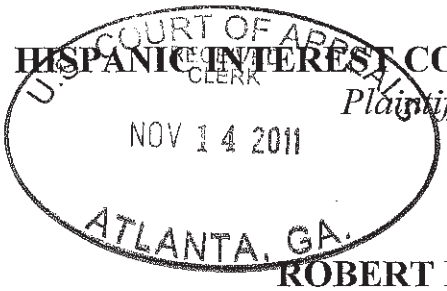
No. 11-14535

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT



HISPANIC INTEREST COALITION OF ALABAMA, *et al.*,
Plaintiffs-Appellants,

v.

ROBERT BENTLEY, *et al.*,
Defendants-Appellees

On Appeal from the United States District Court for the Northern District of Alabama
No. 5:11-CV-02484-SLB

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Appellants hereby certifies, pursuant to Eleventh Circuit Rule 26.1-1, that the following have an interest in the outcome of this case:

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Alabama Coalition Against Domestic Violence (ACADV), *Amicus Curiae*

Alabama Council on Human Relations, *Amicus Curiae*

Alabama Education Association (AEA), *Amicus Curiae*

Alabama Fair Housing Center *et al.*, *Amici Curiae*

Alabama New South Coalition, *Amicus Curiae*

Alabama NOW, *Amicus Curiae*

Alabama State Conference of the National Association for the Advancement of Colored People (NAACP), *Amicus Curiae*

Alianza Latina en contra de la Agresión Sexual (ALAS), *Amicus Curiae*

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Jane Doe # 3, Plaintiff/Appellant

Jane Doe # 4, Plaintiff/Appellant

Jane Doe # 5, Plaintiff/Appellant

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National Council of La Raza, *Amicus Curiae*

The National Dominican American Council, *Amicus Curiae*

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The National Fair Housing Alliance, *Amicus Curiae*

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Republic of Chile, *Amicus Curiae*

Republic of Colombia, *Amicus Curiae*

Republic of Costa Rica, *Amicus Curiae*

Republic of Ecuador, *Amicus Curiae*

Republic of El Salvador, *Amicus Curiae*

Republic of Guatemala, *Amicus Curiae*

Republic of Honduras, *Amicus Curiae*

Republic of Nicaragua, *Amicus Curiae*

Republic of Paraguay, *Amicus Curiae*

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Southern Christian Leadership Conference, *Amicus Curiae*

Southern Coalition for Social Justice, *Amicus Curiae*

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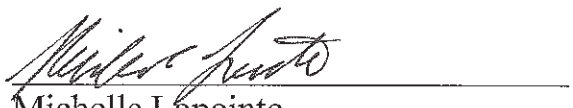
9 to 5, National Association of Working Women, *Amicus Curiae*

The undersigned attorney further certifies, pursuant to Federal Rule of Appellate Procedure 26.1, that Plaintiffs/Appellants have no parent corporations and that no corporation directly or indirectly holds 10% or more of the ownership interest in any of the Appellants.

Respectfully submitted,



Michelle Lapointe
Counsel for Plaintiffs/Appellants

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is appropriate because it will assist the Court's understanding of the issues presented in this appeal. *See* Fed. App. P. 34(a)(2)(C).

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INTRODUCTION

This case challenges the constitutional of Alabama Act 2011-535 (commonly known as "HB56") (Vol. III, R. 131-1), a comprehensive state immigration law that was designed, in the words of its House sponsor, to "attack[] every aspect of an illegal immigrant's life…so they will deport themselves" and to implement an Alabama state immigration policy of enforcement through attrition. First Am. Compl. ¶ 167 (Vol. III, R. 131). HB56 has fulfilled its sponsor's purpose, leading to a civil rights crisis in the State of Alabama for U.S. citizens and lawful immigrants as well as undocumented immigrants.

This chaos has been caused largely through Sections 10, 12, 18, 27, 28, and 30 of HB56, which turn state and local officers into a roving immigration patrol, impose draconian criminal and civil disabilities as a penalty for immigration violations, and require public school officials to investigate and to report the immigration status and nationality of schoolchildren.

These state laws are preempted because they impermissibly attempt to regulate immigration, intrude in areas that Congress has occupied exclusively through the federal Immigration and Nationality Act ("INA"), and directly conflict with provisions in the INA. Section 28, which chills the long-established right of children to attend public elementary and secondary schools regardless of their immigration status, also violates the Equal Protection Clause. In rejecting the

merits of these constitutional claims, the district court broke from settled precedents and the decisions of other federal courts that have considered similar state laws.

HB56 effectively banishes people who are deemed to be undocumented immigrants by the State—depriving them of housing, water, and electricity; closing the schoolhouse doors to children; and rendering countless human beings non-persons in the eyes of Alabama law. To reach its erroneous decision, the district court ignored ample evidence that these sections of HB56 will cause irreparable harm to countless individuals—including not just undocumented immigrants but also U.S. citizens and lawful immigrants who will be forced to prove their status—and to our societal interest in the enforcement of fundamental constitutional principles. The district court's order denying a preliminary injunction against Sections 10, 12, 18, 27, 28, and 30 should be reversed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether federal law preempts Section 10 of HB56, which makes it a crime under Alabama law to be an undocumented immigrant not in compliance with federal alien registration laws.

2. Whether federal law preempts Section 12 of HB56, which turns every state and local officer into a de facto immigration agent by requiring investigation of immigration status during any stop, arrest, or detention, when "reasonable suspicion exists that the [subject] is an alien who is unlawfully present in the United States."

3. Whether federal law preempts Section 18 of HB56, which amends Alabama's driving-without-a-license criminal statute to require investigation of immigration status and, in the event that the suspect is determined to be "unlawfully present in the United States," requiring detention "until prosecution or until handed over to federal immigration authorities," regardless of whether there is any independent state-law justification for custody.

4. Whether Sections 10, 12, and 18 of HB56 together constitute an impermissible state regulation of immigration.

5. Whether federal law preempts Section 27 of HB56, which prohibits Alabama state courts from enforcing contracts (with narrow enumerated exceptions) when a party had knowledge that another party was an undocumented immigrant at the time the contract was formed.

6. Whether federal law preempts Section 30 of HB56, which makes it an Alabama state crime for certain non-citizens to enter into or attempt to enter into any transaction with the state or a political subdivision of the state (with a single

exception of a marriage license), or for third parties to enter into or attempt to enter into such a transaction on non-citizens' behalf.

7. Whether Plaintiffs have standing to challenge Section 28 of HB56, which chills the right of children in immigrant families to a public education by requiring schools to determine and to report to state officials whether a child or her parents were born outside the United States or are aliens "not lawfully present in the United States."

8. Whether federal law preempts Section 28 of HB56.

9. Whether Section 28 of HB56 violates the Equal Protection Clause of the Fourteenth Amendment because it burdens and deters certain citizens' and non-citizens' attendance at Alabama's public schools.

10. Whether the district court erred in failing even to consider the equitable factors that weighed strongly in favor of a preliminary injunction.

STATEMENT OF THE CASE

On June 9, 2011, Governor Bentley signed HB56 into law. HB56 supplants federal authority over immigration enforcement by creating a comprehensive state-law scheme to investigate, arrest, detain, and punish alleged undocumented immigrants with the purpose and effect of driving them out of the State of

Alabama. HB56 (Vol. III, R. 131-1). During the signing, Governor Bentley proclaimed that HB56 is "the strongest immigration bill in the country."[1]

Even in a field of proliferating state immigration laws, HB56 has unprecedented impact on constitutional rights. It turns local and state law enforcement officers into a roving immigration patrol by requiring immigration status checks upon "reasonable suspicion" that an individual is unlawfully present in the United States, HB56 § 12, and it requires immigration detention by state and local officers even when there is no state-law basis for custody, § 18. It creates new state criminal offenses that include immigration status as an element, including: being an alien present in Alabama without an alien registration document, § 10; the solicitation of work by undocumented immigrants and day laborers, § 11; harboring, transporting, or renting to an undocumented immigrant, or encouraging one to reside in Alabama § 13; virtually any attempt by an undocumented immigrant to engage in a transaction with the state or local government entities, § 30; and any attempt, conspiracy, or solicitation to commit any of these crimes, § 25.

HB56 also imposes severe civil disabilities on undocumented immigrants in order to drive them out of Alabama. It renders contracts unenforceable if the

[1] Samuel King, *Sheriffs' Association, Dept. of Justice To Meet Concerning Immigration Law*, WSFA.com, June 24, 2011, *available at* http://www.wsfa.com/Global/story.asp?S=14974594.

parties to the contract knew or should have known that one of them was undocumented. § 27. It prohibits various categories of aliens, including refugees and asylees, those granted Temporary Protected Status because of dangerous conditions in their home countries, and undocumented individuals, from enrolling in any public college or university. § 8. And it creates an immigration verification and reporting scheme mandatory for all children enrolling in public K-12 schools, as well as their parents. § 28.

The law further mandates full enforcement of the provisions of HB56, and also of federal immigration law, by state personnel and entities, including all officers of the court. Failure to comply can result in financial penalties, civil lawsuits against individuals, and individual criminal liability for any state employee who fails to report violations. §§ 5, 6.

The majority of HB56's provisions were scheduled to go into effect on September 1, 2011. § 34.

Plaintiffs—12 organizations and 24 individuals—brought suit in the U.S. District Court for the Northern District of Alabama to challenge the law on July 8, 2011 (Vol. I, R. B Doc. 1), suing the Governor, Attorney General, State Superintendent of Education, and Chancellor of Postsecondary Education (collectively, "the State Defendants"), as well as county and city officials. The State Defendants moved for a more definite statement, (Vol. I, R. B, Doc. 36), and

Plaintiffs filed a first amended complaint on September 16, 2011. (Vol. III, R. 131.)

Plaintiffs moved for a preliminary injunction against HB56 in its entirety on July 21, 2011. (Vol. I, R. B, Doc. 37.) Shortly thereafter, the United States also filed a complaint and motion for preliminary injunction, challenging Sections 10, 11(a), 12(a), 13, 16, 17, 18, 27, 28, and 30 of HB56. (Vol. IV, R. C, Doc. 2.) The cases (along with a third one brought by Alabama church leaders) were consolidated for hearing on the preliminary injunction motions on August 24, 2011. (Vol. I, R. B, Doc. 59.)

The district court temporarily enjoined the entire law on August 29, 2011, to permit more time for consideration of the arguments presented (Vol. I, R. B., Doc. 126), and then issued separate orders and opinions in the instant action and *United States v. Alabama* on September 28, 2011. *United States v. Alabama*, 2011 WL 4469941 (N.D. Ala. Sept. 28, 2011); *HICA* Opinion (hereinafter "Opinion") (Vol. IV, R. 137). The district court enjoined the following provisions:

- Section 8, which bars certain non-citizens from postsecondary institutions in violation of the Equal Protection Clause (Opinion at 36-44 (Vol. IV, R. 137));
- Section 11(a), which prohibits the solicitation of work by undocumented immigrants in violation of the Supremacy Clause (*Alabama*, 2011 WL 4469941, at *19-27);

- Sections 11(f) and (g), which prohibit the solicitation of work by day laborers in violation of the First Amendment (Opinion at 61-70 (Vol. IV, R. 137));

- Section 13, which criminalizes harboring, transporting, or renting a home to an undocumented immigrant, or encouraging or inducing one to enter or reside in Alabama, in violation of the Supremacy Clause (*Alabama*, 2011 WL 4469941, at *38-45);

- Section 16, which denies a tax deduction for business expenses related to employing unauthorized workers in violation of the Supremacy Clause (*Alabama*, 2011 WL 4469941, at *46-48);

- Section 17, which creates a cause of action for private citizens to sue employers employing unauthorized workers in violation of the Supremacy Clause (*Alabama*, 2011 WL 4469941, at *48-52); and

- The final sentence of Sections 10(e), 11(e), and 13(h), which limit the types of evidence that may be used as proof of immigration status, in violation of the Sixth Amendment's Compulsory Process Clause (Opinion at 50-53, 56 (Vol. IV, R. 137)).

