (Doc. #43.) The parties complied. (Docs. #47, 48.)

[3] 3ODLQWLIIV KDYH QR ZD\ RI NQRZLQJ ZKDW LQI

enforced as written. Because Plaintiffs were not born in the United States, because they appear to be in the United States in violation of federal law, and because ICE has already determined that Jane Doe #1 is not lawfully present, it is unrealistic that ' H I H Q G D Q W V ¶ enforcement of Section 5 would harm them in at least some of the ways alleged in the Complaint. ' H I H Q G D Q W V ¶ The case is simply without merit.

B. Standing

7 R K D Y H V W D Q G L Q J ³ > D @ S O D L Q W L I I P X V W D O
W K H G H I H Q G D Q W ¶ V D O O H J H G O \ X Q O D Z I X O F R Q G X
U H T X H V W H D Daimler-Chrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006) (quoting Allen v. Wright, 468 U.S. 737, 751). The plaintiff must be both concrete and particularized and actual or imminent. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). There must be a causal F R Q Q H F W L R Q E H W Z H H Q W K H L Q M X U \ Id. at 560. And it must be likely ±not speculative± W K D W W K H L Q M X U \ Z L O O E H U H P H D L H
W K H S O D L Q W L I I ¶ V I T K R U S O D L Q W L I I D V ³ > W @ K H S
M X U L V G L F W L R Q > @ E H D U V W K H Id. E X U G H Q ´ R I H V W D E

7 K H H O H P H Q W V R I V W D Q G L Q J ³ P X V W E H V X S S R
matter on which the plaintiff bears the burden of proof, with the manner and degree of evidence required at the V X F F H V V L Y H V W D J H V Lujan, 504 W K H O L

U.S. at [3] $W WKH SOHDGLQJ VWDJH JHQHUDO IDFW

IURP WKH GHIHQGDQW¶V FRQGXFW PD\ VXIILFH IR

presume[s] that general allegations embrace those specific facts that are necessary

WR VXSSRUW Id. (alteration omitted).´

Defendants argue that 3OD LQWLIIV DOOHJH QR [3] QHJDWLYH RU J PRU

Section ¶V HQIRUFHPHQW but not concrete and particularized injury

'HIHQGDQWV VD\ WKDW 3OD LQWLIIV¶ DOOHJDWLRQ

entirely on speculation and assumption.

The C

from what matters. The proper focus in a Rule 12(b)(1) facial challenge belongs on the Complaint ± Q R W ' H I H Q G D Q W V See Lawrence, 919 F.2d 1529 (11th Cir. 1990). The allegations in the Complaint must be taken as true. Id. 3 O D L Q W L I I V Complaint alleges that Section 5 violates the Supremacy Clause and the Due Process Clause. Plaintiffs assert that the State is invading W K H I H G H U D O J R Y H U role of registering and classifying persons as aliens.[4] Plaintiffs further allege that if the law is enforced as it was written and adopted by the Legislature, 3 O D L Q W L I I V names will be publicly identified by the State as unlawfully present aliens, and they will have no means of challenging that designation before or after Defendants categorize them as unlawfully present and publish their names.

For purposes of the injury-in-fact requirement of standing, Plaintiffs must assert an actual or imminent violation of a ³ O H J D O O \ S U R W H F W H G L Q W H Bochese v. Town of Ponce Inlet, 405 F.3d 964, 980 (11th Cir. 2005); see also Cone Corp. v.) O D ' H S ¶ W R I 7 U D Q V S W K & L U ³ W K H W K H > D O O H J H G @ G H S U L Y D W L R Q R I D F R Q V W L W X W L R Q D O U L J K W V ´ The alleged threat of a deprivation of due process ± i.e. 3 O D L Q W L I I V ¶ F R P S O D L Q W W K D

[4] ³ 7 K H S U R S U L H W \ R I E U L Q J L Q J D F K D O O H Q J H I R U L Q M grounds that a state law is preempted by virtue of the Supremacy Clause has gone largely X Q T X H V W L R Q H G´ Georgia Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250, 1261 (11th Cir. 2012).