The remaining portions of Plaintiffs' and the United States' motions for preliminary injunction were denied, and the provisions of HB56 that were not enjoined went into effect, (Vol. IV, R. 138; *Alabama*, 2011 WL 4469941, *60), with the exception of a few provisions with a later effective date.

In both the instant case and *United States v. Alabama*, the plaintiffs filed a notice of appeal. (Vol. I, R. B., Docs. 139, 149.) Both sets of appellants moved the district court for an order enjoining Sections 10, 12, 18, 27, 28, and 30 pending appeal. (Vol. I, R. B, Doc. 140). The district court denied these requests on October 5, 2011. (Vol. I, R. B, Doc. 147.) Plaintiffs and the United States then

moved this Court for the same relief, and by order entered October 14, 2011, this Court enjoined Sections 10 (state alien registration criminal offense) and 28 (concerning immigration status checks and reporting in connection with enrollment in K-12 public schools) pending the outcome of this appeal.

STANDARD OF REVIEW

An order denying a preliminary injunction is reviewed for abuse of discretion. *Bailey v. Gulf Coast Transp., Inc.*, 280 F.3d 1333, 1335 (11th Cir. 2002). Underlying legal determinations are reviewed *de novo*. *Id.* Related findings of fact are reviewed for clear error. *Cumulus Media, Inc. v. Clear Channel Communications, Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002).

SUMMARY OF ARGUMENT

The district court erred as a matter of law in holding that Plaintiffs are not likely to succeed on the merits of their challenge to Sections 10, 12, 18, 27, 28, and 30 of HB56.

Sections 10, 12, and 18 individually and collectively are impermissible regulations of immigration in that they require state officers to investigate and detain people solely on suspicion of civil immigration law violations, and thus also intrude on a field exclusively occupied by a comprehensive federal statutory scheme. Those three Sections also conflict directly with Congress's decision,

through the enactment of four specific provisions in the INA, to limit strictly the participation of state/local officers in immigration enforcement.

Sections 27 and 30 also are preempted by federal law. They are impermissible state regulations of immigration as they impose draconian criminal and civil penalties on undocumented immigrants in order to drive them out of the state. Sections 27 and 30 thus attempt to set the conditions under which non-citizens may remain (or not) in Alabama.

Section 28 is unconstitutional on two grounds. It violates the Supremacy Clause and the Equal Protection Clause. The district court erred in holding that no Plaintiff has standing to challenge Section 28.

Finally, the district court erred in failing even to consider any factor other than the merits of Plaintiffs' constitutional claims, including the ample evidence that Plaintiffs and others will suffer irreparable harm under these sections of HB56 and that the public interest will be served by preserving the status quo while these serious constitutional questions are resolved.

CONTROLLING LEGAL STANDARDS

Preliminary Injunction Standard

A moving party is entitled to a preliminary injunction if they demonstrate that (1) they are substantially likely to prevail on the merits; (2) they will suffer irreparable injury without a preliminary injunction; (3) those threatened injuries

outweigh any harms the non-moving party would suffer if the injunction were to issue; and (4) an injunction is not adverse to the public interest. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998).

Preemption Standards

Immigration laws are subject to a particular preemption analysis. In *DeCanas v. Bica*, 424 U.S. 351, 96 S. Ct. 933 (1976), the Supreme Court held because "[p]ower to regulate immigration is unquestionably exclusively a federal power," a state "regulation of immigration" is "per se preempted by this constitutional power." *Id.* at 354-55, 96 S. Ct. at 936. A "regulation of immigration" is a law that is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id*. at 355, 96 S. Ct. at 936. The exclusive federal power to regulate immigration is preemptive of state law regardless of whether or not it has been exercised by the federal government. *Id*. at 355-56, 96 S. Ct. 936-37.

But even when a state law cannot be characterized as a "regulation of immigration," it may nonetheless be preempted under more general preemption standards. Even when Congress has not expressly prohibited states from regulating, a state law may be subject to implied preemption. First, "there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause," U.S. CONST. ART.

VI, cl. 2. *Id*. at 356, 96 S. Ct. at 937. Such "field" preemption occurs where "'the nature of the regulated subject matter permits no other conclusion'" than that federal regulation should be "'deemed preemptive of state regulatory power,'" *id*. at 356, 96 S. Ct. at 937 (quoting *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142, 83 S. Ct. 1210, 1217 (1963)), or where the complete ouster of state power to regulate was Congress's clear and manifest purpose, *id*. at 356-57, 96 S. Ct. at 936-37. Whether Congress intended to occupy a field may be inferred a pervasive federal regulatory scheme or when there is a dominant federal interest. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S. Ct. 2270, 2275 (1990).

Second, state regulation is preempted when it conflicts with federal law. A state law conflicts with federal law when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *DeCanas*, 424 U.S. at 363, 96 S. Ct. at 940 (internal quotation marks and citations omitted). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 2294 (2000). The touchstone for preemption is congressional intent. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 2383 (1992); *see Hines v. Davidowitz,* 312 U.S. 52, 70, 61 S. Ct. 399, 406 (1941).

ARGUMENT

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THEIR CLAIMS AGAINST SECTIONS 10, 12, AND 18

A. Section 10 Is Preempted By Federal Law

The district court erred as a matter of law in holding that Plaintiffs are not likely to succeed on their preemption claim against Section 10 of HB56. Section 10 makes it a crime under Alabama law to "willful[ly] fail[] to complete or carry an alien registration document." The elements of the offense are that the defendant be "an alien unlawfully present in the United States" and "in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a)," which are federal statutes that impose certain requirements on non-citizens to register with the federal government and to carry registration documents. Section 10 imposes state criminal liability "*[i]n addition* to any violation of federal law" (emphasis added).

Section 10 is preempted because it is an impermissible regulation of immigration, intrudes into areas exclusively occupied by Congress, and conflicts with federal law. The district court erred in rejecting Plaintiffs' preemption challenge, breaking from the well-reasoned rulings of both the Arizona district court and the Ninth Circuit in considering a virtually identical provision of Arizona law. *United States v. Arizona*, 703 F. Supp. 2d 980, 998-99 (D. Ariz. 2010), *aff'd*, 641 F.3d 339, 355-57 (9th Cir. 2011).

1. Section 10 Is an Impermissible Regulation of Immigration

The district court erred in holding that Section 10 is not an impermissible regulation of immigration. By their very nature, requirements like those imposed by Section 10—*i.e.*, that non-citizens register with the government, carry their registration papers, and produce their registration papers on demand—constitute a regulation of immigration. Section 10 imposes conditions on presence in the United States, effectively criminalizes undocumented presence, and thus effectively determines which non-citizens can live in Alabama. *See DeCanas*, 424 U.S. at 354-55, 96 S. Ct. at 936; *see Lozano v. City of Hazleton*, 620 F.3d 170, 220 (3d Cir. 2010), *vacated and remanded on other grounds*, 131 S. Ct. 2958 (2011) (local housing ordinance was preempted because it was an "attempt[] to regulate residence based solely on immigration status," and "[d]eciding which aliens may live in the United States has always been the prerogative of the federal government"); *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 855 (N.D. Tex. 2010), *appeal pending*, No. 10- 10751 (5th Cir. July 28, 2010) (holding that local housing ordinance is an "invalid regulation of immigration"); *see also Hines*, 312 U.S. at 59-60, 65-66, 61 S. Ct. 400-01, 403-04 (requiring aliens to carry registration papers, and produce them to public officials whenever demanded, implicates the welfare and tranquility of all the states, and

raises questions in the fields of international affairs and naturalization entrusted to Congress).

2. Section 10 Intrudes in a Field Occupied Exclusively by Congress

Section 10 is also preempted because it intrudes in fields fully occupied by federal law. The registration and classification of non-citizens is a field under exclusive federal control. As the Supreme Court recognized long ago, "the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens." *Hines*, 312 U.S. at 66–67, 61 S. Ct. at 404. The federal registration scheme is "a single integrated and all-embracing system" through which Congress "plainly manifested a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system[.]" *Id.* at 74, 61 S. Ct. at 408.

That "comprehensive scheme for immigrant registration" governs everything from which non-citizens must register and when, *see* 8 U.S.C. §§ 1201, 1302-03; 8 C.F.R. § 264.1, to the content of those registration forms, *see* 8 U.S.C. § 1304, to when registrants must report changes of address, *see* § 1305, penalties for failing to register, *see* § 1306, penalties for failing to carry registration documents, *see* § 1304(e), and penalties for fraudulent statements and counterfeiting, *see* §§ 1306(c)-(d). *See also Arizona*, 641 F.3d at 355; *Alabama*, 2011 WL 4469941,

at *12 (acknowledging that "[t]he current federal registration system…creates a comprehensive scheme for alien registration.").

The INA's registration provisions contain no saving clauses or other indications that Congress intended for states to have a role in supplementing this comprehensive federal scheme, while in other contexts, Congress has explicitly permitted such state regulation. *See* 8 U.S.C. § 1324a(h) (states may sanction employers for the knowing employment of "unauthorized aliens" through state licensing laws). Nor is there any indication that Congress intended for state or local officers to have any role in enforcing the federal alien registration laws; to the contrary, Congress has omitted such provisions while elsewhere specifying the limited circumstances in which state and local officers may act. *See* §§ 1324(c) (authorizing law enforcement officers to make arrests for offenses under federal anti-harboring statute), 1357(g) (delimiting circumstances in which state and local officers may perform functions of an immigration officer in relation to the investigation, apprehension, or detention of aliens). As the Ninth Circuit has noted, Congress knew how to make room for states to act in the INA when it wished, and it chose not to do so in the field of alien registration. *Arizona*, 641 F.3d at 355. Preemptive intent is therefore implied, for the federal statutory scheme is "sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." *Int'l Paper Co. v.*

Ouellette, 479 U.S. 481, 491, 107 S. Ct. 805, 811 (1986) (internal quotations and citations omitted); *see also Hines*, 312 U.S. at 73, 61 S. Ct. at 407 (registration of aliens is "a matter of national moment").

States cannot step into this federally occupied field and add legislation such as Section 10. "When the national government by…statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the…statute is the supreme law of the land. No state can add to or take from the force and effect of such…statute[.]" *Hines*, 312 U.S. at 62-63, 61 S. Ct. at 402. The district court fundamentally departed from this settled law when it held that section 10 is "not inconsistent" with federal law, *Alabama*, 2011 WL 4469941 at *14 (internal quotation marks and alterations omitted), on the grounds that its standard is borrowed from the federal registration statutes. *Id.* This was error.

As *Hines* made clear, even complementary state laws are preempted when Congress has occupied the field: "[S]tates cannot…curtail *or complement*[] the federal law" if doing so would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 66–67, 61 S. Ct. at 404 (emphasis added); *Arizona*, 641 F.3d at 355-56 (holding that Arizona law similar to Section 10 "plainly stands in opposition to…[this] Supreme Court[] direction); *see also Hines*, 312 U.S. at 62-63, 61 S. Ct. at 402 (states may not "add to…the force and effect" of the federal scheme). Thus, even outside the

area of immigration with its special constitutional status as an area of federal control, the Supreme Court has struck down state laws that seek to ensure compliance with federal law by imposing state-law penalties for failure to do so. *Cf. North Dakota ex rel. Flaherty v. Hanson*, 215 U.S. 515, 524, 30 S. Ct. 179, 182 (1910) (state law imposing requirements on businesses based on their having paid a special federal tax was repugnant to the Constitution because it impermissibly burdened the federal government's taxing power).

Section 10 flies in the face of the rule that when Congress has occupied a field, a state may not enact even an identical criminal offense. As the Supreme Court explained in *Crosby*, "conflict is imminent when two separate remedies are brought to bear on the same activity," even if those remedies "share the same goals." 530 U.S. at 379-80 (internal citation omitted). By enacting the federal criminal statutes, 8 U.S.C. §§ 1304(e) and 1306(a), Congress has determined that it is federal prosecutors who should determine when to pursue penalties against an alien who has failed to register, and federal courts that should impose penalties. Because Congress left it to the Executive Branch to calibrate the proper penalty, state prosecutors and courts may not impose penalties under state law where the federal government has chosen not to do so, or impose additional penalties when the federal government has. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421-25, 427, 123 S. Ct. 2374, 2390-92 (2003) (where Constitution vested authority in

President, states may not interfere with delicate balance effected by federal action); *Crosby*, 530 U.S. at 373-7, 120 S. Ct. at 2294-96; *Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 349-51, 121 S. Ct. 1012, 1018-19 (2001) (federal agency's "flexibility is a critical component of the statutory and regulatory framework under which [it] pursues difficult (and often competing) objectives"); *Wis. Dep't of Indus., Labor & Human Relations v. Gould Inc*., 475 U.S. 282, 286-88, 106 S. Ct. 1057, 1061-62 (1986) (invalidating a state statute that imposed additional sanction on companies that violated federal law); *Farmers Branch*, 701 F. Supp. 2d at 857 ("a local regulation may not—though it may share a common goal with federal law—interfere with Congress's chosen methods").

In asserting that Section 10 represents merely an exercise of "dual sovereignty," as in other criminal areas such as drugs or firearms, Defendants are simply assuming the conclusion they seek to establish and ignoring the fundamental question—whether the field is preempted. If the field of alien registration is intended by Congress to be exclusively occupied by federal law, and it is, Alabama cannot incorporate federal law as its own and add its own enforcement and penalty scheme. In legislating against drugs and firearms, Congress does not act in an area constitutionally committed to the federal government and has not expressed any intent to occupy the field. The registration of aliens is an entirely different matter.

Section 10 also intrudes into another field exclusively occupied by federal law—the status and treatment of aliens who do not have authorization to be in the United States, including provisions relating to grounds for removability, investigations, arrests, detention and release, penalties, removal, and grounds on which relief from removal may be granted. *See*, *e.g.*, 8 U.S.C. §§ 1226 (provisions pertaining to arrest and detention), 1227 (grounds for deportability), 1229a (exclusive removal power vested in federal immigration judges), 1231 (detention of persons after order of removal is issued). By imposing a state-law criminal penalty on individuals whom the state deems to be unlawfully present in the United States and in violation of alien registration requirements, Section 10 intrudes in this area of exclusive federal control.

3. Section 10 Is Preempted Because It Conflicts with Federal Immigration Laws

Section 10 is also preempted because it directly conflicts with federal immigration law in multiple ways. First, Section 10 conflicts with federal laws that permit an undocumented person to acquire lawful status or temporary permission to remain. *See*, *e.g.*, 8 U.S.C. §§ 1151(b)(2)(A)(i), 1154(a) (adjustment of status due to marriage to a U.S. citizen); § 1158 (asylum); § 1254a (Temporary Protected Status); § 1229b(b) (cancellation of removal and adjustment of status for nonpermanent residents). Although Section 10(d) provides that the law does not apply to a person "who maintains authorization from the federal government to be

present in the United States," this does not avoid the conflict with federal law. Under Section 10, an individual may be prosecuted by state authorities and incarcerated, only *later* to be granted relief by the federal government.[2] When federal authorities investigate violations of 8 U.S.C. §§ 1304(e) and 1306(a), they may take such matters into account and elect not to prosecute in the exercise of their congressionally delegated discretion. State authorities have no such power or competency in the full range of immigration penalties and provisions for relief.

Thus, Section 10 conflicts with Congress's enforcement scheme, which delegates to the U.S. Attorney General, the U.S. Secretary of Homeland Security, and other federal Executive Branch officials "the administration and enforcement of this chapter"—including the alien registration provisions—"and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). Decisions about whom to prosecute for registration violations are committed to the Executive Branch, and the exercise of prosecutorial discretion is one of the

[2] Though Section 10 purports to rely upon federal determinations of immigration status, HB56 § 10(b), such federal determinations are merely a snapshot of an individual's status at some point prior to the status check. *See* U.S. Dep't of Justice, Office of the Inspector Gen., Follow-up Review of the Status of IDENT/IAFIS Integration, at 41 (2004), *available at* http://www.justice.gov/oig/reports/plus/e0501/final.pdf (warning that DHS "databases cannot be relied upon accurately to determine immigration status because immigration status is dynamic" and that database entries may be outdated). They are not designed to determine whether an individual is eligible for relief from removal, and the ICE agents who provide such determinations are not authorized to make such decisions.

executive's most basic functions. *See United States v. Armstrong*, 517 U.S. 456, 464, 116 S. Ct. 1480, 1486 (1996).

Indeed, Congress has repeatedly directed the Executive Branch to set priorities for the enforcement of immigration laws, and to focus prosecutorial efforts on individuals with "serious criminal convictions."[3] Registration violations, in contrast, have been de-prioritized under this authority granted by Congress, and are rarely prosecuted. *See* Bureau of Justice Services Statistics (Vol. II, R. 37-43 (Ex. L)) (showing only 30 such prosecutions in 15 years).[4] Section 10 disrupts the balance Congress has struck and frustrates the purpose of delegating authority and discretion in the enforcement of the federal registration statutes to Executive Branch agencies. *Cf. Ga. Latino Alliance for Human Rights v. Deal ("GLAHR")*, No. 11-CV-1804, 2011 WL 2520752, *13 (N.D. Ga. June 27, 2011), *appeal pending*, No. 11-13044 (11th Cir.) (state alien harboring statute enjoined as preempted because it removed prosecutorial decisions from federal government

[3] *See, e.g.,* Consolidated Approp. Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 2050 (2007) (designating $200 million for use in "identify[ing] aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remov[ing] them from the United States once they are judged deportable"); Consolidated Security, Disaster Assistance, and Continuing Approp. Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574, 3659 (2008) (appropriating $150 million to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.").

[4] The federal registration statutes rely on a regulatory list of registration documents, 8 C.F.R. § 264.1, that the federal government has chosen not to update for years. *See* Bo Cooper Decl. ¶¶ 27, 28 (Vol. II, R. 37-42 (Ex. D)).

control, thereby undermining Congress's intent); *Arizona*, 703 F. Supp. 2d at 999 (holding that virtually identical Arizona law "stands as an obstacle to the uniform, federal registration scheme and is therefore an impermissible attempt by Arizona to regulate alien registration") (citing *Hines*, 312 U.S. at 67, 61 S. Ct. at 399).

In addition, Section 10 conflicts with Congress's decision to strictly limit the circumstances in which state and local law enforcement officers or employees may perform the functions of an immigration officer in relation to the investigation, apprehension, or detention of aliens. *See infra* at (I)(B)(1). Section 10 attempts an end-run around Congress's scheme for federal control of immigration enforcement by directing all state and local law enforcement officers to investigate potential immigration violations and to punish violations of federal registration rules. It thereby "impair[s] the federal superintendence of the field covered by the INA," and is preempted. *DeCanas*, 424 U.S. at 363, 96 S. Ct. at 940 (internal quotation marks and citation omitted).

The conflicts between Section 10 and the INA are particularly offensive to established constitutional principles because many foreign nationals who reside in the United States with the permission or knowledge of the United States do not possess or have readily available documentation that is acceptable under HB56. These foreign nationals include those with explicit permission to remain under congressionally created categories, such as those with deferred action, travelers

covered under the Visa Waiver Program, individuals with Temporary Protected Status, those who have applied for visas as victims of crimes (such as Plaintiff Jane Doe #2), and those who are here through the Family Unity Program (such as Plaintiff Zamora). *See* Michael Aytes Decl. ¶¶ 17, 19, 21 (Vol. II, R. 37-42 (Ex. C)). Subjecting these immigrants, whom the federal government is not attempting to prosecute or remove, to state criminal prosecution conflicts with the federal government's enforcement discretion and its ability to mediate among the various objectives of the INA.

For all the foregoing reasons, Section 10 is preempted by federal law.

B. Section 12 Is Preempted by Federal Law

The district court also erred as a matter of law in holding that Plaintiffs are not likely to succeed in their challenge to Section 12 of HB56, which unconstitutionally mandates that state and local officers inject immigration enforcement into traffic stops and other routine police encounters throughout the State of Alabama. Section 12 requires all state and local law enforcement officers, in a broad range of circumstances, to investigate the immigration status of persons whom they stop, detain, or arrest; to detain them pending verification of their immigration status (for up to 24 hours in the case of any "alien" arrested and booked into custody); and to further detain those "aliens" determined to be "unlawfully present" in order to facilitate their transfer to federal custody, if the

federal government so requests. *See* HB56 §§ 12(a), (b), (e). Other courts have enjoined similar state immigration laws in Arizona and Georgia on preemption grounds. *See Arizona*, 641 F.3d at 348-55; *GLAHR*, 2011 WL 2520752, *9-11. The district court below erred as a matter of law in breaking from those well-reasoned decisions.

1. Section 12 Conflicts with Federal Law

Section 12(a) is preempted because it conflicts with the INA. In requiring local and state officers in Alabama to check immigration status during any stop, detention, or arrest, Section 12(a) conflicts with Congress's scheme for the limited participation of state and local law enforcement officers in the enforcement of our nation's immigration laws. Congress has provided for four specific circumstances in which state or local officers may aid in the enforcement of federal immigration laws:

1) 8 U.S.C. § 1103(a)(10): The Attorney General of the United States may authorize "any State or local enforcement officer" to enforce immigration laws upon certification of "an actual or imminent mass influx of aliens."
2) 8 U.S.C. § 1357(g): The federal government may enter into written agreements with state or local agencies, permitting designated officers to take specified actions to enforce immigration law, under the training and "subject to the direction and supervision of the Attorney General."

3) 8 U.S.C. § 1252c: To enforce the federal statute criminalizing illegal re-entry (8 U.S.C. § 1326), state and local officers may arrest "an alien illegally present in the United States" who has a previous felony conviction and who was deported or left the United States after that conviction, but only if the federal government confirms the individual's status as such, and may detain the individual only for the limited time necessary for federal authorities to take custody.

4) 8 U.S.C. § 1324(c): Congress provided that "any officer whose duty it is to enforce criminal laws" may make arrests for violations of the federal statute criminalizing the illicit smuggling, harboring, and transportation of aliens.

By enacting these provisions and no others, Congress deliberately chose to limit state and local officers' participation in the enforcement of federal immigration laws to specific and narrow circumstances.

Section 12 far exceeds these specific and narrow circumstances, broadly charging all state and local officers in the state of Alabama with immigration law enforcement authority and enacting a shadow, state law enforcement scheme involving investigations, document requirements, arrests, detentions, and transfers to federal custody. This regulatory scheme is contrary to Congress's intent as expressed in the INA. If Congress had not intended to foreclose such state

regulation, there would have been no need to enact any of the four federal provisions setting out precisely when state and local officers may engage in the enforcement of federal immigration laws.

In the face of Congress's clear statement as to how and when state and local officers may participate in the enforcement of the INA, the district court relied erroneously on two other federal provisions, 8 U.S.C. §§ 1357(g)(10) and 1373(c). Both sections contemplate that state and local officers will "communicate" with the federal government (§ 1357(g)(10)) and request information about individuals' immigration status (§ 1373(c)).[5] And Section 1357(g)(10) also contemplates that state and local agencies might, absent a written agreement and the other specific requirements of Section 1357(g)(1) through (9), "otherwise…cooperate with the Attorney General" in enforcement activities. But if such "cooperation" meant free-ranging state and local agency immigration enforcement activities as required by Section 12(a), there would have been no need for Congress to enact the four statutes that expressly authorize state and local immigration enforcement activities. The district court, like the dissenting judge in *Arizona*, ignores those four statutes

[5] The district court places great weight on 8 U.S.C. § 1373(c)'s requirement that the federal government "shall respond" to inquiries from state and local officers. But Section 1373(c) merely requires the sharing of information and contains no provision for arrest and detention by local officers. If the district court's reading of Section 1373(c) were correct, then the four specific provisions limiting state and local participation would be nugatory. Nothing in Section 1373(c) remotely suggests that Congress intended to broaden state and local authority so radically.

and unreasonably interprets 8 U.S.C. §§ 1357(g)(10) as a broad grant of authority to state and local governments to enact their own state immigration enforcement schemes even when not in "cooperat[ion] with the Attorney General." The district court's reading of § 1357(g)(10) turns the first nine subsections of § 1357(g) into surplusage, and thus violates a "cardinal principle" of statutory interpretation. *See Williams v. Taylor*, 529 U.S. 362, 404, 120 S. Ct. 1495, 1519 (2000) (statute should be construed to "give effect, if possible, to every clause") (internal quotation marks and citation omitted).

Apart from directly conflicting with Congress's intent, Section 12 also more generally "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" regarding federal immigration enforcement. *See Hines*, 312 U.S. at 67, 61 S. Ct. at 404. The district court erroneously adopted the Defendants' characterization of Section 12(a) as merely requiring state and local officers to inform the federal government of an "illegally present" immigrant and then leave further action up to the federal government. *See Alabama*, 2011 WL 4469941, at *37. In fact, Section 12(a) does not merely contemplate communication, requests for information, or "cooperation" with federal authorities. By its plain terms, it requires state and local officers conducting stops to determine whether there is "reasonable suspicion" of unlawful presence in the United States. HB56 § 12(a). If there is such "reasonable suspicion," the subject will be detained

pending the outcome of an investigation into immigration status. Sheriff Todd Entrekin Decl. ¶ 13 (Vol. II, R. 37-37); Sheriff Mike Hale Decl. ¶ 4 (Vol. II, R. 37-38); Eduardo Gonzalez Decl. ¶ 18 (Vol. II, R. 37-39); George Gascón Decl. ¶ 15 (Vol. II, R. 37-40).

Section 12 does not assist in federal immigration enforcement; it interferes with it. Like criminal laws, the immigration laws necessarily entail discretion in enforcement because violations far outstrip prosecutorial capacity. The federal immigration system, as designed by Congress, cannot coexist with state laws like Section 12(a). Federal immigration authorities do not seek out unlawful immigrants through street patrols and other activities generally carried out by state and local law enforcement agencies because such an enforcement practice would overwhelm a system designed to function in a far more targeted way. *See* Daniel Ragsdale Decl. ¶¶ 7, 10-11, 40 (Vol. IV, R. 2-2). This problem is compounded by the number of states that have attempted to pass laws like Section 12(a). *See GLAHR*, 2011 WL 2520752, *10. By flooding the federal immigration system indiscriminately with status requests, Section 12(a) interferes with the federal government's ability to detain and deport those non-citizens who pose a threat to public safety or national security. *See* Ragsdale Decl. ¶¶ 31-32, 36-38 (Vol. IV, R. 2-2); William Griffen Decl. ¶ 28 (Vol. IV, R. 2-7). It thus "impair[s] the federal

superintendence of the field covered by the INA," and is preempted. *DeCanas*, 424 U.S. at 363 (internal quotation marks and citation omitted).

Contrary to the district court's holding (and the dissenting opinion in *United States v. Arizona*, on which it relies), *Alabama*, 2011 WL 4469941, at *32 (quoting 641 F.3d at 371-82 (Bea, J., dissenting)), consideration of these federal immigration enforcement priorities is fully consistent with preemption doctrine. Congressional intent is indeed the touchstone of preemption analysis. But this rule requires the opposite result from that reached by the district court. Federal priorities matter in this case because that is what Congress dictated when it enacted the federal statutes that govern immigration regulation and enforcement.

Congress charged the Secretary of Homeland Security with the administration and enforcement of the INA and all other laws relating to immigration and naturalization of aliens, except those conferred upon the President, the Attorney General, and the Department of State. 8 U.S.C. § 1103(a). Congress charged the Attorney General with the responsibility for the administrative court system that applies the INA. § 1103(g). Congress also charged the Attorney General with the authority to issue regulations on detention and administrative immigration proceedings. *Id.* Congress specifically granted the power to interrogate and arrest for immigration violations to the Secretary of Homeland Security, § 1357(a), and carved out an exceptionally narrow role for

state and local agencies to participate under the supervision of the Attorney General, § 1357(g). And Congress approves of the exercise of that delegated power on a yearly basis, through appropriations to the Department of Homeland Security and the Department of Justice. *See*, *e.g.*, Consolidated Approp. Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007); Consolidated Security, Disaster Assistance and Continuing Approp. Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574 (2008). Indeed, this Court has recognized that Congress vested the Executive Branch with prosecutorial discretion in the enforcement of immigration laws. *Haswannee v. U.S. Att'y Gen.*, 471 F.3d 1212, 1218 (11th Cir. 2006); *Zafar v. U.S. Att'y Gen.*, 461 F.3d 1357, 1367 (11th Cir. 2006) (citing *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 489-92, 119 S. Ct. 936, 946-47 (1999)); *see also United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S. Ct. 309, 312 (1950) ("When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power."); *Heckler v. Chaney*, 470 U.S. 821, 831, 105 S. Ct. 1649, 1655 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion."). Thus, in determining whether a law creates obstacles to the accomplishment of congressional immigration objectives, courts must also

evaluate whether the state law presents obstacles to the Executive Branch's scheme for achieving such goals.

Because it interferes with this complex and comprehensive congressional scheme for immigration enforcement, Section 12(a) is preempted.

2. Section 12 Intrudes in a Field Exclusively Occupied by Congress

Section 12(a) is also preempted because it intrudes in an area that Congress intends to be exclusively regulated by federal law. As set forth above, Congress has enacted a comprehensive federal scheme to address aliens who do not have authorization to be in the United States—a matter intrinsically and constitutionally committed to the federal government. Under federal law, persons who are unlawfully in the United States are thus not subject to automatic arrest and detention. Rather, as set forth above, Congress has vested the Secretary of Homeland Security and the Attorney General with the discretion to pursue removal or other penalties, or not.

In enacting the INA with its comprehensive system for defining the legal status of non-citizens and imposing consequences on lack of legal status, Congress has established "a scheme of federal regulation…so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *English*, 496 U.S. at 79, 110 S. Ct. at 2275 (internal quotation marks omitted). And in particular, Congress further signaled its intent to occupy this field by

strictly limiting state participation to specific, narrow circumstances by statute. *See supra* at (I)(B)(1). In this field, "the federal interest [e.g., the interest in immigration and foreign relations] is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English*, 496 U.S. at 79, 110 S. Ct. at 2275 (internal quotation marks omitted). For these reasons, Congress's intent to have the field of unauthorized presence in the United States be exclusively occupied by federal law must be inferred.

Section 12 impermissibly intrudes on this field by regulating in the area of investigating, arresting, and detaining non-citizens for being present in the United States without lawful authorization.

3. Section 12 Is an Impermissible State Regulation of Immigration

Finally, Section 12 of HB56 is preempted because it is an impermissible state regulation of immigration. Section 12 places special burdens on non-citizens to prove the lawfulness of their presence, determines that certain non-citizens should not be permitted to remain in the United States because they are not "lawfully present" at the particular time of their stop or arrest, and attempts to funnel such persons into removal proceedings. This scheme is an impermissible state regulation of immigration. *See DeCanas*, 424 U.S. at 355, 96 S. Ct. at 936 (regulation of immigration includes determining who should or should not be admitted into the country). *See also Hines,* 312 U.S. at 66, 61 S. Ct. at 403.

For the foregoing reasons, Section 12 is preempted by federal law and the district court erred in concluding otherwise.

C. Section 18 Is Preempted By Federal Law

The district court also erred in rejecting Plaintiffs' motion to enjoin Section 18(d), which confers broad immigration enforcement authority on state and local officers and requires state and local officers to detain individuals solely for immigration enforcement purposes. Like Section 12, Section 18 impermissibly regulates immigration, intrudes in areas Congress has reserved to the federal government, and conflicts with Congress's intent.

Section 18 amends Alabama's substantive criminal offense of driving without a license, Ala. Code § 32-6-9 (1975). Under Section 18 of HB56, Section 32-6-9(b) now provides that if a person arrested for driving without a license and the arresting officer is "unable to determine by any other means that the person has a valid driver's license," the person shall be transported to a magistrate. Section 32-6-9(c) requires officers to make a "reasonable effort…to determine the citizenship of [the arrestee]" and if he is "an alien," then to verify status with the federal government. Under Section 18, Alabama Code § 32-6-9(d) now provides that "[a] verification inquiry, pursuant to 8 U.S.C. § 1373(c), shall be made within 48 hours to [federal immigration authorities]. If the person is determined to be an alien unlawfully present in the United States, the person shall be considered a

flight risk and shall be detained until prosecution or until handed over to federal immigration authorities."

Section 18 requires state and local officers to determine, at least in the first instance, who is an alien unlawfully present in the United States, and to detain individuals solely for immigration purposes. Under Section 32-6-9(d) of the Code of Alabama, a person who is arrested but whose case the county declines to prosecute may continue to be held for 48 hours before an officer even submits a request for immigration status verification to the federal authorities. During that entire period of detention, where no state charges have been filed, there is no basis other than suspicion of an immigration violation (including merely a civil violation) for continued custody.

In addition, Alabama Code § 32-6-9(d) requires state and local officers to "detain[] until prosecution or until [the person has been] handed over to federal immigration authorities." Section 18 therefore requires detention regardless of whether the federal government requests continued detention. An individual who is arrested for driving without a license, whether prosecuted criminally or not, will be subject to immigration detention of indeterminate length under Alabama Code § 32-6-9(d). The Alabama statute is entirely inconsistent with the federal government's immigration enforcement scheme, which permits ICE to exercise discretion in whether to detain or initiate removal proceedings and specifically

limits the role of state/local officers in the enforcement of immigration laws. Under federal enforcement guidelines, ICE will likely not proceed against an undocumented immigrant who has been arrested for driving without a license but has no other criminal history, so that its limited enforcement resources may be used on individuals who pose a threat to public safety or national security.[6] Thus, if ICE notifies the county jail officer that the detainee is without lawful status, the county is required under Section 18 of HB56 to continue custody, even after the person's charges have been dropped, or after she has completed service of her sentence.

In short, Section 18 requires state and local officers to impose detention purely for immigration enforcement purposes, and without regard to federal law and the decisions of federal immigration officials. Like Section 12, which suffers the same constitutional defects, Section 18 is subject to field and conflict preemption and is also an impermissible regulation of immigration.

D. Sections 10, 12, and 18 Together Constitute an Impermissible Regulation of Immigration

As set forth above, Sections 10, 12, and 18 each constitute an impermissible state regulation of immigration, standing alone. But because the three statutes

[6] *See* Ragsdale Decl. ¶¶ 7-8 (Vol. IV, R. 2-2) (instructing that immigrants with misdemeanors are low enforcement priorities and that ICE agents "should exercise particular discretion when dealing with minor traffic offenses such as driving without a license").

have the purpose and effect of operating in concert as part of a comprehensive state system for immigration enforcement, the Court should consider how they function together and with other provisions of HB56. *See League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 771 (C.D. Cal. 1995).

Sections 10, 12, and 18 work in concert with other sections of HB56, including Sections 5, 6, and 19, as a comprehensive state system to detect, apprehend, detain, and punish undocumented immigrants and otherwise to impose consequences on being an unlawfully present alien. This comprehensive state-law system for immigration enforcement creates a state substantive criminal offense that includes immigration status as an element (Section 10), while simultaneously injecting immigration status investigation into traffic stops and other routine police interactions (Section 12), and requiring state jail officials to maintain custody even if there is no state-law basis for it (Sections 18, 19).[7] At the same time, Section 6 of HB56 requires state and local officers to enforce these criminal provisions to the fullest extent of the law, or else face criminal prosecution and civil lawsuits.

[7] Section 19 requires that "[w]hen a person is…confined for any period in a state, county, or municipal jail, …[and] is determined to be an alien unlawfully present in the United States, the person shall be considered a flight risk and shall be detained until prosecution or until handed over to federal immigration authorities." HB56 § 19. Thus, even if a state court would otherwise set bail, or even if state-law charges have been dismissed or the person has been acquitted, custody will continue.

Section 5 of HB56 similarly requires state and local officers to enforce federal immigration laws to the fullest extent of the law, on pain of the same penalties.

These provisions of HB56 work together to transform state and local officers in Alabama into a roving immigration patrol. This subjects countless individuals, such as Plaintiffs John Doe #1, #3, and #4 and Jane Doe #2, #4, and #5, to investigation for failure to carry alien registration documents (which the federal government may not even issue under current regulations, *see supra* at 22 n.4), detention pending an immigration status investigation, and arrest and then incarceration on a *state* immigration charge—even when federal immigration authorities would choose not to detain the individual. For example, a person who has overstayed a student visa and has been placed in removal proceedings but is pursuing an asylum application may have been released on bond by a federal immigration judge, but HB56's criminal provisions subject her to arrest, detention, prosecution, and imprisonment under Alabama state law. This is a clear regulation of immigration and is unconstitutional.

II. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THEIR CLAIM THAT SECTION 27 IS PREEMPTED BY FEDERAL LAW

Section 27 impermissibly imposes severe penalties on purported undocumented immigrants and regulates immigration by attempting to turn undocumented immigrants into non-persons in the eyes of the law, drastically

altering the conditions under which certain immigrants can remain in Alabama, and attempting to drive undocumented immigrants out of the state. It prohibits Alabama courts from enforcing contracts between any party and "an alien unlawfully present in the United States, if the party had direct or constructive knowledge that the alien was unlawfully present in the United States at the time the contract was entered into…." HB56 § 27(a). The district court acknowledged the striking breadth of Section 27 by noting that it essentially "strips an unlawfully-present alien of the capacity to contract except in certain circumstances…."[8] *Alabama*, 2011 WL 4469941, at *54. Nonetheless, the court rejected—without explanation—Plaintiffs' argument that Section 27 is an impermissible regulation of immigration that fundamentally alters the conditions under which immigrants may remain in Alabama. *See id.*; *see also* Opinion at 91-92 (Vol. IV, R. 137).

The district court erred in failing to consider whether Section 27 makes living conditions for non-citizens in Alabama so difficult that it amounts to a regulation of their residence—that is, an impermissible regulation of immigration. Indeed, courts have found that ordinances that effectively restrict the ability of non-citizens to remain in the locality are preempted. *See Lozano*, 620 F.3d at 224 (striking down ordinance prohibiting rental of housing to undocumented

[8] Contracts for "lodging for one night," "the purchase of food to be consumed by the alien," "medical services," or "transportation…intended to facilitate the alien's" deportation are exempted from this anti-enforcement provision. HB56 § 27(b).

immigrants because "th[e] power to effectively prohibit residency based on immigration status…is…clearly within the exclusive domain of the federal government"); *Villas at Parkside Partners*, 701 F. Supp. 2d at 855 (striking down rental ordinance as unconstitutional regulation of immigration because it places a burden on the "'entrance and residence of aliens' that was never contemplated by Congress") (quoting *Toll v. Moreno*, 458 U.S. 1, 12, 102 S. Ct. 2977, 2983 (1982)). Because it reaches virtually all contracts including rental agreements, Section 27 impermissibly regulates immigration by effectively altering the conditions under which non-citizens may live in Alabama.

Moreover, the impact of this provision will not be borne by undocumented immigrants alone. Section 27 imposes severe burdens on U.S. citizens and lawful immigrants, who will be forced to prove repeatedly to state officials and private contract parties that they are lawfully in the United States in order to enter into transactions including those affecting basic necessities like shelter. *See* Evangeline Limón Decl. ¶ 7 (Vol. IV, R. 143-6).

In summary, Section 27 is an impermissible regulation of immigration because it fundamentally restricts the residence of immigrants in the state.

III. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THEIR CLAIM THAT SECTION 30 IS PREEMPTED BY FEDERAL LAW

Section 30 of HB56 imposes a wide range of criminal and civil disabilities on individuals based on their purported lack of lawful immigration status, and thus fundamentally alters the conditions under which they can remain in Alabama. Section 30 requires immigrants to "demonstrate" their "lawful presence" whenever they enter into or attempt to engage in "any transaction" with the state or its political subdivisions, and makes any violation of the Section—including merely *attempting* to engage in a "business transaction"—a felony. HB56 §§ 30(a), (b), (d). The statutory term "business transactions" is deceptively broad, however—it encompasses "*any* transaction between a person and the state or a political subdivision," with only one exception: marriage licenses. § 30(a) (emphasis added).

The district court erred in its ruling on Section 30 by failing to even address Plaintiffs' argument that Section 30 is an impermissible regulation of immigration. *See Alabama*, 2011 WL 4469941, at *59-60; *see also* Opinion at 105 (Vol. IV, R. 137). Section 30 is preempted under settled Supreme Court precedent striking down state laws that effectively impose restrictions on the "entrance and abode" of non-citizens. *Graham v. Richardson*, 403 U.S. 365, 380, 91 S. Ct. 1848, 1856 (1971) (state welfare laws that denied benefits to certain non-citizens were

constitutionally impermissible).[9] *See also Lozano*, 620 F.3d at 224 (striking down ordinance prohibiting rental of housing to undocumented immigrants); *Villas at Parkside Partners*, 701 F. Supp. 2d at 855 (same). Like these enjoined laws, Section 30 attempts to classify non-citizens and, in the process, imposes burdens on lawful immigrants. In doing so, Section 30 regulates the "conditions under which a legal entrant may remain" and is therefore preempted. *See DeCanas*, 424 U.S. at 355, 96 S. Ct. at 936. In addition, Section 30 criminalizes undocumented immigrants who merely attempt to access essential services, imposing a severe penalty based solely on their immigration status and presence in the United States—an area committed exclusively to the federal government.

By design and in practice, Section 30 reaches into every aspect of everyday life for immigrants in Alabama, including, *inter alia*: water and sewage services (Vol. IV, RR. 143-4; D)[10]; sanitation, garbage, and recycling services (Vol. IV R. E); housing and building occupancy licenses (Vol. IV R. F); obtaining a house number (Vol. IV R. G); recording a document or engaging in any activity in a probate office (Vol. IV RR. 143-5, H); obtaining an animal license (Vol. IV, R. I);

[9] Though *Graham* involved a state law denying benefits to lawfully admitted non-citizens, its holding is not so limited. The "regulation of immigration" includes not only restrictions on lawfully admitted non-citizens but also those on undocumented immigrants and, necessarily, the drawing of lines between those categories.

[10] The Volume Excerpts D to J in Volume IV are legal memoranda written by Madison County, Alabama, on October 26, 2011. They were written after this appeal was initiated, and therefore were not introduced in the district court. Plaintiffs' motion to supplement the record is filed herewith.

or any sort of business license or car tag (Vol. IV, R. J), among other publicly provided services. As a result, purported undocumented immigrants have been or will be blocked under Section 30 from obtaining essential services from public utilities (like water or power) and are moreover subject to criminal prosecution for attempting to do so. This is a direct regulation of immigration as it effectively expels immigrants from Alabama by depriving them of life's necessities.

There can be no question that Section 30 directly targets undocumented immigration and is not a legitimate state regulation that only "indirect[ly]" touches upon immigration. *DeCanas*, 424 U.S. at 355, 96 S. Ct. at 936. Indeed, the state has not identified a specific state or local interest addressed by Section 30 aside from a desire to drive immigrants out of the State of Alabama.

In addition, Section 30 is preempted as a regulation of immigration because state and municipal officials are required to make initial determinations of immigration status in enforcing it.[11] State and local officials will inevitably make mistakes in determining whether an individual is lawfully present in the United States or even a non-citizen in the first place.[12] This, in turn, will lead to

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[11] That Section 30(c) provides for state and local officials to rely upon the federal government to confirm immigration status does not save the statute. A state law that "uses those [federal] classifications for purposes not authorized or contemplated by federal law" is an impermissible regulation of immigration. *See Farmers Branch,* 701 F. Supp. 2d at 855.

[12] For example, attached to the Madison County memoranda in Tabs D to J of Volume IV is a county-generated list of documents purporting to establish lawful

discriminatory burdens on "the entrance or residence" of non-citizens in Alabama, in direct contravention of Supreme Court precedent. *DeCanas*, 424 U.S. at 358, 96 S. Ct. at 938 (finding preempted "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States").

IV. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THEIR CLAIM THAT SECTION 28 IS UNCONSTITUTIONAL

The district court also erred in denying the motion for a preliminary injunction against Section 28, which deters and burdens access to K-12 public education by requiring public schools to inquire into and report children's and parents' immigration status. Section 28 requires every public elementary and secondary school in Alabama to determine whether an enrolling student "was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States…." HB56 § 28(a)(1). Each child must produce a birth certificate. § 28(a)(2). "If, upon review of the student's birth certificate, it is determined that the student was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States, or where such certificate is not available for any reason," the family has 30 days to notify the

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presence. There are various categories of lawfully present immigrants who would not possess one of these described documents. For example, a person granted Temporary Protected Status under federal law would not possess any of the listed documents.

school of the student's "actual citizenship or immigration status." § 28(a)(3). They must do so by providing official documentation of the child's status, or a declaration under penalty of perjury. § 28(a)(4). "If no such documentation or declaration is presented, the school official shall presume for the purposes of reporting under this section that the student is an alien unlawfully present in the United States." § 28(a)(5). School districts must submit annual reports "listing all data obtained pursuant to this section" to the State Board of Education, § 28(c), and the State Board of Education, in turn, must submit annual aggregated reports to the Legislature. § 28(d).

Section 28(e) further authorizes school officials to report information obtained pursuant to this section to federal immigration authorities. While Section 28(e) merely authorizes disclosure, the remainder of HB56 makes such disclosure a requirement. Sections 5 and 6 forbid state and local agencies, including schools, from maintaining any "policy or practice" that "limits…communication between its officers and federal immigration officials," or "that limits or restricts the enforcement of [HB56] *to less than the full extent permitted by this act*…." §§ 5(a), 6(a) (emphasis added). School officials must also "fully comply with and, to the full extent permitted by law, support the enforcement of federal law prohibiting the entry into, *presence*, or residence in the United States of aliens in violation of federal immigration law." § 5(b) (emphasis added). Schools that limit

the sharing of information are subject to the loss of state funds and penalties of $1,000 to $5,000 for each day that the policy or practice is in effect. §§ 5(a), (d), 6(a), (d). Individual school officials who fail to report violations of these procedures are guilty of a Class A Misdemeanor. §§ 5(f), 6(f). Thus, HB56 effectively compels school officials to disclose the identities of students and their parents whom they believe to be unlawfully present.

After Section 28's passage, the State Superintendent of Education issued new enrollment procedures. Under the Superintendent's scheme, students newly enrolled in a "statewide student management system" will be coded as being enrolled either with or without a birth certificate. Morton Mem. (Vol. II, R. 82-3). This codification, however, is not actually based on the presence or absence of a birth certificate. Students will be coded as being "enrolled with a birth certificate" if they show either (a) that they were born in the United States, or (b) that they are U.S. citizens or lawfully present aliens. *Id.* All other students—including those who are undocumented, and those who are unable or unwilling to produce a requested document—will be coded as being enrolled "without a birth certificate." *Id.* The Superintendent's memorandum provides no other instruction on how schools should comply with the remainder of Section 28—including the requirement that schools must "determine whether the student…is the child of an alien not lawfully present," § 28(a)(1), and the requirement that schools must

determine the specific immigration status of each student. *See* § 28(d)(2) (requiring that the State Board of Education's annual report include "data, aggregated by public school, regarding the numbers of…lawfully present aliens *by immigration classification*…") (emphasis added).

A. The District Court Erred in Holding that Plaintiffs Lacked Standing To Challenge Section 28

The district court erroneously held that Plaintiffs lacked standing to challenge to Section 28. Opinion at 98-101 (Vol. IV, R. 137). This decision was in error. Article III requires plaintiffs to establish (1) an injury in fact which is concrete and particularized, and actual or imminent; (2) "a causal connection between the injury and the conduct complained of;" and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992) (citations and quotation marks omitted). Plaintiffs met this burden.

First, the Organizational Plaintiffs have standing because Defendants' "'illegal acts impair [their] ability to engage in [their] projects by forcing the organization to divert resources to counteract those illegal acts.'" *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (quoting *NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008)). While all of the plaintiff organizations have established standing because Section 28 has impaired their ability to provide services, this Court need find only one plaintiff has standing.

Watt v. Energy Action Educ. Found., 454 U.S. 151, 160, 102 S. Ct. 205, 212 (1981). For brevity's sake, Plaintiffs will focus on two, Hispanic Interest Coalition of Alabama ("HICA") and Alabama Appleseed ("Appleseed").

Both HICA and Appleseed have been unable to devote resources to their core missions because of overwhelming demand for information about HB56 and particularly Section 28. Isabel Rubio July 6, 2011 ("Rubio I") Decl. ¶¶ 2, 15 (Vol. I, R. 37-2); Isabel Rubio Aug. 15, 2011 ("Rubio II") Decl. ¶¶ 3, 5, 7 (Vol. II. R. 109-3); John Pickens July 11, 2011 ("Pickens I") Decl. ¶¶ 3, 11(a)-(c) (Vol. I, R. 37-6); John Pickens Aug. 13, 2011 ("Pickens II") Decl. ¶¶ 2, 11-13 (Vol. II, R. 109-2). Despite this ample and undisputed evidence that HICA and Appleseed's core organization missions have been impacted severely by HB56, the district court—discussing only HICA—found that organizational standing was lacking. The court reasoned that "the diversion of HICA resources alleged in this case is only time spent *discussing* Section 28," which it considered insufficient to establish standing. Opinion at 101 (Vol. IV, R. 137) (emphasis in original). This is plainly reversible error.

Under settled Eleventh Circuit precedent, HICA and Appleseed more then met their burden to show standing. In *Common Cause/Georgia*, this Court held that the NAACP had standing to challenge Georgia's voter identification law based on the direct harm to the organization: namely, that the Georgia law forced the

NAACP to "divert resources from its regular activities to educate voters about the requirement of photo identification and assist voters in obtaining free identification cards." 554 F.3d at 1350. *See also Havens Realty Corp v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114, 1124 (1982) (organization suffers injury in fact where challenged practices perceptibly impair organization's ability to provide services). The harm that HICA and Appleseed have alleged here is identical.

The district court also erred in holding that no individual Plaintiff had standing to challenge Section 28. The court reasoned that although Plaintiffs Jane Doe #1-6 and John Doe #2 have documented and undocumented children enrolled in school; although John Doe #1 is an undocumented student; and although Jane Doe #1, #2, #4-6, and John Doe #2 are all undocumented parents of public schoolchildren, each lacked standing because the State Superintendent has promised, in the course of this litigation, that Section 28's enrollment procedures will not apply to any students who are already in school. Opinion at 98-99 (Vol. IV, R. 137); *see* Jane Doe #6 Decl. ¶¶ 8-11 (Vol. I, R. 37-30); Jane Doe #1 Decl. ¶¶ 4, 6, 11 (Vol. I. R. 37-25); Jane Doe #4 Decl. ¶¶ 5-8 (Vol. I, R. 37-28); John Doe #2 Decl. ¶¶ 5-7, 13 (Vol. I, R. 37-32). This conclusion was erroneous.

The State Superintendent's statement in response to this litigation does not strip the Plaintiffs of standing. By its terms, Section 28 requires immigration inquiries each time a student enrolls "in kindergarten or any grade in such school."

HB56 § 28(a)(1). The State Superintendent has taken the position that "enrollment" should be defined as occurring only once—the first time a child enrolls in any public school in the state system—and not when a child registers for subsequent grades. *See* Morton Mem. (Vol. II, R. 82-3); *but see Lee v. Eufaula City Bd. of Ed.*, 573 F.2d 229, 234 n.12 (5th Cir. 1978) ("presum[ing] that all students attending the Eufaula schools [in Alabama] are required to enroll annually"). There is no guarantee that the state will continue to implement the statute this way in the future. The term "enrollment" is not defined in the Alabama Code, and since Section 28(a)(1) implies an annual process, the Superintendent can change or retract the current policy at any time. *Cf. Nat'l Advertising Co. v. City of Fort Lauderdale*, 934 F.2d 283, 286 (11th Cir. 1991) (district court erred in holding that amendments to city's sign code rendered case moot, because "[t]he City presently possesses the power and authority to amend the sign code"). Plaintiffs Jane Doe #1-6 and John Doe #1-2 thus remain at risk even though the current policy would not immediately affect them.[13]

Moreover, it is undisputed that if Section 28 were in effect, its status determination requirements would apply *now* to new students entering Alabama

[13] *See* Jane Doe #1 Decl. ¶ 8 (Vol. I, R. 37-25)); (Jane Doe #2 Decl. ¶ 9 (Vol. I, R. 37-26)); (Jane Doe #3 Decl. ¶ 8 (Vol. I, R. 37-27)); (Jane Doe #4 Decl. ¶ 5 (Vol. I, R. 37-28)); Jane Doe #5 Decl. ¶ 6 (Vol. I, R. 37-29); Jane Doe #6 Decl. ¶¶ 8-9 (Vol. I, R. 37-30); John Doe #1 Decl. ¶ 13 (Vol. I, R. 37-31); John Doe #2 Decl. ¶¶ 3-9 (Vol. I, R. 37-32).

public schools during the current academic year. The operation of these discriminatory procedures in Plaintiffs' schools creates a threatening and hostile learning environment—and indeed, as discussed *infra* at 62-63, that is precisely Section 28's intent. Plaintiffs and their children are effectively being told: "'[W]e will tolerate you[,] but want no more like you.'" *Smith v. City of Cleveland Heights*, 760 F.2d 720, 724 (6th Cir. 1985). In *Smith*, the Sixth Circuit held that an African-American city resident had standing to challenge the city's racially discriminatory housing practice because, although the plaintiff himself was not "steered" away from the city, he was nevertheless injured because the practice "stigmatize[d] him as an inferior member of the community in which he lives." *Id.* at 722. Likewise, here, students from immigrant families are being told that they are inferior and unwelcome in Alabama's schools. For example, Jane Doe #4 fears that Section 28's documentation requirements "will give [her daughters] an idea that they are second class people." Jane Doe #4 Decl. ¶¶ 4-5 (Vol. I, R. 37-28). *See also* Jane Doe #1 Decl. ¶ 8 (Vol. I, R. 37-25); Jane Doe #2 Decl. ¶ 9 (Vol. I, R. 37-26); Jane Doe #6 Decl. ¶ 9 (Vol. I, R. 37-30); John Doe #1 Decl. ¶ 13 (Vol. I, R. 37-31); John Doe #2 Decl. ¶ 7 (Vol. I, R. 37-32). These injuries are direct and traceable to Section 28.

Finally, as already noted, questioning at enrollment is not the only harm that Section 28 imposes. Because of Sections 5 and 6, which require full enforcement

of federal immigration law and HB56 on pain of criminal prosecution and civil lawsuits, schools officials are effectively required to report students' information, however obtained, to federal immigration authorities and state officials for enforcement purposes. *See* HB56 § 28(e), 5, 6. These provisions effectively block access to the schools for children in immigrant families. *See, e.g.*, Jane Doe #3 Decl. ¶ 8 (Vol. I, R. 37-27) (fearing that school officials may turn her husband's immigration status and emergency contact information over to federal officials); Jane Doe #6 Decl, ¶ 9 (Vol. I, R. 37-30) (fearing that her developmentally disabled son will reveal his status to people in his school).

B. Section 28 Is Preempted by Federal Law

Although the district court did not reach the merits of Plaintiffs' Section 28 claims, Opinion at 101 (Vol. IV, R. 137), it is appropriate for this Court to do so and it should rule in Plaintiffs' favor. The general rule that federal appellate courts do not consider issues not decided below is "pragmatic in nature" and "not a jurisdictional limitation." *De Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.5 (11th Cir. 1998) (quotations and citations omitted). In this case, there is no pragmatic reason for this Court to refrain from considering the merits: The only issues in dispute concern the legality of Section 28; the parties fully briefed these issues below; and Plaintiffs will face irreparable harm if Section 28 is permitted to go into effect on remand. It is therefore appropriate for this Court to exercise its discretion

to reach the merits. *Cf. Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976) (purpose is to avoid prejudice); *see also Charles v. Carey*, 627 F.2d 772, 790 n.32 (7th Cir. 1980) (reaching merits after district court denied preliminary injunction on standing).

Section 28 is preempted because it is an impermissible state regulation of immigration. Section 28 requires verification of student and parental immigration status and, when viewed in light of HB56 as a whole, effectively guarantees the reporting of such information to federal immigration and state authorities. *See supra* at 45-46. As a result, it is part of "an impermissible scheme to regulate immigration" and is unconstitutional under *DeCanas*. *See League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 774 (C.D. Cal. 1995); *see also DeCanas*, 424 U.S. at 354.[14]

Section 28 is also preempted by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996), a comprehensive federal statutory scheme regulating alien eligibility for government benefits. In PRWORA, Congress expressly incorporated

[14] As noted *supra* at 22 n.4, some students whom the federal government has allowed to remain in the United States lack formal documents establishing their status. Section 28(a)(5) mandates that any such student "shall [be] presume[d]…[to be] an alien unlawfully present in the United States" unless her parent or guardian signs a declaration under penalty of perjury, HB56 § 28(a)(4)(b)—which, if the parent is undocumented, puts the parent herself at risk. By creating the designation of "presumed…unlawful[] presen[ce]," Section 28 creates a novel state immigration classification that flies in the face of federal law.

Plyler v. Doe, 457 U.S. 202, 102 S. Ct. 2382 (1982), which held that all children have a constitutional right to public primary and secondary education regardless of immigration status. *See* 8 U.S.C. § 1643(a)(2) ("Nothing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler v. Doe*"). Consequently, PRWORA preempts any state regulations that would deter children's access to a public education based on immigration status. *See League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244, 1255-56 (C.D. Cal. 1997); *see also infra* at 58-63 (setting out conflicts between Section 28 and *Plyler*).

C. Section 28 Violates the Equal Protection Clause

Section 28 violates the Equal Protection Clause of the Fourteenth Amendment by creating three classifications, each of which stands as an obstacle to the enrollment of children from immigrant families in public school. None of these classifications can withstand any level of constitutional scrutiny.

First, Section 28 creates a classification of children born outside the United States—a proxy for alienage. Under Section 28, all students must show a birth certificate to school officials at enrollment. Children "born outside the jurisdiction of the United States," HB56 § 28(a)(1), however, are subject to *additional* documentation requirements to prove their immigration status. § 28(a)(3). Schools must record these students as having been born outside the United States,

§ 28(b), must report that information to the State Board of Education, § 28(c), and may also report such information to the federal immigration authorities. § 28(e).

In Section 28, place of birth functions as a proxy for alienage. By definition, all aliens must be born abroad, for any person born inside the United States is automatically a citizen. 8 U.S.C. § 1101(a)(3) (defining aliens as non-citizens); U.S. CONST. amend. XIV, § 1. Because it creates an alienage classification, Section 28 must withstand strict scrutiny. *See Nyquist v. Mauclet*, 432 U.S. 1, 7, 97 S. Ct. 2120, 2124 (1977) ("[C]lassifications by a State that are based on alienage are 'inherently suspect and subject to close judicial scrutiny'" (quoting *Graham v. Richardson*, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852 (1971)).

Second, Section 28 creates a classification of children who are presumed to be unlawfully present. If a child is unable to produce a birth certificate (or if school officials determine that she was born abroad or that at least one of her parents is undocumented), and if the child is unable to produce the additional documentation or a declaration establishing her immigration status as Section 28 requires, school officials must "presume" that she is "an alien unlawfully present in the United States." HB56 § 28(a)(5). The school must record the child as such, § 28(b), must report the child as such to the State Board of Education, § 28(c), and may report that information to the federal immigration authorities. § 28(e).

This second classification requires intermediate scrutiny under *Plyler v. Doe*. In *Plyler*, considering the constitutionality of a Texas education statute that distinguished between schoolchildren who were "legally admitted" to the United States and those who were not, the Supreme Court applied an intermediate standard of review because of the "fundamental role [of education] in maintaining the fabric of our society," *Plyler*, 457 U.S. at 221, 102 S. Ct. at 2397, and because regulations that deter access to education can "impose[] a lifetime hardship on a discrete class of children not accountable for their disabling status." *Id.* at 223, 102 S. Ct. at 2398; *see also id.* at 220, 102 S. Ct. at 2396 (citing illegitimacy cases). Any state law that serves as a barrier to a public education based on immigration status must be "justified by a showing that it furthers some *substantial* state interest." *Id.* at 230, 102 S. Ct. at 2402 (emphasis added).

Third, Section 28 creates a classification of children based on their *parents*' immigration status, which similarly calls for intermediate scrutiny. Section 28 requires schools to determine whether a child "is the child of an alien not lawfully present." HB56 § 28(a)(1). If the school determines that a child's parent is "not lawfully present," the child must produce additional documentation to prove her immigration status. §§ 28(a)(3)-(4). Schools must record this information and report it to the State Board of Education, *see* § 28(b)-(c), and are also authorized to report it to the federal immigration authorities. § 28(e).

This third classification targets *U.S. citizen* children in particular, because Section 28 already requires immigration status determinations for children born abroad (a category that, as noted above, necessarily encompasses all non-citizen children).[15] By subjecting U.S. citizen children whose *parents* are unlawfully present to the statute's documentation and reporting procedures, Section 28 creates a classification targeting children solely based on their parentage—"a characteristic determined by causes not within [the child's] control." *Reed v. Campbell*, 476 U.S. 852, 854 n.5, 106 S. Ct. 2234, 2237 n.5 (1986) (internal quotation marks omitted). Therefore, like "provisions that impose special burdens on illegitimate children," it merits intermediate scrutiny. *Id*. at 854-55, 106 S. Ct. at 2237; *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914 (1988) ("discriminatory classifications based on…illegitimacy" are subject to intermediate scrutiny and "must be substantially related to an important governmental objective."). The Second Circuit in *Lewis v. Thompson*, 252 F.3d 567 (2d Cir. 2001), for example, applied intermediate scrutiny to a law that discriminated among children based on parental immigration status. *Id.* at 590-91. In *Lewis*, U.S. citizen children challenged the denial of automatic eligibility for Medicaid based solely on the

[15] Only a small minority of children with undocumented parents are themselves undocumented. In fact, 82% of children whose parents lack immigration status are U.S. citizens. Pew Hispanic Center, *Unauthorized Immigrant Population: National and State Trends, 2010*, at 13 (Feb. 1, 2011), *available at* http://pewhispanic.org/files/reports/133.pdf.

immigration status of their mothers. *Id.* at 569. Because the Medicaid statute "penalize[d] children for the illegal conduct of their parents" and "risk[ed] significant and enduring adverse consequences to the children," intermediate scrutiny applied. *Id*. at 591.

Whether the Court applies strict scrutiny (as in the alienage cases) or intermediate scrutiny (as in *Plyler* and the illegitimacy cases), Defendants cannot justify the classifications drawn by Section 28 and the barriers to education it imposes. Indeed, Section 28 cannot even survive rational basis review.

Section 28 burdens a child's right to a public education in two impermissible ways: (1) by requiring that schools determine the citizenship or immigration status of every student and her parents at enrollment, and (2) by authorizing and effectively requiring schools to report children and parents whom they presume to be "unlawfully present" to federal immigration and state authorities. *See supra* at 45-46. These obstacles to enrollment violate the Equal Protection Clause. Recent federal guidance by the U.S. Department of Justice and U.S. Department of Education specifically recognizes that a school district violates *Plyler* when it adopts enrollment practices that "may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents' or guardians' actual or

perceived citizenship or immigration status."[16]

By requiring school officials to inquire into immigration status and authorizing them to report that information to DHS, Section 28 ensures that children who are undocumented or whose parents are undocumented will avoid school registration for fear of bringing themselves or their parents to the attention of immigration authorities. Indeed, Section 28 goes even further than the law that *Plyler* struck down: It burdens educational access not only for undocumented children, but also for U.S. citizen children based the immigration status of their parents. *See Lewis*, 252 F.3d at 591 (applying *Plyler* to invalidate denial of Medicaid eligibility to newborn U.S. citizen children because of mothers' undocumented status). This cannot stand.

Defendants cannot provide any valid justification for Section 28's classifications or the resulting educational barriers. The only justification offered appears in Section 2 of HB56, which boldly asserts that the presence of undocumented students "can adversely affect" the educational experience of U.S. citizen and lawfully present students without providing any factual support. HB56

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[16] "Dear Colleague" Letter from the U.S. Dep't of Justice and U.S. Dep't of Educ., May 6, 2011, at 1, *available at* http://www.justice.gov/crt/about/edu/documents/plylerletter.pdf. *See also* U.S. Dep't of Justice and U.S. Dep't of Educ., Questions and Answers for School Districts and Parents, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201101.pdf; U.S. Dep't of Justice and U.S. Dep't of Educ., Fact Sheet: Information on the Rights of All Children to Enroll in School, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201101.pdf.

§ 2. This unfounded speculation purports to justify a requirement that the "State Board of Education…accurately measure and assess the population of students who are aliens not lawfully present in the United States" in order to forecast and plan for the future. § 2.

This is not a sufficient justification, as *Plyler* makes clear. In *Plyler*, the Court struck down a state law permitting school districts to charge tuition to, or to prohibit the enrollment of, undocumented students. 457 U.S. at 227-30, 102 S. Ct. at 2400-01.[17] The Court rejected the argument that excluding undocumented students from state-funded schools would "improve the overall quality of education in the State." *Id.* at 229, 102 S. Ct. at 2401. It rejected this claim in part because Texas failed to establish that exclusion would improve the quality of education, but also because

> 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. (citations omitted) (emphasis in last sentence added). In other words, the lack of data was not the only problem with Texas's law; the Court rejected the very idea

[17] *Plyler* was not concerned solely with the outright *denial* of access to education; in fact, plaintiffs were permitted to enroll but were subjected to a tuition fee because of their undocumented status. *See Doe v. Plyler*, 458 F. Supp. 569, 574-75 (E.D. Tex. 1978).

that a student's immigration status was relevant to assessing costs.[18]

The Court in *Plyler* further dismissed any argument that undocumented children may 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." 457 U.S. at 229-30, 102 S. Ct. at 2401. The Court stressed this likelihood would be impossible to quantify because all children, regardless of status, regularly cross state boundaries; there is no way the State can predict who might stay and who might go at some future date. *Id.* at 230, 102 S. Ct. at 2401. Furthermore, 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.* That fact remains true today. *See* Ltr. of Sect'y Napolitano to Sen. Durbin (Aug. 18, 2011) (Vol. II, R. 113-1) (explaining that undocumented students "who were brought to this country as young children and know no other home" are

[18] In any event, even if such costs were relevant to the Equal Protection claim, the evidence would not justify Section 28. The U.S. Department of Education ("DOE") already calculates the number of enrolled "immigrant children and youth" based upon existing data and without relying on demands for documentation from students, which chill enrollment. *See* Tony Miller Decl. ¶ 14 (Vol. IV, R. 2-3). In the 2009-2010 school year, immigrant children and youth (documented and undocumented) constituted less than 0.5% of the statewide student population in Alabama. *See* Miller Decl. ¶ 18; *see also* Ala. Dep't of Educ., *State Enrollment by Sex and Race, School Year 2009-2010*, *available at* http://www.alsde.edu/PublicDataReports/Default.aspx.

not priorities for immigration enforcement). The risk of "promoting the creation and perpetuation of a subclass of illiterates within our 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, 102 S. Ct. at 2401.

Moreover, the plain text of Section 28 belies any claim that its purpose is to accurately measure enrollment. Section 28 creates a scheme that will never produce reliable data. Under Section 28, any student who declines to provide the requested documentation within 30 days—whether because of neglect, lack of access to documents, or intentional refusal—will be "presume[d]" to be undocumented, *see* HB56 § 28(a)(5), guaranteeing that the resulting numbers will be inaccurate.

The inaccuracy of the data the State is attempting to collect underlines and reinforces the central point about Section 28. It is not designed to collect accurate data; rather, it is designed to deter enrollment by children in immigrant families. Statements by its sponsors confirm that this is Section 28's purpose. HB56's sponsor in the House, Rep. Micky Hammon, described the bill as motivated by the costs of "educat[ing] the children of illegal immigrants" and predicted that HB56 will result in "cost savings for this state"—presumably by driving children from immigrant families out of Alabama's schools. David White, *Alabama Legislative*

Panel Delays Voting on Illegal Immigration Bill, The Birmingham News, Mar. 3, 2011.[19] Likewise, Senator Beason, the bill's sponsor in the Senate, stated that educating immigrant children and the children of immigrants "is where one of our largest costs come[s] from…. Are the parents here illegally, and if they were not here at all, would there be a cost?" (Vol. II, R. 37-43 (Ex. M).)

The intent to chill educational access is particularly clear in Section 28's requirement that schools determine the immigration status of students' *parents*—information that is of no relevance whatsoever in assessing the impact of educating undocumented *children*. *See* HB56 §§ 28(a)(1), (c). The only conceivable purpose of collecting information about children's parents is to intimidate mixed-status families and place an obstacle in the path of student enrollment—particularly for citizen students whose parents lack immigration status. The State plainly has no legitimate interest in deterring U.S. citizen children from securing access to a public education based on their parents' status.

In sum, regardless of the level of scrutiny applied, Alabama cannot justify Section 28 and the burdens it imposes on access to public education.

[19] *Available at* http://blog.al.com/spotnews/2011/03/alabama_legislative_panel_dela.html.

V. PLAINTIFFS MET THEIR BURDEN ON THE EQUITABLE FACTORS FOR A PRELIMINARY INJUNCTION

In its ruling, the district court did not address the three other prongs of the preliminary injunction test. This was error, as the balance of equities is critical to the analysis. Where the balance of equities weighs heavily in favor of the movants, as here, Plaintiffs need not even show probability of success on the merits (though they have) but merely a "substantial case on the merits." *United States v. Hamilton*, 963 F.2d 322, 323 (11th Cir. 1992) (internal citations omitted). In this case, Plaintiffs made the requisite showing both on the merits and the equities.

Unless Sections 10, 12, 18, 27, 28, and 30 of HB56 are enjoined, Plaintiffs and members of the proposed class will suffer irreparable harm. The individual Plaintiffs and countless others will suffer direct harms including: unconstitutional deprivation of physical liberty under Sections 10, 12, and 18; unconstitutional chilling of the right of schoolchildren in immigrant families to attend public schools (Section 28); inability to conduct transactions with state/local entities including those for essential services like water and power, and criminal liability for even attempting to do so (Section 30); and deprivation of the right to enter into certain enforceable contracts, including those for basic life necessities such as housing (Section 27).

Sections 10, 12, and 18 will cause irreparable injury to Plaintiffs such as Jane Doe #1 and Jane Doe #2 and others who lack proof of current lawful immigration status and are therefore at immediate and constant risk of being detained for immigration purposes during ordinary police encounters such as traffic stops.[20] Although they are in the process of obtaining lawful immigration status from the federal government, Jane Does #1 and #2 are also subject to arrest and prosecution under Section 10.[21] They therefore have shown irreparable harm in order to be able to challenge the constitutionality of Sections 10, 12, and 18. *GLAHR*, 2011 WL 2520752 at *3-4 (preliminarily enjoining a similar provision and noting that plaintiffs had shown irreparable harm where the state law would "convert many routine encounters with law enforcement into lengthy and intrusive immigration status investigations"); *cf. Church v. City of Huntsville*, 30 F.3d 1332, 1338-39 (11th Cir. 1994).

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[20] *See* Jane Doe #1 Decl. ¶¶ 3-5 (Vol. I, R. 37-25); Jane Doe #2 Decl. ¶¶ 3-5 (Vol. I, R. 37-26). Other Plaintiffs are also at risk. *See* Jane Doe #4 ¶¶ 1, 6-7 (Vol. I, R. 7-28); Jane Doe #5 Decl. ¶¶ 2, 10 (Vol. I, R. 37-29); Jane Doe #6 Decl. ¶¶ 1, 7, 10-11 (Vol. I, R. 37-30); John Doe #1 Decl. ¶¶ 1, 11-12 (Vol. I, R. 37-31); John Doe #2 Decl. ¶¶ 1, 11-12 (Vol. I, R. 37-32); John Doe #3 Decl. ¶¶ 6, 11 (Vol. I, R. 37-33); John Doe #4 Decl. ¶¶ 8-9 (Vol. I, R. 37-34).

[21] Even individuals who have the federal government's permission to remain in the United States are at risk of detention under Section 12 because they do not have any documentation to prove that status. For example, Plaintiff Zamora is authorized to be in the United States through the Family Unity Program, but lacks the documentation required by Section 12 to prove to an Alabama police officer's satisfaction that she has lawful status. Maria Zamora Decl. ¶¶ 2-5 (Vol. I, R. 37-14).

Sections 27 and 30 will result in irreparable harm by undermining the ability of all Alabamans—citizens and non-citizens alike—to engage in business transactions with the state and to enter into enforceable contracts. In the short time that the law has been in effect, numerous municipal and county services—including water and sewage services, animal licenses, occupancy permits and housing numbers, to name but a few—have required proof of citizenship or lawful status under Section 30. (Vol. IV, RR. 143-4, D, E, F, G, I). Under Section 30, individual Plaintiffs like Jane Doe #2 could be guilty of a felony under Alabama law for merely attempting to engage in a transaction such as payment for water service. Every day that Section 30 is in place, countless Alabamans—including the individual Doe Plaintiffs —are unable to obtain basic life necessities that are provided by state entities.

Section 27 also causes irreparable harm to U.S. citizens and lawfully present non-citizens by directly encouraging race and national origin discrimination by potential contracting parties. For example, an apartment complex in a Birmingham suburb is requiring all tenants to provide proof of lawful status before it will agree to enter into or renew a lease. *See* Evangeline Limón Decl. ¶ 5 (Vol. IV, R. 143-6).[22] Numerous other contracts, including those with attorneys and with landlords,

[22] Such a requirement is hardly surprising, given that many landlords ask for a social security number in order to conduct a background check, and if a number

are also being called into question. *See* Robert Barber Decl. ¶¶ 19-21 (Vol. I, R. 37-19); Daniel Upton Decl. ¶ 10 (Vol. I, R. 37-20); Jeffrey Beck Decl. ¶ 8 (Vol. I, R. 37-21); Michelle Cummings Decl. ¶¶ 3-5 (Vol. I, R. 37-22); Jane Doe #2 Decl. ¶ 11 (Vol. I, R. 37-26); Jane Doe #5 Decl. ¶ 5 (Vol. I, R. 37-29)

Section 28 is causing irreparable harms to Plaintiffs and countless others, as set forth above at Section III.A.

Thus, the balance of equities weighs heavily in favor of a preliminary injunction. A preliminary injunction will impose only minimal harm, if any, on the Defendants because Plaintiffs merely seek to maintain the status quo while serious questions about the law's constitutionality are adjudicated. This is precisely the purpose of a preliminary injunction. *See Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1101 n.13 (11th Cir. 2004). While the Defendants have an interest in seeing state laws enforced, they do not have a legitimate interest in the enforcement of *unconstitutional* state laws. *See Chamber of Commerce v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (affirming district court's preliminary injunction because "Oklahoma does not have an interest in enforcing a law that is likely constitutionally infirm.").

For the same reason, the interests of the Plaintiffs and the general public are aligned in favor of a preliminary injunction. The public interest is not served by

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cannot be provided, the landlord could be deemed to have constructive knowledge that the tenant lacks immigration status.

allowing an unconstitutional law to remain in effect. *See Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Particularly where civil rights are at stake, an injunction *serves* the public interest because the injunction "would protect the public interest by protecting those rights to which it too is entitled." *Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1328 (N.D. Ga. 2000). In addition, courts have specifically held that enjoining a state statute that is preempted by federal law will serve the public interest. *See Edmondson*, 594 F.3d at 771; *GLAHR*, 2011 WL 2520752 at *18; *Farmers Branch*, 701 F. Supp. 2d at 859 (granting permanent injunction). The district court erred by failing to even consider the numerous equities that tip in favor of a preliminary injunction in this case.

CONCLUSION

The district court's order denying Plaintiffs' motion for a preliminary injunction against sections 10, 12, 18, 27, 28 and 30 of HB56 should be reversed and a preliminary injunction should issue.

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CERTIFICATE OF COMPLIANCE

I do hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), and this Court's November 10, 2011 Order granting Plaintiffs/Appellants 16,500 words, because this brief contains 16,350 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, font size 14 Times New Roman.

Dated: November 14, 2011

Michelle R. Lapointe

CERTIFICATE OF SERVICE

I do hereby certify that on November 14, 2011, I served the foregoing Appellants' Opening Brief by electronic mail upon:

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The original, signed brief and six additional copies were also hand-delivered to the Clerk's Office for the United States Court of Appeals for the Eleventh Circuit. An electronic copy of this Brief was also uploaded to the Court website using the EDF Electronic Brief Uploading system.

Dated: November 14, 2011

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