Defendants argue in their reply and supplemental briefing that Section 5 is not an alien registration scheme. (See Doc. # 35, at 12 ± 14.) This argument goes to the merits, not to standing or justiciability, and it was not raised in the motion to dismiss. Although Plaintiffs raised this issue in their response, it will not be discussed in this opinion.

contest their likely designation as unlawfully present aliens and their inclusion on

W K H 6 W D W H ¶ V U H J±L V W U \ R I W K H V D P H

Plaintiffs are denied public benefits or are prosecuted for attempting to enter a public records transaction with the State, it will not be because a State official

release, public benefits, or the engagement in public records transactions with the State. Defendants have not raised this injury-in-fact issue, and in the absence of an argument from their adversaries, neither have Plaintiffs.

Yet, presuming that Section 5 is enforced and Plaintiffs are identified on the ADHS website as unlawfully present aliens, it is plausible that private employers or state agencies may rely upon the AOC ¶ list published by the ADHS. The court elects not to parse these suspect injuries and potential causation and redressability problems on a motion to dismiss, especially where some of the issues identified above have not been briefed. The court prefers the resolution of disputed facts, where possible, and the crystallization of those not resolved, in order to deal with issues of law on a solid record at the summary judgment juncture.[7]

In sum, Plaintiffs have constitutional standing to bring this suit.

C. Mootness

'HIHQGDQWV¶ ILQDO DUJXPHQW LV WKH PRVW that WKH\ KDYH QR LQWHQWLRQ RI HQIRUFLQJ W 6HFWLRQ 20, at 7 (citing Collier and Hobson Affs).) Thus, they argue, the threat of injury anticipated by Plaintiffs will not materialize.

---

[7] +RZHYHU ZLWK UHVSHFW WR &ROOLHU &RXQW ³&RQWH RI RW [that Plaintiffs might endure] should the preliminary injunction be lifted on any other provision RI +% &¶57(9)´ Defs. Br. 57 (emphasis in original). Defs. Br. 57 (emphasis in original). These injuries are not actual or imminent because the preliminary injunction has been made permanent by order of the Northern District of Alabama. (See Docs. # 47-2, 47-3 (Stipulated Permanent Injunctions).) Hence, any alleged injuries relating to provisions of HB 56 that have been enjoined are insufficient to confer standing.

1. Arguments

Defendants rely on *Doe v. Pryor*, 344 F.3d 1282, 1283 (11th Cir. 2003), where the Eleventh Circuit affirmed a Rule 12(b)(1) dismissal for lack of standing after the defendant-Attorney General argued that he had no intention of enforcing a challenged statute. In *Doe*, one of the plaintiffs, J.B., maintained an open lesbian relationship and lost custody of her child to her ex-husband. In ruling in the ex-KXVEDQG¶V IDYRU WKH $ODEDPD 6XSUHPH &R criminalizing deviate sexual intercourse. J.B. and others sued the Attorney General of Alabama, challenging the statute on equal protection and freedom of expression grounds.

With respect to the equal protection claim, the Eleventh Circuit held that, assuming J.B. had pleaded cognizable injuries, -%¶V DOOHJHG neither LQMXULH fairly traceable to any action taken by the Attorney General, nor redressable by a suit against the Attorney General. *Id.* at 1285-86. The court considered the Attorney General¶V SRVLWLRQ that he had neither threatened to enforce nor enforced the challenged law. *Id.* at 1285. The court found credible WKH $WWRUQH\ *H assurance that he would not enforce the law based on his concession that, in the wake of the Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), the challenged Alabama statute was unconstitutional. *Id.* Similarly, with regard to the SODLQWLIIV¶ First Amendment challenge, the court held that there was no credible

threat of prosecution. Id. at 1287. The court noted again that the Attorney General viewed the law to be unconstitutional in light of Lawrence,[8] and that even without the Lawrence G H F L V L R Q L W D S S D U H Q W O \ K D G E H H Q [3] \ H D Alabama had enforced the challenged law. Id. Hence, the court affirmed the dismissal of the suit for S O D L Q W L ff V O D F N o f s t a n d i n g.

Here, Defendants argue that, like the Attorney General of Alabama in Doe v. Pryor, they are the persons charged with enforcing Section 5, they are represented by the Attorney General in this matter, and Mr. Collier has sworn to their intent not to enforce the public disclosure provisions of the law in Section 5(b).

Plaintiffs respond that Defendants are oversimplifying the significance of the holding in Pryor. Plaintiffs distinguish Pryor in three ways. First, there is not a binding Eleventh Circuit or Supreme Court ruling like Lawrence which has held that Section 5, or any virtually identical state law, is unconstitutional. Second, unlike the Attorney General in Pryor, Defendants have not conceded and admittedly will not concede that Section 5 is unconstitutional. Third, unlike the criminal statute at issue in Pryor, which the State had ignored for decades, Section 5 is a novel law enacted within the last two years. Plaintiffs emphasize that there are consequences for Defendants if they do not enforce the law. See Ala.

Code §31-13-6.[9] 'H I H Q G D Q W V ¶ U H S O \ E U L H I L V V L O H Q W arguments. 3 O D L Q W L I I V ¶ Pryor is distinguishable. Defendants' well-taken. Additional distinctions between Pryor and this case include W K D W $ O D E D P D Attorney General had no causal connection to the Plaintiffs' injury (i.e.

promised not to enforce the public disclosure provisions of Section 5(b). Plaintiffs have challenged all of Section 5, QFOXGLQJ 6HFWLRQ D ¶V SURY report unlawfully present aliens to DHS. Plaintiffs say that the public disclosure provisions of Section 5(b) are not severable from Section 5, and therefore, 3ODLQWLIIV¶ FODLPV DUH QRW PRRW

In reply, Defendants counter that a discussion of the mootness doctrine has applicability only where the Government actually engages in the allegedly unlawful conduct at the time the suit is filed, and then voluntarily ceases the offensive conduct during the pendency of a lawsuit. In this case, Mr. Collier has QHYHU ³FHDVHG´ DQ\ RIIHQVLYH FRQGXFW ,QV Section 5(b) prior to the filing of this litigation, and DHS has never published a list of unlawfully present aliens who have appeared LQ $ODEDPD¶V F Notwithstanding their doubts as to the applicability of voluntary cessation analysis, Defendants argue that the non-enforcement policy is unambiguous, the product of substantial deliberation, and consistent.

,Q 3ODLQWLIIV¶ ,QLWLDO &RPSODLQW &RXQVHO emphasized that Defendants were preparing

mootness by characterizing their mootness arguments as an attack on &RPSOD&QW¶V standing. Finally, Plaintiffs reiterate that the &RPSOD&QW¶V that &RRH&J Section 5(b), as it was written by the Legislature, could be enforced immediately, must be accepted as true.

2. Analysis

It is significant that Defendants did not argue mootness in their motion to dismiss (See Doc. #20.) Plaintiffs classified '&RQ&HUQ¶V Pre-enforcement argument

at 1265). But government actors like Defendants[3] F D U U \ D O H V W U H E X U They must first show that the cessation of offensive conduct, or in this case, the decision not to initiate offensive conduct, is unambiguous. Id. On this element of the test, the timing and content of D G H I H Q G D Q W¶V decision are most relevant.

law enforcement capabilities could be compromised by non-compliance with its agreement with the federal government to access and use immigration information. Th H V H D O V R D U H U H O H Y D Q W F R Q V L G H U D W L R Q V W K enforcement policy is ambiguous because there is little to suggest that the law will not be enforced in the future. See id.

Additionally, Mr. Hobson does not dispute that he intends

again at summary judgment if additional evidence supports reevaluation of their arguments.

Because the court is not deferring ruling on the alternative motion for summary judgment, the alternative motion for V U L Q V U H O L H I

V. CONCLUSION

Accordingly, it is ORDERED that:

(1) ' H I H Q G D Q W V ¶ P R W L R Q W R ' L V P L V V the alternative motion for summary judgment (Doc. #20) is DENIED;

(2) 3 O D L Q W L I I V ¶ P R W L R Q W R ' L V P L V V relief pursuant to Rule 56(d) (Doc. #32) is DENIED as moot.

DONE this 2nd day of May, 2014.

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE