IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 11-14535

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

v.

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

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

TIME-SENSITIVE MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL AND FOR EXPEDITED APPEAL

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CIRCUIT RULE 26.1: CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Appellants hereby certifies, pursuant to 11th Cir. R. 26.1-1, that the following have an interest in the outcome of this case:

AIDS Action Coalition, Plaintiff/Appellant;

Alabama Appleseed, Plaintiff/Appellant;

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., *Amicus 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;*

American Friends Service Committee, *Amicus Curiae;*

American Immigration Lawyers Association (AILA), *Amicus Curiae;*

Argentine Republic, *Amicus Curiae*;

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Coalition of Labor Union Women, *Amicus Curiae;*

Coalition to Abolish Slavery & Trafficking (CAST), *Amicus Curiae;*

Colorado Coalition Against Domestic Violence, *Amicus Curiae;*

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Jane Doe # 3, Plaintiff/Appellant;

Jane Doe # 4, Plaintiff/Appellant;

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Jane Doe # 6, Plaintiff/Appellant;

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Respectfully Submitted,

Michelle Lapointe, *Counsel for Appellants*

TIME-SENSITIVE
MOTION FOR INJUNCTION PENDING APPEAL
AND FOR EXPEDITED APPEAL

Appellants/Plaintiffs move for an urgently needed injunction pending appeal pursuant to Rule 8 of the Federal Rules of Appellate Procedure to prevent the implementation or enforcement of Sections 10, 12, 18, 27, 28, and 30 of Alabama Act 2011-535 / H.B. 56 ("HB56"). Appellants also move for an order expediting the appeal pursuant to 11th Cir. R. 27-1 I.O.P.-3.

INTRODUCTION

HB56 is a sweeping state immigration law designed to impose such draconian civic and legal disabilities on undocumented immigrants and their family members, undocumented or not, that they will "deport themselves" from Alabama. Governor Robert Bentley proclaimed that Alabama's HB 56 is "the strongest immigration bill in the country," and indeed the Alabama law contains provisions even more extreme than those enjoined by federal courts in Georgia, Arizona, and elsewhere.[1]

Many of HB56's harshest provisions took effect on September 28, 2011, when the District Court, departing dramatically from the reasoning of multiple other federal courts, denied Appellants' motion for a preliminary injunction in

[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.

pertinent part.

Early-emerging anecdotes and reporting show that the wave of results from the failure to enjoin these provisions are just as intended and expected: parents too afraid to send their children to school, and thousands of Latino children absent;[2] other children appearing at school crying and afraid;[3] families packing up and leaving their homes;[4] workers too afraid to go to their jobs, leaving valuable cash crops rotting in the fields;[5] teachers in at least one public elementary school questioning students about their and their parents' immigration status;[6] a municipal water authority stating that customers would need to provide documents reflecting lawful immigration status to maintain their water service;[7] the Montgomery Probate Office requiring proof of citizenship or lawful presence before any

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[2] The impact was immediate. According to the State Department of Education, By Monday, October 3, 2011, 2,285 Latino students were "absent" statewide. Peggy Gargis, *Judge refuses to block immigration law*, Reuters, Oct. 5, 2011, *available at* http://www.reuters.com/article/2011/10/05/us-immigration-alabama-idUSTRE7946BH20111005.

[3] Rena Harver Phillips, *Foley Elementary Students, Parents Afraid of Alabama's New Immigration Law*, Mobile Press-Register, Sep. 30, 2011, *available at* Doc. 143-2 and http://blog.al.com/live/2011/09/foley_elementary_students_pare.html.

[4] "The vanishing began Wednesday night, the most frightened families packing up their cars as soon as they heard the news." Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, Otc. N.Y. Times, Oct. 3, 2011 (describing Albertville, Alabama, the evening after the law went into effect). Albertville is a town of 20,000, and is 28% Hispanic/Latino, compared to a statewide average of 4%. U.S. Census Bureau, *Hispanic or Latino by* Type: 2010. (Attached as Ex. 4).

[5] The Associated Press, *Farmers complain about rotting crops but Sen. Scott Beason says no to immigration law changes*, Oct. 3, 2011, *available at* http://blog.al.com/wire/2011/10/chandler_mountain_farmers_comp.html.

[6] Jane Doe #7 Decl. (District Court Doc. 143-1) (Attached as Ex. 5).

[7] Dominique Nong Decl. (District Court Doc. 143-4) (Attached as Ex. 6).

transactions with the office can be conducted;[8] a family being told by the electric company that it could not have power service restored to its home unless it could prove its qualifying immigration status, prompting the family to leave;[9] landlords telling tenants that their rental contracts will not be renewed without proof of immigration status;[10] and companies giving contractors comparable messages.[11]

More generally, state and local law enforcement officers are now empowered and *required* to investigate a person's immigration status every time they conduct a routine stop or detention if they reasonably suspect the person is undocumented. State and local police can now arrest a person for being in Alabama without current immigration status, even if the federal government is permitting that person to remain in the United States.[12] It is now a felony—punishable by up to ten years in prison and a $15,000 fine—for a person covered by the law to even *attempt* to enter into any "business transaction" with a state or local government entity. Primary and secondary schools are now required to

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[8] Montgomery Probate Form (District Court Doc. 143-5), *available at* http://www.mc-ala.org/ElectedOfficials/ProbateJudge/Documents/Immigration%20Flyer.pdf.

[9] Evangeline Límon Decl. ¶ 6 (District Court Doc. 143-6) (attached as Ex. 7). Since this incident came to light, representatives of Alabama Power have contacted counsel for Appellants and informed them this is not their policy and it should not recur.

[10] Evangeline Límon Decl. ¶ 4-5.

[11] The Associated Press, *Farmers complain about rotting crops but Sen. Scott Beason says no to immigration law changes*, Oct. 3, 2011, *available at* http://blog.al.com/wire/2011/10/chandler_mountain_farmers_comp.html.

[12] For example, Plaintiff Jane Doe #2 who has applied for a "U" visa based on her cooperation with law enforcement in prosecuting a violent crime, could be subject to detention under HB56 despite the fact that Congress has created a path to legalization for individuals like her. See 8 U.S.C. § 1101(a)(15)(U); Jane Doe #2 Decl., attached as Exh. __.

determine the immigration status of schoolchildren, and their parents, upon enrollment. With limited exceptions, state courts are now prohibited from enforcing contracts between an undocumented immigrant and another party, unless the other party did not have actual or constructive knowledge of the person's undocumented status.

Alabama is in chaos. It has been brought to this point by a state immigration statute of unprecedented breadth, and by a District Court ruling that is utterly at odds with recent decisions from other federal courts, including a Court of Appeals, preliminarily enjoining similar state-law provisions in Arizona, Georgia, and Indiana. At an absolute minimum, Plaintiffs have a substantial case on the merits. But unless HB56 is enjoined while this appeal is pending, Appellants, and the class they seek to represent, will continue to suffer irreparable harms, and HB56's human toll across Alabama and neighboring states will grow. Any harm Defendants might arguably suffer from a temporary stay of the enforcement of this law is negligible in comparison. The only "harm" would be a modest delay in implementing their radical new state immigration regime. In the circumstances presented, an injunction while this appeal is being decided will plainly serve the public interest.

Appellants appreciate that such relief is not to be lightly granted, but this

case presents the type of extraordinary circumstance for which it is intended.[13]

PROCEDURAL HISTORY

HB56 was signed into law on June 9, 2011, with most of its provisions scheduled to take effect on September 1, 2011. Appellants filed their original complaint on July 8, 2011, Doc. 1, raising a facial challenge to HB56 both in its entirety and as to specific sections. Appellants filed an amended complaint on September 16, 2011, Doc. 131. In addition, two other lawsuits were filed challenging specific provisions of HB56—one brought by the United States, and the other by Alabama church groups. *See United States v. Alabama, et al.*, Case No. 11-2746 (N.D. Ala.); *Parsley, et al. v. Bentley, et al.*, Case No. 11-2736 (N.D. Ala.).[14]

Motions for preliminary injunctions were filed in all cases, *see* Doc. 37 ("MPI"), and the U.S. District Court for the Northern District of Alabama conducted a combined hearing on the motions on August 24, 2011. The District Court then temporarily enjoined the enforcement of HB56 until September 29, 2011, or the date of the court's order on the preliminary injunction motions, whichever came earlier. Doc. 126. On September 28, 2011, the District Court

[13] Enjoining the provisions at issue will have the additional salutary benefit of providing more time for Alabama residents to be educated about what the pertinent provisions of HB56 do and do not do. This education will prove a significant benefit to the public in the event that this Court were to rule against Plaintiffs in this appeal as to one or more of the provisions at issue.

[14] The three cases were initially consolidated. *See* Doc. 59. On September 1, 2011, after the hearing on the parties' respective preliminary injunction motions, the District Court vacated the consolidation order, thereby severing the cases. Doc. 128.

issued an order granting the Appellants' motion and the motions of the United States and Churches in part and denying the motion as to the provisions at issue in the instant appeal. Doc. 138; *see also* Doc. 137 (district court's opinion); *see also* Docs. 93 & 94 of Case No. 11-2746 (United States); and Docs. 83 & 84 of Case No. 11-2736 (Churches).[15]

Despite contrary rulings by other federal courts regarding comparable provisions in several other states' laws, the district court refused to enjoin, among other provisions, Sections 10 (making it a state crime for an undocumented alien to fail to comply with federal alien registration laws) and 12 (requiring local and state officers to make immigration status inquiries and conduct status investigations). And although other courts' reasoning would also foreclose Alabama's even more extreme innovations in immigration regulation, the district court also refused to enjoin Sections 18 (authorizing arrest and immigration inquiries for driving without a license), 27 (making certain contracts involving undocumented individuals unenforceable in state courts), 28 (requiring immigration inquiries at the time of enrollment in kindergarten or any grade in elementary or secondary school), and 30 (making it a state crime for undocumented individuals to enter into

[15] The District Court enjoined several provisions of HB56, including Sections 8 (prohibiting certain aliens from enrolling in public colleges and universities); 11 (making it a crime to solicit work without work authorization, or by day laborers); 13 (creating state immigration crimes of harboring, inducing/encouraging, transporting, and renting); 16 (forbidding employers from claiming business tax deductions for any wages paid to unauthorized immigrants), and 17 (establishing a civil cause of action against employers who fail to hire or discharge U.S. citizens or authorized workers if they hire or retain an unauthorized worker).

"business transactions" with state or political subdivisions).

Within twenty-four hours, on September 29, 2011, Appellants filed a notice of appeal and an emergency motion in the District Court to enjoin Sections 10, 12, 27, 28, and 30 while an appeal was pending. Doc. 140. The District Court issued an order denying Appellants' motion on October 5, 2011. Doc. 147. Appellants filed an amended notice of appeal on October 7, 2011. Doc. 149. Like Appellants, the United States also filed a motion for a temporary injunction pending appeal in the District Court. The United States' motion, too, was denied.

Appellants hereby request that this Court enjoin Sections 10, 12, 18,[16] 27, 28, and 30 while this appeal is pending. Appellants further seek to have this appeal resolved on an expedited basis pursuant to 11th Cir. R. 27-1 I.O.P.-3, due to the severity of the harms at issue.

ARGUMENT

I. LEGAL STANDARD

An injunction pending appeal requires consideration of four factors: (1) whether the movant is likely to prevail on the merits of his appeal; (2) whether, if an injunction is not issued, the movant will suffer irreparable harm; (3) whether, if an injunction is issued, any other party will suffer substantial harm; and (4)

[16] Plaintiffs did not ask the District Court to enjoin Section 18 pending appeal, but it is unnecessary to do so because the District Court has denied the United States' request for the same injunction. *See* District Court Orders (attached as Exs. 3). Plaintiffs therefore present their Section 18 arguments directly to this Court. *See* Fed. R. App. P. 8(a)(2)(A).

whether an injunction would serve the public interest. *In re Grand Jury Proceedings*, 975 F.2d 1488, 1492 (11th Cir. 1992). The first factor is generally the most important, but where the "balance of the equities weighs heavily in favor of granting the [injunction]," the movant need only show a "substantial case on the merits," rather than a "'probability' of success on the merits." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)[17]; *see also United States v. Hamilton*, 963 F.2d 322, 323 (11th Cir. 1992); *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). Both tests are satisfied here.

II. THE PROVISIONS OF HB56 AT ISSUE HERE SHOULD BE ENJOINED PENDING APPEAL

A. The Balance of Equities Strongly Favors an Injunction Pending Appeal

1. Appellants will suffer irreparable harm if these provisions are not enjoined

The 36 Appellants seeking relief comprise a broad cross-section of Alabamians. Appellants include immigrants who are currently out of status—some of whom have a path to legalization which will require time for the federal government to process—who are now made criminals because they lack alien registration papers (Section 10), are subject to prolonged detention every time they encounter law enforcement (Section 12), and are at risk of a Class C Felony for

[17] The Fifth Circuit decided *Ruiz* on June 26, 1981. It is therefore binding precedent in this Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

simply engaging state or local entities for commercial transactions (Section 30).[18] Appellants and members of appellant organizations include parents of school children who will face the verification requirements of Section 28.[19] Appellants include tenants, landlords, attorneys, and interpreters who know or have reason to believe they know the immigration status of themselves, their tenants, and their clients, and who will be left without recourse of a future contractual breach because of Section 27. Appellants include organizations whose very purpose has been called into question by HB56, whose ability to fulfill their obligations has been critically compromised by the law, and whose membership is being directly affected by Sections 10, 12, 27, 28, and 30.[20] Each of these Appellants will suffer irreparable harm as long as the law remains in effect. *See Church v. City of Huntsville*, 30 F.3d 1332, 1338-39 (11th Cir. 1994) (individuals facing police

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[18] For example, Jane Doe #2 is undocumented. Her child and another child in her school, were victims of sexual assault by a school official. Jane Doe #2 agreed to testify against the perpetrator, which resulted in the official being convicted and removed from the school. Congress has created a path to legalization for individuals like Jane Doe #2 who may apply for a "U" visa based on their cooperation with law enforcement. *See* 8 U.S.C. § 1101(a)(15)(U); Jane Doe #2 Decl.

[19] For example, Jane Doe #3 has minor children who are not yet in school; Jane Doe #3 does not have current immigration status. Jane Doe #3 Decl. (District Court Doc. 37-27). Greater Birmingham Ministries has new members arriving in Alabama regularly who are themselves undocumented, or whose children are undocumented. Scott Douglas Aug. 15, 2011 Decl. ¶ 3 (District Court Doc. 109-4) (attached as Ex. 8).

[20] *See* John Pickens July 11, 2011 Decl. ¶ 11 (Alabama Appleseed) (District Court Doc. 37-6) (attached as Ex. 9); Pickens Aug. 13, 2011 Decl. ¶¶ 2-14 (Alabama Appleseed) (District Court Doc 109-2) (attached as Ex. 10); Isabel Rubio July 6, 2011 Decl. ¶¶ 13, 15 (Dist. Ct. Doc. No. 37-2); (attached as Ex. 11); Rubio Aug. 15, 2011 Decl. ¶¶ 2-7 (District Court Doc. 109-3) (attached as Ex. 12); Scott Douglas July 15, 2011 Decl. ¶ 11 (District Court Doc. No. 37-11) (attached as Ex. 13); Scott Douglas Aug. 15, 2011 Decl. ¶¶ 2-4..

action); *GLAHR*, 2011 WL 2520752 at *3-4 (same); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009) (organizational harm); *Fl. State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008) (same).

An injunction pending resolution of this appeal will impose minimal harm on the State of Alabama because Appellants ask merely for the status quo to be maintained 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).

The equities tip sharply in favor of granting a preliminary injunction while the constitutionality of HB 56 is decided. *See Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010); *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

B. Appellants are Likely to Succeed and Can Show a Substantial Case on the Merits

1. HB56 § 10 is Preempted

Section 10 is an unconstitutional state-law alien registration regime, which creates a state crime of "willful failure to complete or carry an alien registration document." HB56 § 10.[21] Apart from the District Court's ruling here, *every*

[21] The statute makes it a state crime for "an alien unlawfully present in the United States" to be "in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a)," two federal statutes that require certain non-citizens to register with the federal government and carry registration documents. HB56 § 10.

federal court that has considered the legality of state alien registration laws has found them to be unconstitutional, including two courts which considered virtually identical provisions of Arizona's SB-1070 law. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *United States v. Arizona*, 703 F. Supp. 2d 980, 990, 998-1000, 1008 (D. Ariz. 2010); *aff'd*, 641 F.3d 339, 354-357, 366 (9th Cir. 2011). As the three judges on the Ninth Circuit panel uniformly agreed when affirming the injunction of a virtually identical provision,[22] these regulations

> plainly stand[] in opposition to the Supreme Court's direction: "where 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, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines*, 312 U.S. at 66-6

Arizona, 641 F.3d at 355. The District Court here attempted to distinguish *Hines* by reasoning that Alabama's Section 10 merely "'complement[s]' the [federal]

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[22] *Compare* HB 56 §§ 10(a), (d):

> (a) In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), and the person is an alien unlawfully present in the United States.
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> . . . .
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> (d) This section does not apply to a person who maintains authorization from the federal government to be present in the United States.

with Ariz. SB 1070 § 3, codified at Ariz. Rev. Stat. §§ 13-1509(A), (F):

> (A) In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a).
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> . . . .
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> (F) This section does not apply to a person who maintains authorization from the federal government to remain in the United States.

registration provisions," *see* DOJ Order at 23, 22-25, but in so doing, it ignored the plain language of *Hines* when it invalidated a Pennsylvania state alien registration law: the federal government's "power over immigration, naturalization and deportation," is supreme and exclusive, and

> When the national government by treaty or. . . statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. *No state can add to or take from the force and effect of such treaty or. . . statute.*

Hines v. Davidowitz, 312 U.S. 52,at 62-62 (1941) (emphasis added).

Because federal courts have enjoined a nearly identical provision from Arizona, based on clear and longstanding Supreme Court precedent, Appellants have a substantial case and are likely to prevail on the merits of their appeal.

2. Sections 12 and 18 Are Preempted

Sections 12 and 18 mandate Alabama law enforcement officers to investigate the immigration status of people they encounter in the field. These provisions purport to turn state and local officers into immigration officers, who are unconstrained by the federal government's enforcement priorities and who will instead implement Alabama's preferred enforcement policies. The provisions are very similar to sections in Arizona's SB 1070 law and Georgia's HB 87 law which have been enjoined by federal courts on preemption grounds. *See Ga. Latino Alliance for Human Rights v. Deal ("GLAHR")*, No. 11-1804, 2011 WL 2520752,

at *1, 7-15, 18 (N.D. Ga. June 27, 2011), (enjoining Ga. HB 87 § 8, codified at O.C.G.A. § 17-5-100), *appeal docketed*, No. 11-13044; *United States v. Arizona*, 703 F. Supp. 2d 980, 989, 993-998, 1008 (D. Ariz. 2010) (enjoining Ariz. SB 1070 § 2(B), codified at Ariz. Rev. Stat. § 11-1051(B)); *aff'd*, 641 F.3d 339, 346-354, 366 (9th Cir. 2011). Yet the District Court in this case departed from these rulings, rejecting Appellants' and the U.S. Department of Justice's preemption challenge. It did so in error.

Section 12 requires that during "*any* lawful stop, detention, or arrest" by a state or local law enforcement officer, if the officer has a "reasonable suspicion" that the person is "unlawfully present," the officer *must* attempt to "determine the citizenship and immigration status" of the person. HB56 § 12(a) (emphasis added). If the person cannot produce one of the enumerated state-approved identity documents that give rise to a presumption of lawful presence, the officer must investigate the person's "citizenship and immigration status" by contacting the federal government. §§ 12(a), (d). Similarly, Section 18 requires officers to "determine the citizenship" of any person arrested for driving without a license, and to determine, "if an alien, whether the alien is lawfully present in the United States." § 18(c). Officers must make a "verification inquiry" to the federal government "within 48 hours." § 18(d). If the person is deemed to be "an alien unlawfully present . . . , the person . . . shall be detained until prosecution or until

handed over to federal immigration authorities." § 18(d).

Being present in the United States without lawful immigration status is not a crime, as the District Court acknowledged. HICA PI Order at 74; *accord Arizona*, 641 F.3d at 352; *GLAHR*, 2011 WL 2520752, *9. State and local law enforcement officers have no power to make arrests for suspected civil immigration violations such as unlawful presence.[23] They may assist the federal government in enforcing civil immigration law *only* if the federal government has chosen to delegate its authority through one of two statutory mechanisms. First, the U.S. Attorney General may authorize "any State or local enforcement officer" to enforce immigration laws upon certification of "an actual or imminent mass influx of aliens"—a provision that has never been invoked. 8 U.S.C. § 1103(a)(10). Second, under 8 U.S.C. § 1357(g), the federal government may enter into written agreements ("287(g) agreements") with state or local agencies, permitting designated officers to exercise immigration enforcement functions under certain conditions and under the supervision of the federal government.

Sections 12 and 18, like the now enjoined provision of Georgia's HB 87, "attempt[] an end-run" around this scheme." *GLAHR*, 2011 WL 2520752 at *11.

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[23] Separately, federal law authorizes state and local officers to assist in enforcing two specific *criminal* immigration offenses. Under 8 U.S.C. § 1252c, state and local officers may arrest and detain a noncitizen for the federal crime of illegal re-entry by a previously deported alien if the federal government provides "appropriate confirmation" of the suspect's status. And under 8 U.S.C. § 1324(c), federal law allows state and local officers to make arrests for the federal immigration crimes of transporting, smuggling, or harboring certain aliens.

They attempt to wrest control over immigration enforcement from the federal government, supplanting the federal government's enforcement priorities and policy judgments with the State of Alabama's. They create a scheme of *mandatory* investigation and detention on the basis of suspected violations of civil immigration law, which, "[b]y imposing mandatory obligations on state and local officers, . . . interfere[] with the federal government's authority to implement its priorities and strategies in law enforcement, turning [state] officers into state-directed DHS agents." *Arizona*, 641 F.3d at 351-52. This state enforcement scheme directly conflicts with Congress's careful limitation of the circumstances in which state and local law enforcement officials may assist in the enforcement of immigration law. By attempting to "circumvent[] Congress'[s] intention to allow the Attorney General to authorize and designate local law enforcement officers" to assist in certain immigration enforcement functions through the federally controlled 287(g) program, Sections 12 and 18 "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *GLAHR*, 2011 WL 2520752 at *3-4 (citing *Crosby*, 530 U.S. at 373).[24] As

[24] Indeed, HB 56's enforcement scheme is so broad and intrusive that it permits Alabama law enforcement officers to make warrantless civil immigration arrests in circumstances where even federal immigration agents cannot. Under 8 U.S.C. § 1357(a)(2), in order to make a warrantless arrest for a suspected civil immigration violation, a federal immigration officer must reasonably believe that the individual is likely to escape before an arrest warrant can be obtained; no such limitation applies to Alabama officers under Section 12. *See Buquer v. City of Indianapolis*, No. 1:11–CV–708, 2011 WL 2532935 at *11 (S.D.Ind. June 24, 2011) (no provision of INA

recognized in *GLAHR* and *Arizona*, Appellants have a substantial case to present on the merits.

3. Section 28 violates the Equal Protection Clause

Section 28 requires public schools in Alabama, from kindergarten to twelfth grade, to inquire into the immigration status of students and parents. It mandates that "[e]very public elementary and secondary school . . . , at the time of enrollment in kindergarten or any grade in such school, shall determine whether the student enrolling in public school 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). This information will be reported to the State Board of Education. § 28(b). Section 28(e) also provides that school officials may "[p]ublic[ly] disclos[e] . . . information obtained pursuant to this section which personally identifies any student . . . for purposes permitted pursuant to 8 U.S.C. §§ 1373 and 1644." HB 56 § 28(e).[25]

Section 28 violates the Equal Protection Clause of the Fourteenth Amendment by creating three impermissible classifications, each of which creates

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"indicat[es] that Congress intended state and local law enforcement officers to retain greater authority to effectuate a warrantless arrest than federal immigration officials.").

[25] Sections 5 and 6 of HB56 add on to these reporting requirements by forbidding 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* . . . ." HB56 §§ 5(a), 6(a) (emphasis added). Schools that adopt a policy of not reporting students and their parents to immigration officials are subject to the loss of state funds and financial penalties of $1,000 to $5,000 for each day. §§ 5(a) & (d), 6(a) & (d).

unconstitutional obstacles to the enrollment of children from immigrant families.[26] Of course, a child has no control over her place of birth, the immigration status of her parents, or their decision to reside in the United States. As the Supreme Court articulated in *Plyler v. Doe*, 457 U.S. 202 (1982), and in a long line of nonmarital children cases, targeting a child for a parent's perceived misdeeds "does not comport with fundamental conceptions of justice." *Plyler*, 457 U.S. at 220. As *Plyler* explained:

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

Id. (internal citation and alterations omitted). Punishing a child by denying education is especially egregious because it would

> impose[] a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure

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[26] First, it creates a classification of children born outside the United States who are subject to additional documentation requirements of section 28; this classification is based on alienage and must satisfy strict scrutiny to be upheld. *See Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977). Second, it creates a classification of children who are presumed to be unlawfully present and who are subject to reporting requirements to both federal and state officials; this classification is based on alienage and is subject to intermediate scrutiny. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). Finally, it creates a classification of children whose parent(s) are not lawfully present in the United States and who are subject to the reporting requirements of Section 28; this classification distinguishes among U.S. citizen children based on an attribute of their parents and is subject to intermediate scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001).

> of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [such a statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

Id. at 223-24.

By requiring different documentation depending on a child's citizenship, immigration status, place of birth, and parents' immigration status, Section 28 facially discriminates among children along these lines. Moreover, by requiring both inquiry into and reporting of immigration status, Section 28 in conjunction with Sections 5 and 6 is designed to deter—and is already deterring—children in mixed-status families from going to school. As the U.S. Department of Justice and U.S. Department of Education recently made clear, 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."[27] Section 28 blatantly violates this guidance.

The District Court avoided the merits of Appellants' Equal Protection claim, instead holding that Appellants lacked standing to challenge Section 28. HICA

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[27] "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.

Order at 93-102. This reasoning was fundamentally flawed in key respects. First, the District Court misapplied *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009) and *Fl. State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008) and failed to even acknowledge the evidence Appellants Alabama Appleseed, Hispanic Interest Coalition of Alabama, and Greater Birmingham Ministries ("GBM") provided to establish diversion of resources and harm to the organizations, as well as the fact that GBM constantly has new members with immigrant children coming into the state, who will be affected by Section 28 this year.[28] Second, the District Court ignored the plain language of Section 28(a)(1) requiring school officials to inquire into the immigration status of parents, and simply "assume[d]" that school officials would ignore this requirement. HICA Order at 97, 98 (using this basis to find Jane Doe #3 lacked standing). This assumption is improper because the question of Section 28's scope and effect is precisely the matter being disputed.[29]

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[28] *See* John Pickens Aug. 13, 2011 Decl. ¶¶ 2 (diversion of resources) 7 ("at virtually every single presentation, parents and other service providers have asked questions . . . [and] for information about how to enroll their children in school; whether to enroll their children in school; what will happen to the registration information that is collected by the school when they enroll their children; [and] whether registration information will be shared with immigration authorities . . . .") (Doc. 109-2) (attached as Ex.10); Isabel Rubio Aug. 15, 2011 Decl. ¶¶ 3 (noting 13 information sessions conducted "to give information on HB 56 and . . . specifically information on enrollment of students in Alabama public schools"), 5, 7 (harm to HICA) (Doc. 109-3) (attached as Ex. 12); Scott Douglas Aug. 15, 2011 Decl. ¶¶ 2 (noting diversion of resources to educate people about how to "'enroll' in Alabama schools"), 3 (harm to members) (Doc. 109-4) (attached as Ex. 8).

[29] Put differently, the District Court could have found that Jane Doe #3 is not likely to prevail on the merits because the District Court did not believe the law as written would apply to her (a

Finally, the District Court accepted a limiting interpretation of the law provided by Defendants—that immigration questions would only be asked when a child enters the Alabama public school system, and not every year during the annual registration process. HICA Order at 98. However, Defendants remain free to retract their current reading of the statute that students "enroll" in school only once, for there is no codified definition of the term in Alabama law, and Section 28(a)(1) can naturally be read to require annual inquiries. Thus, the threat of imminent harm to undocumented students and students from mixed-status families will continue absent an injunction. *See Harrell v. Florida Bar*, 608 F.3d 1241, 1267-68 (11th Cir. 2010). Moreover, Section 28(e) specifically exempts immigration status information from the privacy protections that would otherwise apply under state and federal law, expressly permitting school officials to share that information with the federal government for enforcement purposes. And, as noted above, *see supra* note 25, HB 56 Sections 5 and 6 require school officials to aid in the enforcement of federal immigration law and of HB 56 to the fullest extent allowed by law; thus, there is a very real threat that, even after enrollment, school officials will be bound to report any information they acquire about a child's or parent's immigration status. The risk of Section 28's harms are thus not limited to enrollment time.

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point which Plaintiffs would dispute). To instead find that Jane Doe #3 lacked standing was in error, for whether Section 28 requires this inquiry is part of the case and controversy at issue.

4. HB56 § 30 should be enjoined pending appeal

Section 30 makes it a felony for an "alien not lawfully present" to enter or attempt to enter into any "business transaction" with the state or local government agency. HB56 § 30(b).[30] This is a direct regulation of immigration, and is invalid because the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica*, 424 U.S. 351, 354 (1976); *Hines*, 312 U.S. at 66. The touchstone of constitutional preemption analysis is whether the state law regulates the conditions under which immigrants may remain in the country. State laws that affect "the conditions under which a legal entrant may remain" constitute direct regulation of immigration, which is a power exclusively reserved for the federal government. *DeCanas*, 424 U.S. at 355, *Toll v. Moreno*, 458 U.S. 1, 11 (1982).

Section 30 goes far beyond the provisions enjoined by Arizona or Georgia, but its efforts to regulate and punish every aspect of an undocumented immigrant's life in Alabama—including those who are seeking relief from the federal government like Jane Doe #2 who has an immigration petition pending—is strikingly similar to efforts by certain local municipalities to prohibit renting to undocumented individuals; such renting restrictions have been consistently

[30] The term "business transaction" is defined only by stating it "includes any transaction between a person and the state or a political subdivision," with a single exception of applying for a marriage license. HB56 § 30(a).

enjoined, and indeed even the District Court in this case recognized that criminalizing *renting* would be unacceptable. *See* DOJ Order at 70-86; *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 530-33 (M.D. Pa., 2007) (enjoining rental restriction ordinance); *aff'd*, 620 F.3d 170, 219-24 (3d Cir. 2010), *vacated and remanded on other grounds*, No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011); *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 854-56 (N.D. Tex. 2010) (invalidating ordinance placing restrictions on renting to undocumented individuals), *appeal docketed*, No. 10-10751 (5th Cir. July 28, 2010). Section 30's express function is to control the conditions under which immigrants can remain in Alabama by prohibiting *and criminalizing* immigrants' efforts to engage in a wide range of transactions necessary for daily life, which is unacceptable because it creates a "[l]egal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens" by "subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials." *Hines*, 312 U.S. at 65-66.[31]

[31] Section 30 is also conflict-preempted because it undermines federal immigration law by criminalizing basic life activities of individuals that Congress intended to be able to remain in the United States pending the adjudication of their immigration cases, like Appellant Jane Doe #2. *See supra* n.18. Congress has created a path to legalization for individuals like Jane Doe #2 who may apply for a "U" visa based on their cooperation with law enforcement. *See* 8 U.S.C. § 1101(a)(15)(U). Congress plainly intended that individuals like Jane Doe #2 would be able to remain in the United States while their applications were pending. Yet under Section 30 Jane Doe #2 will be committing a Class C felony for any attempt to engage in any type of transaction with Alabama or her home city of Birmingham. HB56 § 30(d). This decision by Alabama to criminalize her activities is in direct conflict with Congressional priorities and intent. *See This*

In rejecting Appellants' and the United States' preemption challenge to Section 30, the District Court limited the scope of the phrase "business transactions", DOJ Order at 112-114,[32] and reasoned that since courts have affirmed the ability of states to limit undocumented immigrants' access to licenses, Section 30 therefore cannot be preempted. *See* DOJ Order at 113-14. This reasoning is erroneous. As an initial matter, the notion that a state may deny driver's licenses to individuals who cannot provide proof of lawful immigration status does not mean that a state may also criminalize the mere *attempt* to obtain a license, which is precisely what Section 30 does. More importantly, the question of whether Section 30 impermissibly regulates immigration is not altered by a single, potentially permissible, example of the state law's reach.[33] The question is only answered by determining whether the law regulates immigration in an

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That & Other Gift & Tobacco, Inc. v. Cobb County, 285 F.3d 1319, 1322 (11th Cir. 2002) (citing *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)).

[32] This interpretation is suspect. For example, the District Court found that public corporations are excluded, DOJ Order at 112 (quoting *Limestone Cnty. Water and Sewer Auth. V. City of Athens*, 896 So. 2d 531, 534 (Ala. Civ. App. 2004)), yet a decision of the Alabama Supreme Court reached a contrary conclusion by holding that "[b]ecause public corporations perform municipal functions, they have long been held to be agencies of the municipality they serve, regardless of their organizational structure." *Water Works and Sewer Bd. of City of Talladega v. Consolidated Publ'g, Inc.*, 892 So.2d 859, 863 (Ala. 2004).

[33] It is not clear that the standard articulated in *United States v. Salerno*, 481 U.S. 739, 745 (1987), applies in facial challenges on preemption grounds. In three cases since *Salerno*, the Supreme Court has addressed the merits of preemption claims without applying the *Salerno* standard. *See Chamber of Commerce v. Whiting*, __ U.S. __, 131 S.Ct. 1968 (2011); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000). Moreover, in other contexts, the Supreme Court has questioned the applicability of the *Salerno* standard. *United States v. Arizona*, 641 F.3d 339, 345-46 (9th Cir. 2011); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008). In any event, Plaintiffs meet either standard.

impermissible fashion, *DeCanas*, 424 U.S. at 355, or conflicting with federal law, both of which Section 30 does.

5. HB56 § 27 should be enjoined pending appeal

Section 27, with a few narrow exceptions, prohibits Alabama state courts from enforcing contracts between an alien "unlawfully present in the United States" and any other party, if the other party had direct or constructive knowledge that the alien was "unlawfully present" and if the contract "requires the alien to remain unlawfully present in the United States for more than 24 hours after the time the contract was entered into or performance could not reasonably be expected to occur." HB56 § 27(a). Like Section 30, Section 27 constitutes an impermissible state regulation of immigration. It is clear that the intention Section 27 is to fundamentally alter the conditions under which immigrants reside in Alabama. *DeCanas*, 424 U.S. at 355, and as the District Court recognized, "In essence, Section 27 strips an unlawfully-present alien of the capacity to contract except in certain circumstances—i.e., the other party to the agreement did not know the alien was unlawfully present and the contract could be performed in less than 24 hours."[34] DOJ Order at 101.[35] Section 27 is a deliberate usurpation of the

[34] Section 27 does not, however, apply to contracts for a night's lodging, food for the noncitizen, or medical services. HB56 § 27(b).

[35] In addition, this provision also affects lawfully present aliens who will invariably face myriad questions from private individuals regarding their lawful status as well as U.S. citizens and lawfully present immigrants who contract with individuals who may lack immigration status. Límon Decl. ¶ 7.

federal government's exclusive authority to regulate immigration by establishing new conditions under which immigrants may remain. *DeCanas*, 424 U.S. at 355; *see also Toll*, 458 U.S. at 11; *Lozano*, 620 F.3d at 219-24; *Farmers Branch*, 701 F. Supp. 2d at 854-56.

Section 27 is also preempted by 42 U.S.C. § 1981.[36] Although § 1981 was originally drafted in 1866 with a limit on the guarantee of equal contract rights to all "citizens," Congress explicitly expanded the guarantee of equal contract rights to "all persons within the jurisdiction of the United States" when it amended the statute in 1870. *See Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 385 (1982). The very purpose of the change was to extend the protections of the 1866 Act to "aliens." *See Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 653-54 (5th Cir. 1974) (adopting district court's opinion that Congress "explicitly broadened the language of the portion of the 1866 Act that has become § 1981 to include 'all persons' in order to bring aliens within its coverage") (footnotes omitted), *overruled on other grounds*, *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1981), *vacated*, 492 U.S. 901 (1989), *reinstated on remand*, 887 F.2d 609 (5th Cir.) (per curiam); *see De Malherbe v.*

[36] 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.").

Int'l Union of Elevator Constructors, 438 F. Supp. 1121, 1136-38 (N.D. Cal. 1977). Thus Congress occupied the field regarding the right of aliens to make and enforce contracts by enacting and amending § 1981, and Section 27 conflicts with this federal law directive to ensure that all persons have equal contracting rights. *See Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419 (1948) (describing § 1981, then codified at 8 U.S.C. § 41, as part of a "comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization").

The District Court incorrectly reasoned that although Section 27 strips the ability to contract from undocumented immigrants, it nevertheless is not preempted by federal law because "nothing shows Congress intended [unlawful aliens'] contracts would be enforceable." DOJ Order at 102. This is patently incorrect as evidenced by § 1981's plain language. It further reasoned that Section 27 does not conflict with § 1981 because § 1981 does not require that undocumented immigrants always be treated equally—a result also in direct conflict with § 1981's text. The District Court attempted to shore up this conclusion by noting that it would be appropriate for an employer to elect not to hire an undocumented immigrant because such discrimination is based on "noncompliance with federal law." HICA Order at 93 (quoting *Anderson v. Comboy*, 156 F.3d 167, 180 (2d. Cir. 1998)). This reading of *Anderson* misses the central point of § 1981, and of the *Anderson* decision. *Anderson* holds that § 1981 "provides a claim against

private discrimination on the basis of alienage," and its example of the ability of an employer to not hire an undocumented worker was used to show that this would constitute discrimination based not on *alienage* (which would be illegal) but on compliance with IRCA. *Id.* The District Court's opinion is undermined, not supported, by *Anderson*.

III. APPEAL OF DISTRICT COURT'S PRELIMINARY INJUNCTION RULING SHOULD BE EXPEDITED PURSUANT TO 11TH. CIR. R. 27-1 I.O.P.-3.

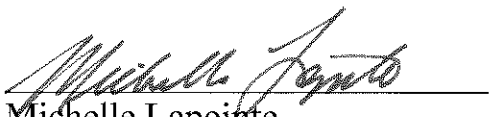
Pursuant to Internal Operating Procedure 3 of Rule 27-1 of the Eleventh Circuit Rules, Appellants seek to expedite this Court's review of the District Court's denial of their request for a preliminary injunction. Good cause to expedite exists because of the irreparable harm being caused to Appellants and putative class members.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court enjoin HB56 §§ 10, 12, 27, 28, and 30 pending appeal.

Dated: October 7, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that on October 7, 2011, I caused service of the foregoing Appellants' Motion for Leave to Exceed Page Limit by personal service at the following address:

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I further certify that on October 7, 2011, I caused service of the foregoing Appellants' Motion for Leave to Exceed Page Limit by overnight mail properly addressed upon:

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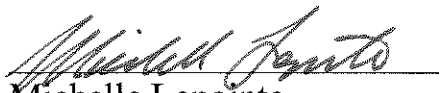
The original, signed Motion and three additional copies were also hand-delivered to the United States Court of Appeals for the Eleventh Circuit.

The original, signed Motion was also emailed to the Court and all counsel.

Dated: October 7, 2011



Michelle Lapointe

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 11-14535

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

v.

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

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

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TIME-SENSITIVE
MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL
AND FOR EXPEDITED APPEAL

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*Motion for Admission forthcoming

CONTENTS

EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

HISPANIC INTEREST COALITION OF ALABAMA, *et al.*	)	
Plaintiffs,	)	
vs.	)	**Case Number 5:11-CV-2484-SLB**
ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; *et al.*,	)	
Defendants.	)	

ORDER

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is hereby **ORDERED** as follows:

1. Plaintiffs' Motion for Preliminary Injunction, (doc. 37), is **GRANTED IN PART**. The Motion is **GRANTED** as to Section 8; the last sentence of Sections 10(e), 11(e), and 13(h); and Section 11(f) and (g) of H.B. 56.

2. Defendants are **ENJOINED** from enforcing Section 8 – which prohibits "[a]n alien who is not lawfully present in the United States" from attending or enrolling in an Alabama "public postsecondary education institution in this state," and requires any alien attending such an institution to possess either "lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq." – pending final judgment in this case.

3. Defendants are **ENJOINED** from enforcing the last sentence of Sections 10(e), 11(e), and 13(h) of H.B. 56 – "A court of this state shall consider only the federal

government's verification in determining whether an alien is lawfully present in the United States" – pending final judgment in this case.

4. Defendants are **ENJOINED** from enforcing Section 11 (f) and (g) of H.B. 56 – "(f) It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway, or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic," and "(g) It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic," – pending final judgment in this case.

5. Plaintiffs' Motion for Preliminary Injunction, (doc. 37), is **MOOT** as to their request for an injunction preliminarily enjoining Section 11(a) and Section 13 of H.B. 56. These Section have been enjoined pending final judgment in *United States v. Alabama*, Case No. 2:11-CV-2746-SLB.

6. Plaintiffs' Motion for Preliminary Injunction, (doc. 37), is **DENIED IN PART**. The Motion is **DENIED** as to H.B. 56 in its entirety, and as to Section 10 (except the last sentence of Section 10(e)), and Sections 12, 18-20, 27, 28, and 30 of H.B. 56.

DONE, this 28th day of September, 2011.

Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

HISPANIC INTEREST COALITION OF ALABAMA, *et al.*	)	
Plaintiffs,	)	
vs.	)	**Case Number 5:11-CV-2484-SLB**
ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; *et al.*,	)	
Defendants.	)	

MEMORANDUM OPINION

This case is presently pending before the court on plaintiffs' Motion for Preliminary Injunction. (Doc. 37.)[1] Plaintiffs[2] have sued defendants,[3] alleging that the Beason-Hammon

[1]Reference to a document number, ["Doc. ___"], refers to the number assigned to each document as it is filed in the court's record.

[2]Plaintiffs are (1) Hispanic Interest Coalition of Alabama; (2) AIDS Action Coalition; (3) Huntsville International Help Center; (4) Interpreters and Translators Association of Alabama; (5) Alabama Appleseed Center for Law & Justice, Inc.; (6) Service Employees International Union; (7) Southern Regional Joint Board of Workers United; (8) United Food and Commercial Workers International Union; (9) United Food and Commercial Workers Union Local 1657; (10) DreamActivist.org; (11) Greater Birmingham Ministries; (12) Boat People SOS; (13) Matt Webster; (14) Maria D. Ceja Zamora; (15) Pamela Long; (16) Juan Pablo Black Romero; (17) Christopher Barton Thau; (18) Ellin Jimmerson; (19) Robert Barber; (20) Daniel Upton; (21) Jeffrey Allen Beck; (22) Michelle Cummings; (23) Esayas Haile; (24) Fiseha Tesfamariam; (25) Jane Doe #1; (26) Jane Doe #2; (27) Jane Doe #3; (28) Jane Doe #4; (29) Jane Doe #5; (30) Jane Doe #6; (31) John Doe #1, a minor, by his legal guardian Matt Webster; (32) John Doe #2; (33) John Doe #3; (34) John Doe #4; (35) John Doe #5; and (36) John Doe #6.

[3]The plaintiffs have sued Robert Bentley, in his official capacity as Governor of the State of Alabama and Luther Strange, in his official capacity as Attorney General of the State

Alabama Taxpayer and Citizen Protection Act, Act No. 2011-535, [hereinafter "H.B. 56"], is unconstitutional and is preempted by federal immigration law. They seek a court order enjoining defendants from enforcing H.B. 56. As discussed more fully below, "[a] preliminary injunction is an extraordinary and drastic remedy." *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Florida,* 896 F.2d 1283, 1285 (11th Cir. 1990) (citations omitted). Moreover, as the Eleventh Circuit has noted

> When a federal court before trial enjoins the enforcement of a municipal ordinance adopted by a duly elected [Legislature], the court overrules the decision of the elected representatives of the people and, thus, in a sense interferes with the processes of democratic government. Such a step can occasionally be justified by the Constitution (itself the highest product of democratic processes). Still, ***preliminary injunctions of legislative enactments – because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits – must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts***.

Id. (emphasis added).

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of Alabama. They also named as defendants Joseph B. Morton, State Superintendent of Education and Freida Hill, Chancellor of Postsecondary Education, as well as six school superintendents: E. Casey Wardynski, Superintendent of the Huntsville City School System; Jamie Blair, Superintendent of the Vestavia Hills City School System; Randy Fuller, Superintendent of the Shelby County Public School System; Charles D. Warren, Superintendent of the DeKalb County Public School System; Barbara W. Thompson, Superintendent of the Montgomery County Public School System; and Jeffery E. Langham, Superintendent of the Elmore County Public School System. They also name Robert L. Broussard, District Attorney for Madison County. On September 16, 2011, plaintiffs filed an Amended Complaint, which substituted Larry E. Cravin, in his official capacity as Interim State Superintendent of Education, for Morton, who retired on August 31, 2011. (Doc. 131 ¶ 158 n.1.)

Upon consideration of the record, the submissions of the parties, the arguments of counsel, and the relevant law, the court is of the opinion that plaintiffs' Motion for Preliminary Injunction, (doc. 37), is due to be granted in part and denied in part.

As more fully discussed below, for the reasons set forth in its Memorandum Opinion and Order in *United States v. Alabama*, Case No. 2:11-CV-2746-SLB, docs. 93, 94, the court finds (1) that Sections 10, 12(a), 18, 27, 28, and 30 of H.B. 56 are not preempted by federal law, and (2) that Sections 11(a) and 13 are preempted by federal law. Therefore, plaintiffs' Motion for Preliminary Injunction is moot as to the preemption grounds asserted for enjoining these Sections. The court finds plaintiffs' Motion for Preliminary Injunction seeking to enjoin Section 11(a) on First Amendment grounds is moot because Section 11(a) is enjoined as preempted by federal law. *United States*, docs. 93, 94. Moreover, the court finds that plaintiffs do not have standing to assert their claims against Section 28 of H.B. 56 or their claim that H.B. 56 is preempted in its entirety by federal law. Also, the court finds that plaintiffs have not shown a likelihood of success on their facial challenges to Sections 12, and 18-20 based on the Fourth Amendment; their challenges to Section 10(e), 11(e), and 13(h) based on the Confrontation Clause of the Sixth Amendment; or their challenges to Section 27 and 30 based on 42 U.S.C. § 1981. Therefore, the court will deny their Motion for Preliminary Injunction as to these Sections. However, the court finds that plaintiffs have shown their entitlement to a preliminary injunction enjoining the enforcement of Section 8 as preempted by federal immigration law; enjoining the enforcement of the last sentence of

Sections 10(e), 11(e), and 13(h) based on the Compulsory Process Clause of the Sixth Amendment; and enjoining the enforcement of Section 11 (f) and (g) based on the First Amendment. Therefore, their Motion for a Preliminary Injunction as to these Sections or parts of Sections will be granted.

I. PRELIMINARY INJUNCTION STANDARD

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."[4] *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal quotations and citations omitted). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)(internal quotations and citations omitted). In this Circuit –

> In order to prevail on an application for a preliminary injunction, the plaintiff must clearly establish all of the following requirements:
>
> (1) . . . a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

---

[4]"It is always true, by definition, that the status quo is less restrictive than a new regulatory law. It is always less restrictive to do ***nothing*** than to do ***something***." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 684 (2004)(Breyer, J., dissenting)(emphasis in original).

Bloedorn v. Grube, 631 F.3d 1218, 1229 (11th Cir. 2011)(quoting *Am. Civil Liberties Union of Fla., Inc. v. Miami–Dade County Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

II. BACKGROUND AND PROCEDURAL HISTORY

A. FEDERAL IMMIGRATION LAW

The Third Circuit in *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), *vacated* 131 S. Ct. 2958 (2011),[5] clearly set forth the current federal law regarding immigration and immigrants:

1. The Immigration and Nationality Act

> The primary body of federal immigration law is contained in the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101–537, enacted in 1952, and amended many times thereafter. The INA sets forth the criteria by which "aliens," defined as "any person not a citizen or a national of the United States," 8 U.S.C. § 1101(a)(3), may enter, visit, and reside in this country.
>
> Under the INA, there are three primary categories of aliens who may lawfully enter and/or spend time within the United States: (1)

[5]The Supreme Court vacated the *Lozano* judgment and remanded the case to the Third Circuit Court of Appeals for reconsideration in light of *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). *City of Hazleton v. Lozano,* 131 S. Ct. 2958, 2958 (2011).

"nonimmigrants," who are persons admitted for a limited purpose and for a limited amount of time, such as visitors for pleasure, students, diplomats, and temporary workers, see 8 U.S.C. § 1101(a)(15); (2) "immigrants," who are persons admitted as (or after admission, become) lawful permanent residents of the United States based on, *inter alia*, family, employment, or diversity characteristics, *see* 8 U.S.C. § 1151; and (3) "refugees" and "asylees," who are persons admitted to and permitted to stay for some time in the United States because of humanitarian concerns, *see* 8 U.S.C. §§ 1157–58. Aliens wishing to be legally admitted into the United States must satisfy specific eligibility criteria in one of these categories, and also not be barred by other provisions of federal law that determine inadmissibility. Congress has determined that non-citizens who, *inter alia*, have certain health conditions, have been convicted of certain crimes, present security concerns, or have been recently removed from the United States, are inadmissible, *see* 8 U.S.C. § 1182, and if detained when attempting to enter or reenter the country, may be subject to expedited removal, *see* 8 U.S.C. § 1225.

Despite the carefully designed system for lawful entry described above, persons lacking lawful immigration status are obviously still present in the United States. As the Supreme Court explained almost thirty years ago: "[s]heer incapability or lax enforcement of the laws barring entry into this country . . . has resulted in the creation of a substantial 'shadow population' . . . within our borders." *Plyler* [*v. Doe*], 457 U.S. [202,] 218 [(1982)]. Such persons may lack lawful status because they entered the United States illegally, either by failing to register with immigration authorities or by failing to disclose information that would have rendered them inadmissible when they entered. *See* 8 U.S.C. § 1227. In addition, aliens who entered legally may thereafter lose lawful status, either by failing to adhere to a condition of admission, or by committing prohibited acts (such as certain criminal offenses) after being admitted. *See id.*

Persons here unlawfully are subject to removal from the country. Removal proceedings are initiated at the discretion of the Department of Homeland Security ("DHS"). [footnote] *See Juarez v. Holder*, 599 F.3d 560, 566 (7th Cir. 2010)("[T]he decision when to initiate removal proceedings is committed to the discretion of immigration authorities." (citing *Reno v. Am.-Arab Anti–Discrimination Comm.*, 525 U.S. 471, 489 (1999))). Although certain aliens are subject to more expedited removal proceedings, for all others, section 240 of the INA sets forth the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the

alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3).

> [Footnote:] Prior to 2003, the Immigration and Naturalization Service ("INS"), which operated under the Department of Justice, administrated both immigration services and immigration enforcement. On March 1, 2003, Congress abolished the INS. Pursuant to the Homeland Security Act of 2002, Pub.L. No. 107–296, 116 Stat. 2135, that agency's functions were transferred to three separate agencies within the newly created Department of Homeland Security: U.S. Citizenship and Immigration Services ("USCIS"), which performs immigration and naturalization services, U.S. Immigration and Customs Enforcement ("ICE"), which enforces federal immigration and customs laws, and U.S. Customs and Border Protection ("CBP"), which monitors and secures the country's borders. Older documents may continue to refer to the pre–2003 administrative structure, and citations to them should be understood in that context.

Under section 240, an alien facing removal is entitled to a hearing before an immigration judge and is provided numerous procedural protections during that hearing, including notice, the opportunity to present and examine evidence, and the opportunity to be represented by counsel (at the alien's expense). *See* 8 U.S.C. § 1229a. At the conclusion of a removal hearing, the presiding immigration judge must decide, based on the evidence produced during the hearing, whether the alien is removable, *see* 8 U.S.C. § 1229a(c)(1)(A), and if so, whether s/he should be ordered removed, or should be afforded relief from removal. Such relief can include postponement of removal, cancellation of removal, or even adjustment of status to that of lawful permanent resident. *See* 8 U.S.C. §§ 1229a(c)(4), 1229b.

In sum, while any alien who is in the United States unlawfully faces the prospect of removal proceedings being initiated against her/him, whether s/he will actually be ordered removed is never a certainty until all legal proceedings have concluded. Moreover, even after an order of removal issues, the possibility remains that no country will accept the alien. Under such circumstances, the Constitution limits the government's authority to detain someone in anticipation of removal if there is no significant likelihood of removal in the reasonably foreseeable future. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

The INA, as amended, also prohibits the "harboring" of aliens lacking lawful immigration status. It provides that any person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection . . . such alien in any place, including any building or any means or transportation" shall be subject to criminal penalties. 8 U.S.C. § 1324(a)(1)(A)(iii).

For decades, the INA contained no specific prohibition against the employment of aliens lacking legal status. Rather, regulation of the employment of aliens not lawfully present was at most a "peripheral concern." *DeCanas v. Bica*, 424 U.S. 351, 360 (1976). This changed in 1986, when Congress amended the INA through enactment of the Immigration Reform and Control Act ("IRCA"), Pub.L. No. 99–603, 100 Stat. 3359 (codified at 8 U.S.C. §§ 1324a–1324b). IRCA "forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 147(2002) (internal quotation marks and alterations omitted).

2. The Immigration Reform and Control Act

IRCA regulates the employment of "unauthorized aliens," a term of art defined by the statute as those aliens neither "lawfully admitted for permanent residence" nor "authorized to be . . . employed by this chapter or by the Attorney General." 8 U.S.C. § 1324a(h)(3). IRCA makes it unlawful to knowingly hire or continue to employ an unauthorized alien, or to hire anyone for employment without complying with the work authorization verification system created by the statute. 8 U.S.C. § 1324a(a)(1)-(2). This verification system, often referred to as the "I–9 process," requires that an employer examine certain documents that establish both identity and employment authorization for new employees. *See* 8 U.S.C. § 1324a(b). The employer must then fill out an I–9 form attesting that s/he reviewed these documents, that they reasonably appear to be genuine, and that to the best of the employer's knowledge, the employee is authorized to work in the United States. *See id*. Although employers are required to verify the work authorization of all ***employees***, Congress did not extend this requirement to independent contractors. *See* 8 U.S.C. § 1324a(a)(1)(making unlawful the knowing "employment" of an unauthorized alien, and the hiring of an employee for "employment" without verifying the employee's work authorization); 8 C.F.R. § 274a.1(f)(specifically excluding "independent

contractors" from the definition of "employee"); 8 C.F.R. § 274a.1(g) (specifically excluding a "person or entity using . . . contract labor" from the definition of "employer").

The I–9 "verification system is critical to the IRCA regime." *Hoffman Plastic Compounds*, 535 U.S. at 147–48. Not only is failure to use the system illegal, but use of the system provides an affirmative defense to a charge of knowingly employing an unauthorized alien. *See* 8 U.S.C. § 1324a(a)(3). Thus, employers who use the I–9 process in good faith to verify the work authorization of employees are presumed not to have knowingly employed someone unauthorized to work in this country. In enacting IRCA, Congress required the President to monitor the security and efficacy of this verification system. *See* 8 U.S.C. § 1324a(d). Congress also imposed limits on the President's ability to change it. *Id*.

In addition to relying on the I–9 verification system, IRCA uses public monitoring, prosecution, and sanctions to deter employment of unauthorized aliens. IRCA provides for the creation of procedures through which members of the public may file complaints about potential violations; it authorizes immigration officers to investigate these complaints; and it creates a comprehensive hearing and appeals process through which complaints are evaluated and adjudicated by administrative law judges. *See* 8 U.S.C. § 1324a(e)(1)-(3).

Under IRCA, an employer who knowingly hires an unauthorized alien shall be ordered to cease and desist the violation, and to pay between $250 and $2000 per unauthorized alien for a first offense, between $2000 and $5000 per unauthorized alien for a second offense, and between $3000 and $10,000 per unauthorized alien for a third or greater offense. 8 U.S.C. § 1324a(e)(4). An employer who fails to verify the work authorization of its employees can be ordered to pay between $100 and $1000 for each person whose authorization it failed to authenticate. 8 U.S.C. § 1324a(e)(5). Employers who engage in a "pattern or practice" of hiring unauthorized aliens shall be fined up to $3000 per unauthorized alien, imprisoned for not more than six months, or both. 8 U.S.C. § 1324a(f)(1).

IRCA expressly pre-empts states and localities from imposing additional "civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

Because of its concern that prohibiting the employment of unauthorized aliens might result in employment discrimination against authorized workers who appear to be foreign, Congress included significant anti-discrimination protections in IRCA. *See* 8 U.S.C. § 1324b. [Footnote] The statute provides that, with certain limited exceptions, it is an "unfair immigration-related employment practice" to discriminate in hiring on the basis of national origin or citizenship status. 8 U.S.C. § 1324b(a)(1). Congress put teeth into this provision by creating the office of a "Special Counsel" to investigate and prosecute such offenses, and it required that the President fill that position "with the advice and consent of the Senate." 8 U.S.C. § 1324b(c). Congress also authorized immigration judges to punish those who violate IRCA's anti-discrimination mandate by imposing civil fines equivalent in amount to those imposed for knowingly hiring unauthorized aliens. *Compare* 8 U.S.C. § 1324a(e)(4)(A)(i)-(iii) *with* 8 U.S.C. § 1324b(g)(2)(B)(iv)(I)-(III).

[Footnote:] 8 U.S.C. § 1324b provides in relevant part that:

> [with certain limited exceptions, it] is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment – (A) because of such individual's national origin, or (B) in the case of a protected individual . . . because of such individual's citizenship status.

8 U.S.C. § 1324b(a). Any person adversely-affected by an unfair immigration-related employment practice "may file a charge respecting such practice or violation." 8 U.S.C. § 1324b(b)(1).

3. The Illegal Immigration Reform and Immigrant Responsibility Act

In 1996, Congress again amended the INA by enacting the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in various sections of 8 U.S.C.). In IIRIRA, Congress directed the Attorney General, and later the

Secretary of Homeland Security, to conduct three "pilot programs of employment eligibility confirmation" in an attempt to improve upon the I-9 process. IIRIRA § 401(a), 110 Stat. 3009-655. Congress mandated that these programs be conducted on a trial basis, for a limited time period, and in a limited number of states. *See* IIRIRA § 401(b)-(c), 110 Stat. 3009-655-66. Two of these trial systems were discontinued in 2003. However, the third – originally known as the "Basic Pilot Program" but since renamed "E-Verify" – was reauthorized and expanded to all fifty states in 2003. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub.L. No. 108-156, §§ 2, 3, 117 Stat. 1944. It has been reauthorized several times since, and its current authorization will expire, absent congressional action, on September 30, 2012. *See* Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 547, 123 Stat. 2177; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Div. A, § 143, 122 Stat. 3580.

E-Verify allows an employer to actually authenticate applicable documents rather than merely visually scan them for genuineness. When using E-Verify, an employer enters information from an employee's documents into an internet-based computer program, and that information is then transmitted to the Social Security Administration and/or DHS for authentication. *See* IIRIRA, as amended, § 403(a)(3). These agencies confirm or tentatively nonconfirm whether the employee's documents are authentic, and whether the employee is authorized to work in the United States. *See* IIRIRA, as amended, § 403(a)(4). If a tentative nonconfirmation is issued, the employer must notify the employee, who may contest the result. *See id*. If an employee does not contest the tentative result within the statutorily prescribed period, the tentative nonconfirmation becomes a final nonconfirmation. *See id*. If the employee does contest it, the appropriate agencies undertake additional review and ultimately issue a final decision. *See id*. An employer may not take any adverse action against an employee until it receives a final nonconfirmation. *See id*. However, once a final nonconfirmation is received, an employer is expected to terminate the employee, or face sanctions.

With only a few exceptions, federal law makes the decision of whether to use E-Verify rather than the default I-9 process entirely voluntary. *See* IIRIRA, as amended, § 402(a). Federal government employers and certain employers previously found guilty of violating IRCA are currently required to use E-Verify; all other employers remain free to use the system of their choice. *See* IIRIRA, as amended, § 402(e). Significantly, in enacting IIRIRA,

> Congress specifically prohibited the Secretary of Homeland Security from requiring "any person or other entity to participate in [E-Verify]." *See* IIRIRA, as amended, § 402(a). Congress also directed the Secretary to publicize the "voluntary nature" of the program and to ensure that government representatives are available to "inform persons and other entities that seek information about [E-Verify] of [its] voluntary nature." IIRIRA, as amended, § 402(d).
>
> Those employers who elect to use E-Verify and actually do use the system to confirm an employee's authorization to work are entitled to a rebuttable presumption that they did not hire that employee knowing that s/he lacks authorization to work in this country. *See* IIRIRA, as amended, § 402(b)(1). Employers who elect to use E-Verify, but in practice continue to use the I-9 process, are not entitled to the E-Verify rebuttable presumption, but can still claim the I-9 affirmative defense. *See* IIRIRA, as amended, § 402(b)(2).

Lozano, 620 F.3d at 196-201 and nn. 21, 24 (emphasis in original; footnotes omitted except where other indicated; parallel Supreme Court citations omitted).

B. PLAINTIFFS' COMPLAINT

Plaintiffs filed this action against defendants seeking a court order declaring H.B. 56 unconstitutional and requesting that its enforcement be permanently enjoined. Count One of their Complaint alleges, "HB 56 is void in its entirety because it is a regulation of immigration, and therefore usurps powers constitutionally vested in the federal government exclusively." (Doc. 1 ¶ 340.)[6] Also, they allege that H.B. 56 "conflicts with federal laws,

[6]In response to defendants' Motion for a More Definite Statement, (doc. 36), the court ordered plaintiffs to file an Amended Complaint, (doc. 129). Plaintiffs filed their First Amended Complaint on September 16, 2011. (*See* doc. 131.) However, for purposes of deciding plaintiffs' Motion for Preliminary Injunction, (doc. 37), the court will refer to plaintiffs' original Complaint, (doc. 1).

regulations and policies, attempts to legislate in fields occupied by the federal government, imposes burdens and penalties on legal residents not authorized by and contrary to federal law, and unilaterally imposes burdens on the federal government's resources and processes . . . in violation of the Supremacy Clause." (*Id.* ¶ 341.)

In Count Two of the Complaint plaintiffs allege that H.B. 56 violates the Fourth Amendment because it "requires officers to seize, detain, and arrest individuals without reasonable suspicion or probable cause to believe a person has engaged in criminal activity in violation of the Fourth Amendment." (*Id.* ¶ 345.) According to plaintiffs, this Count challenges Sections 12, 18, 19, and 20 of H.B. 56. (Doc. 104-1 at 5.)[7]

Count Three of the Complaint alleges violations of the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs contend:

> 349. HB 56 impermissibly discriminates against non-citizens on the basis of alienage and against various classes of non-citizens on the basis of immigration status and deprives them of the equal protection of the laws within the meaning of the Fourteenth Amendment to the U.S. Constitution.
>
> 350. HB 56 authorizes impermissible discrimination by Alabama state and local officers and officials on the basis of race, ethnicity, alienage, national origin, and language.

(Doc. 1 ¶¶ 349-50.) Plaintiffs contend that Count Three challenges Sections 8, 10, 12, and 28. (Doc. 104-1 at 5.)

[7]References to page numbers in this Memorandum Opinion refer to the page numbers assigned to the document by the court's electronic filing system.

Count Four contains claims that H.B. 56 violates plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment – as depriving plaintiffs of their right to procedural due process and as unconstitutionally vague and overbroad. (Doc. 1 ¶¶ 354-56.) Plaintiffs contend that Count Four challenges Sections 12, 18, 19, and 20 on procedural due process grounds and Sections 10, 12, 13, and 30 on vagueness grounds. (Doc. 104-1 at 6.)

Count Five alleges that H.B. 56 violates the plaintiffs' First Amendment rights to free speech and to petition the government. They allege:

> 360. Section 11 of HB 56 violates the First Amendment right to free speech because it is a content-based restriction on speech relating to work and is impermissibly vague.
>
> 361. HB 56 violates the Petition Clause of the First Amendment by depriving persons in Alabama of the right to petition the government through court actions for redress of contract disputes and by prohibiting state officials and agencies from exercising discretion not to engage in immigration enforcement to the fullest extent of the law.

(Doc. 1 ¶¶ 360-61.) Plaintiffs contend that Count Five challenges Sections 5, 6, 27, and 30 as violating their right to petition and Section 11 as violating their right to free speech. (Doc. 104-1 at 6.)

In Count Six, plaintiffs allege:

> Section 27 of HB 56 unconstitutionally impairs the obligation of contracts by forbidding courts of the State of Alabama from enforcing "the terms, or otherwise regard as valid, any contract between a party and alien unlawfully present in the United States, within the meaning of HB 56, 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, and the performance of the contract required the alien to remain unlawfully present in the United States for more than 24 hours after the time the contract was

> entered into or performance could not reasonably be expected to occur without such remaining.

(Doc. 1 ¶ 365.)

Counts Seven and Eight allege violations of the Sixth Amendment. Count Seven alleges H.B. 56 violates the Confrontation Clause of the Sixth Amendment by prohibiting defendants in criminal cases under the Act "from confronting the witness who prepared the federal government verification, and the state court is prohibited from considering any evidence except for the federal government verification" as evidence of immigration status, a "central element" of the crime. (*Id.* ¶¶ 369-71.) Plaintiffs allege in Count Eight that H.B. 56 violates the Compulsory Process Clause of the Sixth Amendment because "the [criminal] defendant is prohibited from presenting a defense on the issue of whether he or she possesses lawful immigration status." (*Id.* ¶ 375.) Plaintiffs contend that Counts Seven and Eight raise challenges to Sections 10, 11, and 13. (Doc. 104-1 at 7-8.)

Count Nine alleges that H.B. 56 violates 42 U.S.C. § 1981 because it "deprives persons classified by Alabama officers and officials as 'alien[s] unlawfully present in the United States' of the rights enumerated in 42 U.S.C. § 1981" to make and enforce contracts. (Doc. 1 ¶¶ 378-79.) Plaintiffs contend that Count Nine challenges Sections 27 and 30. (Doc. 104-1 at 8.)

Plaintiffs seek certification of a class consisting of persons:

> (a) who are or will be subject to detention, arrest, or interrogation about their citizenship or immigration status pursuant to the provisions of HB 56; or

(b) who are or will be subject to unlawful detention pursuant to the provisions of HB 56; or

(c) who are or will be deterred from living, associating, or traveling with immigrants in Alabama because of the provisions of HB 56; or

(d) who are or will be excluded from state colleges or universities because of the provisions of HB 56; or

(e) who are or will be deterred from enrolling their children in public elementary or secondary school because of the provisions of HB 56; or

(f) who are or will be deterred from securing governmental services or governmental licenses or contracting with governmental agencies because of the provisions of HB 56; or

(g) who are or will be chilled from soliciting or speaking about work because of the provisions of HB 56; or

(h) who are or will be chilled from petitioning the government because of the provisions of HB 56; or

(i) who are or will be impaired from enforcing the rights guaranteed to them by 42 U.S.C. 1981 because of the provisions of HB 56; or

(j) who as a result of the criminal sections of HB 56 will be charged with a crime and will be impaired from receiving a fair criminal trial on the central element of immigration status because (i) the government will not be required to prove the element of immigration status beyond a reasonable doubt; (ii) the defendant will not be able to confront witnesses against him or her on the element of immigration status; and (iii) the defendant will not be able to introduce evidence in support of himself or herself on the element of immigration status.

(Doc. 1 ¶ 318.)

C. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs ask the court to "enjoin[ ] Defendants from enforcing [H.B. 56]," because the Act "is a blatantly unconstitutional state law that regulates immigration and will require Alabama state and local officers to violate core constitutional rights." (Doc. 37 at 10.) They contend, "The requested injunction is urgently needed to prevent this unconstitutional law from causing irreparable injury to Plaintiffs and countless other individuals." (*Id*.)

As grounds for their requested injunction, plaintiffs allege that they are likely to succeed on the merits of their claims because:

> 1. H.B. 56 and/or certain sections therein are preempted by federal immigration law and/or § 1981;
>
> 2. Sections 12 and 18-20 of H.B. 56 violate the Fourth Amendment;
>
> 3. Sections 8 and 28 violate the Equal Protection Clause of the Fourteenth Amendment;
>
> 4. Section 11 violates the First Amendment's protection of free expression; and
>
> 5. Sections 10(e), 11(e), and 13(h) violate the Confrontation Clause and the Compulsory Process Clause of the Sixth Amendment.

(*See generally* doc. 37.)

Plaintiffs also contend that they will suffer irreparable injury if H.B. 56 is enforced, that the balance of equities favors an injunction, and that an injunction will serve the public's interest. (*Id*. at 70, 77, 78.)

Defendants oppose the plaintiffs' Motion for Preliminary Injunction on every front.

III. DISCUSSION

A. H.B. 56 IN ITS ENTIRETY

Plaintiffs contend that H.B. 56 "violates the constitutional prohibition on state regulation of immigration because its express purpose and actual function is to control which classes of immigrants can enter and the conditions under which they can remain in Alabama – a brazen usurpation of the federal government's exclusive authority." (Doc. 37 at 19-20.) They argue, "The text of HB 56 as well as the legislative debates make clear that HB 56 is centrally concerned with immigration, and not with matters of traditional state control," and the purpose of the Act is "to expel undocumented immigrants from the State of Alabama." (*Id*. at 21, 22.)

1. Standing

Plaintiffs contend that all plaintiffs have standing to challenge H.B. 56 in its entirety. "A federal court has the obligation to review *sua sponte* whether it has subject matter jurisdiction under Article III's case-or-controversy requirement." *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1302 (11th Cir. 2011)(citing *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1242 (11th Cir. 2003)(citing *Juidice v. Vail*, 430 U.S. 327, 331 (1977))).

> In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. See *Lujan v. Defenders of Wildlife*,

> 504 U.S. 555, 559-560 (1992); *Los Angeles v. Lyons*, 461 U.S. 95, 111-112 (1983). This limitation "is founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). See *United States v. Richardson*, 418 U.S. 166, 179 (1974).
>
> The doctrine of standing is one of several doctrines that reflect this fundamental limitation. It requires federal courts to satisfy themselves that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." 422 U.S., at 498-499. He bears the burden of showing that he has standing for each type of relief sought. See *Lyons*, *supra*, at 105.

Summers v. Earth Island Inst., 129 S. Ct. 1142, 1148-49 (2009)(parallel citations omitted). Therefore, this court must determine, *inter alia*, whether plaintiffs have standing before proceeding.

"'At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for [at this stage a court must] presume that general allegations embrace those specific facts that are necessary to support the claim." *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1286 (11th Cir. 2010) (quoting *Lujan*, 504 U.S. at 561). (internal quotations omitted). "However, in determining subject matter jurisdiction [the court is] permitted to look at all of the evidence presented, including affidavits and testimony relating to a motion for a preliminary injunction." *Fla. Family Policy Council v. Freeman*, 561 F.3d 1246, 1253 (11th Cir. 2009)(citing *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947)). Also, the court notes, "'[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal'; it 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'"

Mulhall, 618 F.3d at 1286 (quoting *Warth*, 422 U.S. at 500 and *Flast v. Cohen*, 392 U.S. 83, 99 (1968))(internal citations omitted).

> To seek injunctive relief, a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Summers, 129 S. Ct. at 1149 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). "[A]n organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its 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 *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008)). (internal quotations omitted). Also, "[a]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 (11th Cir. 2006)(quoting *Friends of the Earth*, 528 U.S. at 181 (2000)). (internal quotations omitted). Every plaintiff need not have standing to assert every claim. The court has jurisdiction over a claim if at least one plaintiff has standing to assert the claim. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977).

"While true that 'it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights,' a plaintiff still must demonstrate 'an actual and well-founded fear that the law will be enforced against [him].'" *Dermer v. Miami-Dade County*, 599 F.3d 1217, 1220 (11th Cir. 2010)(quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) and *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)). "[I]n order to establish standing, the plaintiff must show that [1] he has an unambiguous intention [2] at a reasonably foreseeable time [3] to engage in a course of conduct arguably affected with a constitutional interest, but [4] proscribed by a statute or rule, *and* [5] that there is a credible threat of prosecution." *Bloedorn*, 631 F.3d at 1228 (citing *Pittman v. Cole*, 267 F.3d 1269, 1283-84 (11th Cir. 2001)) (numerical alterations added).

"Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate – as opposed to a merely conjectural or hypothetical – threat of *future* injury." *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994)(citing *Lyons*, 461 U.S. at 102). "In determining whether an injury is imminent, the law 'requires only that the anticipated injury occur within some fixed period of time in the future. Immediacy, in this context, means reasonably fixed and specific in time and not too far off.'" *Bloedorn*, 631 F.3d at 1228 (quoting *Am. Civil Liberties Union of Fla., Inc.*, 557 F.3d at 1193-94.)

"The fairly traceable element explores the causal connection between the challenged conduct and the alleged harm." *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1247 (11th Cir. 1998)(quoting *Federal Deposit Ins. Corp. v. Morley*, 867 F.2d 1381, 1388 (11th Cir.), *cert. denied*, 493 U.S. 819 (1989)). To satisfy this element of standing, "The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be indirect, but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions." *Vill. of Arlington Heights*, 429 U.S. at 260-61. "Essentially, 'this requirement focuses on whether the line of causation between the illegal conduct and injury is too attenuated.'" *Loggerhead Turtle*, 148 F.3d at 1247 (quoting *Morley*, 867 F.2d at 1388).

As to redressability, "It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." *Friends of the Earth*, 528 U.S. at 185-86.

In this case, plaintiffs seek to enjoin H.B. 56 in its entirety as violative of the Supremacy Clause; they allege:

> 340. HB 56 is void in its entirety because it is a regulation of immigration, and therefore usurps powers constitutionally vested in the federal government exclusively.
>
> 341. HB 56 also conflicts with federal laws, regulations and policies, attempts to legislate in fields occupied by the federal government, imposes burdens and penalties on legal residents not authorized by and contrary to

> federal law, and unilaterally imposes burdens on the federal government's resources and processes, each in violation of the Supremacy Clause.

(Doc. 1 ¶¶ 340-41.)

The court finds that none of the individual plaintiffs have standing to challenge H.B. 56 in its entirety. Although various plaintiffs may meet the requirements of standing as to specific sections of H.B. 56, including the requirement of an injury in fact, the court finds that no one plaintiff has standing to challenge each provision; therefore, no individual plaintiff has standing to challenge H.B. 56 in its entirety. *See CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F3d 1257, 1273 (11th Cir. 2006) (holding in a facial challenge to a city ordinance that injury under one provision is insufficient to confer standing on a plaintiff to challenge all provisions of an allegedly unconstitutional ordinance.)

Moreover, the court finds that these plaintiffs do not have associational standing. "Standing is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. Federal Election Com'n*, 554 U.S. 724, 734 (2008)(internal quotations and citations omitted). Therefore, a general reference to an injury engendered by H.B. 56 will not satisfy plaintiffs' obligation to show standing. A number of the plaintiff associations allege they have spent time discussing H.B. 56 with their members or those helped by their organizations. Although diversion of resources to fight or counteract a challenged law may be adequate to establish standing, the diversion of resources alleged in this case is only time spent discussing H.B. 56. The Eleventh Circuit has found standing based on an association's diversion of resources

when the diversion involved activities designed to counteract or compensate for the effects of the challenged law. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009)("Because it will divert resources from its regular activities to educate voters about the requirement of a photo identification ***and*** assist voters in obtaining free identification cards, the NAACP established an injury sufficient to confer standing to challenge the statute."); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008)("In this case, the diversion of personnel and time to help voters resolve matching problems effectively counteracts what would otherwise be Subsection 6's negation of the organizations' efforts to register voters. The net effect is that the average cost of registering each voter increases, and because plaintiffs cannot bring to bear limitless resources, their noneconomic goals will suffer. Therefore, plaintiffs presently have standing on their own behalf to seek relief."). This court finds that the general allegation that members of an associational plaintiff have spent time discussing H.B. 56 with their constituents, is not a concrete and real injury fairly traceable to H.B. 56 in its entirety.

Therefore, plaintiffs' Motion for a Preliminary Injunction to the extent they seek to enjoin H.B. 56 in its entirety will be denied for lack of standing.

Although a finding of no standing precludes consideration of plaintiffs' claim that H.B. 56 is preempted in its entirety, assuming the court is in error and an individual plaintiff or plaintiff association has standing to challenge H.B. 56 in its entirety, then, for the reasons set forth below, the court finds that plaintiffs have not demonstrated a likelihood of success

on the merits of their claim that H.B. 56, in its entirety, is preempted as a state law regulating immigration.

2. Preemption

Plaintiffs contend that H.B. 56 "violates the constitutional prohibition on state regulation of immigration because its express purpose and actual function is to control which classes of immigrants can enter and the conditions under which they can remain in Alabama – a brazen usurpation of the federal government's exclusive authority." (Doc. 37 at 19-20.) Specifically, they contend that H.B. 56 is preempted in its entirety because it is a regulation of immigration and a classification of aliens.

"It is a basic tenet of 'Our Federalism' that where federal and state law conflict, state law must yield." *Denson v. United States*, 574 F.3d 1318, 1345 (11th Cir. 2009). The Supremacy Clause of the U.S. Constitution provides that the Constitution, federal laws, and treaties are "the supreme Law of the Land . . ., any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. Const. art VI, cl. 2. "[T]he Supremacy Clause was designed to ensure that states do not 'retard, impede, burden, or in any manner control' the execution of federal law. *Denson*, 574 F.3d at 1345 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819); citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.)).

In certain instances, the Constitution itself can preempt state action in a field exclusively reserved for the federal government. *See DeCanas v. Bica*, 424 U.S. 351, 354-56

(1976)("[The constitutional] [p]ower to regulate immigration is unquestionably exclusively a federal power."), *superseded by statute*, Immigration Reform and Control Act, Pub. L. No. 99-605, 100 Stat. 3359, as recognized by *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1975 (2011). The Supremacy Clause also "vests Congress with the power to preempt state law." *Stephen v. Am. Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987)(per curiam); *see also Gibbons*, 22 U.S. at 211 ("[A]cts of the State Legislatures . . . [that] interfere with, or are contrary to the laws of Congress, made in pursuance of the [C]onstitution" are invalid under the Supremacy Clause.). This court's analysis of preemption claims –

> must be guided by two cornerstones of our pre-emption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 129 S. Ct. 1187, 1194-95 (2009)(quoting *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996))(internal quotations and citations omitted).

Preemption may be express or implied, *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)(O'Connor, J., plurality opinion), and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Express preemption occurs when the text of a federal law is explicit about is preemptive effects. *Browning*, 522

F.3d at 1167. Implied preemption falls into two categories: field preemption and conflict preemption. *Gade*, 505 U.S. at 98; *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Browning*, 522 F.3d at 1167. "Field preemption" exists when

> Congress' intent to supercede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983)(internal quotations omitted). "Conflict preemption" occurs when "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132,142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The "categories of [implied] preemption are not 'rigidly distinct,'" and, therefore, "field pre-emption may be understood as a species of conflict pre-emption." *Crosby*, 530 U.S. at 373 n.6 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)).

a. Regulation of Immigration

Plaintiffs contend, "HB 56 should be preliminarily enjoined in its entirety because Plaintiffs are likely to succeed on the merits of their claim that the entire enactment is a state law attempting to regulate immigration. . . . To withstand constitutional scrutiny, a state

law relating to immigration must primarily address legitimate local concerns and have only a 'purely speculative and indirect impact on immigration.'" (Doc. 37 at 19 [quoting *DeCanas*, 424 U.S. at 355].)

The Supreme Court has "long recognized the preeminent role of the Federal Government with respect to the regulation of aliens within our borders." *Toll v. Moreno*, 458 U.S. 1, 10 (1982). "Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization,' U.S. Const., [a]rt. I, § 8, cl. 4[;] its power '[t]o regulate Commerce with foreign Nations', *id.*, cl. 3[;] and its broad authority over foreign affairs." *Toll*, 458 U.S. at 10. "The National Government has 'broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.'" *Graham v. Richardson*, 403 U.S. 365, 377 (1971)(quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948)).

In *DeCanas*, the Supreme Court held that a California statute that prohibited employers from knowingly employing aliens not entitled to lawful residence in the United States if such employment would have an adverse impact on lawful resident workers was not preempted by federal law. 424 U.S. at 353-54. The Court recognized that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *Id.* at 354. However, it noted that it had "never held that ***every*** state enactment which in any way deals with aliens

is a ***regulation of immigration*** and thus *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355 (emphasis added). A "regulation of immigration," the Court explained, "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.* Therefore, "standing alone, the fact that aliens are the subject of a state statute does not render [the state statute] a regulation of immigration." *Id.*

Therefore, the Court found that the California statute was not a regulation of immigration. *Id.* at 355-56. To the contrary, the *DeCanas* Court found that California "sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country." *Id.* at 355. The Court further recognized that "even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration . . . ." *Id.* at 355-56. The fact that the California statute had adopted federal standards, which saved it from becoming a "constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve," was essential to the Court's decision. *Id.* at 356. "The importance of this distinction is clear because the Constitution itself prohibits Congress from authorizing or approving a scheme under which states create their own standards to assess an alien's immigration status . . . ." *Equal Access Educ. v. Merten,* 305 F. Supp. 2d 585, 602 (E.D. Va. 2004).

Plaintiffs argue that H.B. 56 is a regulation of immigration; they contend:

> The text of HB 56 as well as the legislative debates make clear that HB 56 is centrally concerned with immigration, and not with matters of traditional state control. The preamble to HB 56 states that it is a law "[r]elating to illegal immigration" and that its purposes include the regulation of documents that immigrants must carry, the employment of immigrants, the classification of immigrants as "lawfully present" or not, and the punishment of perceived violations of immigration law.
>
> The legislative history also demonstrates that HB 56 is intended to expel undocumented immigrants from the State of Alabama. The original bill arose through a "Joint Interim Patriotic Immigration Commission" created by the Alabama legislature in 2007 to address the "unprecedented influx of non-English speaking legal and illegal immigrants." Ex. 42-I, State of Alabama, Joint Interim Patriotic Immigration Commission Report at 1 (Feb. 13, 2008). The Commission made sweeping recommendations to the Alabama legislature on how to regulate immigration by limiting access to public education, benefits, and medical services, as well as by making law enforcement policies more punitive and employer hiring practices more restrictive – all expressly for the purpose of discouraging illegal immigration. *Id*. at 8-11. One of HB 56's two primary drafters and sponsors, Representative Hammon, stated that the bill was based on the Commission's recommendations. Ex. 42-J, Transcript of April 5, 2011 House Debate on HB 56 ("April 5 Debate") at 24:39-43.
>
> Legislative supporters of HB 56 expressed disagreement with federal immigration policy and their intent that, with HB 56, the State of Alabama would supplant the federal government as the enforcer and regulator of immigration in Alabama. Representative Hammon repeatedly stated that the federal immigration system is "broken" and that "this issue [of immigration enforcement] is now the responsibility of the State of Alabama and not the federal government." April 5 Debate at 1:12-14, 7:35-42, 73:44-74:1, 86:33-35. Other legislative supporters, including Senators Holley and Scofield and Representative Rich, expressed similar views that the State of Alabama should enact a law to regulate immigrants and to expel and deter undocumented immigrants from the State. April 5 Debate at 16:34-43 (Rep. Rich); Ex. 42-K, Transcript of April 21, 2011 Senate Debate on SB 256 at 54:9-24 (Sen. Schofield); 77:23-40 (Sen. Holley). Specifically, as Representative Hammon stated, HB 56 is intended to implement an Alabama

> state immigration policy of "attacking ***every aspect*** of an illegal immigrant's life . . . so they will deport themselves." April 5 Debate at 9:3-8 (emphasis added).

(Doc. 37 at 21-23 [emphasis in original; footnotes omitted].)

As a matter of historical fact, anti-illegal immigrant sentiment and frustration with federal immigration policies has driven the enactment of H.B. 56. Nevertheless, any determination of whether H.B. 56 is preempted as a state regulation of immigration must be based on the language of the Act alone and not the motivation for its enactment.

Based on the lanaguage of H.B. 56, the court finds it is not a regulation of immigration as defined in *DeCanas*. H.B. 56 does not determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas*, 424 U.S. at 355. It does not create standards for determining who is and is not in this country legally; rather, it repeatedly defers to federal verification of an alien's lawful presence.[8] *See*, *e.g.*, H.B. 56 § 3(10)("A person shall be regarded as an alien unlawfully present in the United States only if the person's unlawful immigration status has been verified by the federal government pursuant to 8 U.S.C. § 1373(c)); H.B. 56 § 10(d)("This section does not apply to a person who maintains authorization from the federal government to be present in the United States."). The fact that H.B. 56 is an act "[r]elating to illegal immigration," H.B. 56, Preamble, does not make it "a constitutionally proscribed regulation of immigration" under *DeCanas*, 424 U.S. at 356.

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[8]The court notes that § 8 of H.B. 56 does not defer to federal verification.

Therefore, if any plaintiff possessed standing to pursue this claim, the court would find that plaintiffs have not demonstrated a likelihood of success on the merits of their claim that H.B. 56, in its entirety, is preempted as a state law regulating immigration.

b. Classification of Aliens

Plaintiffs argue, "HB 56 is fundamentally at odds with federal immigration law in its premise that there is a clearly defined category of immigrants who are clearly removable or 'unlawfully present' and who may be subjected to state-law penalties and burdens." (Doc. 37 at 28.) The court notes, "The States enjoy no power with respect to the classification of aliens." *Plyler v. Doe,* 457 U.S. 202, 225 (1982). The power to classify aliens is "committed to the political branches of the Federal Government." *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976))(quotations omitted). "Although it is a routine and normally legitimate part of the business of the Federal Government to classify on the basis of alien status, and to take into account the character of the relationship between the alien and this country, only rarely are such matters relevant to legislation by a State." *Id.* (citations and quotations omitted).

Provisions of H.B. 56 employ the phrases "unlawfully present in the United States," "not lawfully present in the United States," and "lawfully present in the United States." *See*, *e.g.*, H.B. 56 §§ 3(10), 5(d), 6(d), 7(b), 8, 10(a), 12(a), 13(a)(4), 27(a), 28(a)(2). Plaintiffs argue that H.B. 56 in its entirety is preempted because it imposes "state-created penalties and burdens – including criminal penalties – by using federal tools that are expressly

contraindicated for such purposes." (Doc. 37 at 31.) Specifically, they argue that "verifications under 8 U.S.C. § 1373 [referred to in H.B. 56 § 3(10) and other sections], which are carried out through the database checks by the [Department of Homeland Security's] Law Enforcement Support Center . . . 'do not always provide a definitive answer as to an alien's immigration status,' and will often generate 'no match' notices that cannot be used to conclusively determine status." (*Id*. at 30 [citing doc. 37-42 at 11, 14-15].) Also, the SAVE database, referred to in H.B. 56 § 30(c), was "expressly not designed to make 'a finding of fact or conclusion of law that [an] individual is not lawfully present.'" (*Id*. at 30-31 [citing 65 Fed. Reg. 58301, 58302 (Sept. 28, 2000)].) Plaintiffs argue, "Under federal law, a noncitizen's immigration status is governed by numerous sections of the INA; turns on complex legal questions, myriad individualized factors, and in many cases, the exercise of administrative discretion; is fluid and subject to change over time; and ultimately is decided through an administrative adjudication process subject to federal court review." (Doc. 37 at 29 [citing doc. 37-42 at 89-91].) Therefore, plaintiffs argue that H.B. 56, which relies on verification from the federal government of unlawful presence – despite the fact that the federal immigration system does not have a system for definitively determining unlawful presence – imposes burdens and penalties on aliens and, conflicts with federal immigration law. *Id*. at 31.

The court finds H.B. 56 is not conflict preempted because it relies on federal tools to determine an alien's immigration status. In *Whiting*, the Supreme Court expressly approved

an Arizona statute's deferential approach for determining an alien's status according to federal law 131 S. Ct. 1968. The Chamber of Commerce had argued that Arizona's licensing law was preempted because it conflicted with the federal system. *Id.* at 1981. The Supreme Court disagreed, noting that "Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws." *Id.* The Court stated that because "Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Id.* The Court discussed in detail the approach used in the Arizona statute, under which Arizona gave deference to a federal determination of an alien's immigration status. The Court stated:

> And here Arizona went the extra mile in ensuring that its law closely tracks IRCA's provisions in all material respects. The Arizona law begins by adopting the federal definition of who qualifies as an "unauthorized alien." Compare 8 U.S.C. § 1324a(h)(3) (an "unauthorized alien" is an alien not "lawfully admitted for permanent residence" or not otherwise authorized by federal law to be employed) with Ariz. Rev. Stat. Ann. § 23–211(11) (adopting the federal definition of "unauthorized alien"); see [*DeCanas*], 424 U.S., at 363 (parallel citations omitted) (finding no preemption of state law that operates "only with respect to individuals whom the Federal Government has already declared cannot work in this country").
>
> Not only that, the Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and "shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States." § 23–212(B). What is more, a state court "shall consider ***only*** the federal government's determination" when deciding "whether an employee is an unauthorized alien." § 23–212(H) (emphasis added). As a result, there can by definition be no conflict between state and federal law as to worker authorization, either at the investigatory or adjudicatory stage.

Id. (emphasis in original; parallel citations and footnote omitted).[9]

Here, Alabama also ensured that its law closely tracked federal law with respect to the determination of an alien's status. *See id.* Like the Arizona law in *Whiting*, H.B. 56 repeatedly defers to a federal determination of whether an "alien [is] unlawfully present in the United States." *See*, *e.g.*, H.B. 56 §§ 3(10), 10(b), 11(b). H.B. 56 expressly and repeatedly provides that "[n]o officer of this state or any political subdivision of this state shall attempt to independently make a final determination of an alien's immigration status." *Id.* § 3(10); *see also id*. §§ 11(b) 12(c). To the extent Alabama has the authority to regulate the areas covered by the provisions of H.B. 56, "it stands to reason that Congress did not intend to prevent . . . [Alabama] from using appropriate tools to exercise that authority." *See Whiting*, 131 S. Ct. at 1981.

For these reasons, assuming plaintiffs have standing to pursue this claim, the court would find that plaintiffs have not demonstrated a likelihood of success on the merits of their

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[9]The Supreme Court noted that the Arizona statute gave the employer the opportunity to rebut the federal determination of an alien's unlawful status. *Whiting*, 131 S. Ct. at 1981 n.7 ("After specifying that a state court may consider 'only' the federal determination, the Arizona law goes on to provide that the federal determination is 'a rebuttable presumption of the employee's lawful status.' Arizona explains that this provision does not permit the State to establish unlawful status apart from the federal determination – the provision could hardly do that, given the foregoing. It instead operates to 'ensur[e] that the *employer* has an opportunity to rebut the evidence presented to establish a worker's unlawful status.' Only in that sense is the federal determination a 'rebuttable presumption.' Giving an employer a chance to show that it did not break the state law certainly does not place the Arizona regime in conflict with federal law.")(internal citations omitted). H.B. 56 does not allow an individual to rebut the federal verification of unlawful presence.

claim that H.B. 56 in its entirety is preempted because it creates alien classifications, employs terminology unfamiliar to federal law, or relies on federal tools to determine an alien's immigration status.

Plaintiffs' Motion for a Preliminary Injunction enjoining the implementation of H.B. 56 in its entirety on the grounds that it is preempted as a regulation of immigration or a classification of aliens will be denied.

B. SECTION 8

Section 8 of H.B. 56 provides:

> An alien who is not lawfully present in the United States shall not be permitted to enroll in or attend any public postsecondary education institution in this state. An alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq. For the purposes of this section, a public postsecondary education institution officer may seek federal verification of an alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A public postsecondary education institution officer or official shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States. Except as otherwise provided by law, an alien who is not lawfully present in the United States shall not be eligible for any postsecondary education benefit, including, but not limited to, scholarships, grants, or financial aid.

H.B. 56 § 8. Although the first sentence of Section 8 bars "[a]n alien who is not lawfully present in the United States" from enrolling or attending an Alabama "public postsecondary education institution," the second sentence limits attendance at those institutions to aliens that

"possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq."[10] *Id.*

1. Standing

Plaintiff Esayas Haile is lawfully present in the United States as a refugee from Eritrea. (Doc. 1 ¶ 109; doc. 37-23 ¶ 2-3.) However, because he is classified as a refugee, he has neither a nonimmigrant visa nor status as a lawful permanent resident. (Doc. 1 ¶ 109; doc. 37-23 ¶ 3.) He intends to enroll at a state public post-secondary institution – Gadsden State Community College. (Doc. 1 ¶ 109.) However, "Section 8 of HB 56 will prohibit Plaintiff Haile from studying at Gadsden State or any similar public postsecondary institution because he is not a lawful permanent resident or a holder of a nonimmigrant visa." (*Id.*)

The court finds that Haile has standing to assert the claims against Section 8. His injury is imminent and concrete and it is traceable to H.B. 56 § 8. By its terms Section 8 would prevent Haile from attending Gadsden State despite the fact that he is lawfully present. Moreover, it is likely that this injury would be redressed by a favorable judgment. Therefore, the court finds that Haile has standing to challenge Section 8.

2. Preemption

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[10]"The term 'nonimmigrant visa' means a visa properly issued to an alien as an eligible nonimmigrant by a competent officer as provided in [the INS]. 8 U.S.C. § 1101(a)(26). Eligible nonimmigrants include, *inter alia*, foreign diplomats, students, and vacationers. *See id.* (a)(15)(A), (B), (F). Generally, "nonimmigrants" are aliens whose stay in the United States is intended to be temporary. The terms does not include refugees and asylum seekers. *Id.* (a)(15)(A)-(V); 8 U.S.C. § 1157; 8 U.S.C. § 1158.

Plaintiffs seek an injunction preventing the implementation of Section 8 of H.B. 56 on the ground that Section 8 creates a state definition of "not lawfully present." (*See* doc. 37 at 28 ["Other provisions of HB 56 include . . . state immigration definitions, such as Section 8 (creating a state definition of 'lawfully present' noncitizens for purposes of eligibility for public higher education that includes only [legal permanent residents] and non-immigrant visa holders) . . . ."].) In other words, they claim that Section 8 creates a state classification of aliens.[11]

The law is well established that "The States enjoy no power with respect to the classification of aliens. This power is 'committed to the political branches of the Federal Government.'" *Plyler*, 457 U.S. at 225 (1982)(citing *Hines*, 312 U.S. 52 (1941); quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

The first two sentences of Section 8 appear to define "an alien who is not lawfully present" for purposes of enrolling or attending Alabama's postsecondary education institutions –

> An alien who is not lawfully present in the United States shall not be permitted to enroll in or attend any public postsecondary education institution in this state. An alien attending any public postsecondary institution in this state ***must***

[11]Plaintiffs correctly note that "Section 8 excludes noncitizens whom the federal government has authorized to remain in the United States but who do not hold [legal permanent resident] status or a 'nonimmigrant visa' - including *inter alia* those whom the federal government has granted asylum, refugee status, Temporary Protected Status because of environmental disaster or armed conflict in their home countries or deferred action." (Doc. 37 at 13.)

> either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq.

H.B. 56 § 8 (emphasis added). The court notes that no other provision of H.B. 56 seeks to similarly limit the definition of a lawfully-present alien to include only aliens that possess lawful permanent residence or an appropriate nonimmigrant visa. Therefore, the court presumes the Alabama legislature intended to so limit the class of lawfully-present aliens allowed to attend to Alabama's public postsecondary education institutions. *See Russello v. United States*, 464 U.S. 16, 23 (1983)("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally ***presumed*** that Congress acts ***intentionally*** and ***purposely*** in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))) (emphasis added; internal quotations and alterations omitted); *see also Trott v. Brinks, Inc.*, 972 So. 2d 81, 85 (Ala. 2007)("'When the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were ***intended***.... The use of different terms within related statutes generally implies that different meanings were ***intended***.' We presume that the use of two different words indicates that the legislature intended the two words be treated differently." (quoting 2A Norman Singer, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 194 (6th ed. 2000))) (emphasis added; internal citation and footnote omitted); *House v. Cullman County*, 593 So. 2d 69, 75 (Ala. 1992)("Indeed, where there is a 'material alteration in the language used in the different

clauses, it is to be inferred' that the alterations were ***not inadvertent***." (quoting *Lehman, Durr & Co. v. Robinson*, 59 Ala. 219, 235 (1877)))(emphasis added).

Defendants contend that this court should defer to their interpretation of Section 8. They argue:

> As set out in the first sentence of Section 8, the Legislature's focus was on excluding illegal aliens from public postsecondary institutions. Section 8, doc. 1-2 at 24 ("An alien who is not lawfully present in the United States shall not be permitted to enroll in or attend"). The second sentence then provides that an immigrant student "possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, *et seq*. . . ." Section 8, doc. 1-2 at 24.
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> If one reads the second sentence as limiting the class of lawfully present aliens who may attend public postsecondary institutions to only those in possession of the specified documents, as the Plaintiffs do, the two sentences are in tension with each other: the first would recognize that lawfully present aliens may attend public postsecondary institutions, but the second would seek to deny a subclass of those lawfully present aliens the right just recognized. This is not what the Legislature was doing.
>
> Instead, the first sentence of Section 8 recognizes that lawfully present aliens may attend public postsecondary institutions and the second sentence requires proof of lawful presence. Indeed, the reference to 8 U.S.C. § 1101, *et seq*. is a broad one; it encompasses the entire Immigration and Nationality Act (INA). *Cf.* Plaintiff's Motion for Preliminary Injunction in *United States v. Alabama*, doc. 2 at 15.
>
> Accordingly, the State Defendants read Section 8 to draw a line to the exclusion only of illegal aliens; Section 8 draws no line among lawfully present aliens. [Footnote] This is the way that Section 8 will be implemented

> by the Alabama Department of Postsecondary Education.[12] *See* Exhibit 4 (Letter from Chancellor Hill). . . .
>
> > [Footnote] It is important that this argument is being made by the Alabama Attorney General. As the chief legal officer of the State, the positions the Attorney General takes in litigation are binding on State officials. *Chapman v. Gooden*, 974 So. 2d 972, 988 (Ala. 2007). Moreover, "[i]n evaluating a facial challenge to a [S]tate law, a federal court must, of course, consider any limiting construction that a [S]tate court or enforcement agency has proffered." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*[,] 455 U.S. 489, 494 n.5 (1982). Additionally, of course, certification to the Alabama Supreme Court is an option.

(Doc. 82 at 116-17 and n. 50 [footnote added].)

"In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Kolender v. Lawson*, 461 U.S. 352, 355 (1983)(quoting *Vill. of Hoffman Estates*, 455 U.S. at 494 n.5). Nevertheless, the court should not defer to defendants' limiting construction if

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[12]Defendant Freida Hill, Chancellor of the Alabama Department of Postsecondary Education, sent a Memorandum to the presidents of the Alabama community colleges, in which she wrote:

> The categories of aliens lawfully present in the United States that most frequently attend our institutions are lawful permanent residents (sometimes called "green card holders") and holders of non-immigrant visas that permit study at an institution of postsecondary education. However, in addition to these categories, there are some categories of aliens who are lawfully present in the United States who are not lawful permanent residents and who are not in possession of a non-immigrant visa. Aliens in these categories are also eligible to enroll in Alabama's postsecondary educational institutions.

(Doc. 82-4 at 2 [underlining in original].)

the language of Section 8 is "plain and its meaning unambiguous." *City of Houston v. Hill*, 482 U.S. 451, 468 (1987). Indeed, deference to the state's interpretation is only appropriate when the language of the statute at issue leaves room for the state's proposed interpretation. *See Stenberg v. Carhart*, 530 U.S. 914, 945 (2000)("Certification of a question [to the state supreme court] (or abstention) is appropriate only where the statute is 'fairly susceptible' to a narrowing construction." (citing *City of Houston*, 482 U.S. at 468-71)). The constitutionality of Section 8 does not "turn upon a choice between one or several alternative meanings." *City of Houston*, 482 U.S. at 468 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964)).

Defendants propose to enforce Section 8 without regard to the second sentence requiring that "[a]n alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq." H.B. 56 § 8. They propose interpreting Section 8 to allow all lawfully-present aliens to enroll in Alabama's postsecondary educational institutions, despite the fact that Section 8 requires lawful permanent status or a nonimmigrant visa in order for an alien to attend an Alabama postsecondary institution. (*See* doc. 82-4 at 2.) This court may "not uphold an unconstitutional statute merely because the Government promised to use it responsibly," especially when the promised responsible use is contrary to the plain and unambiguous language of the statute. *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010)(citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001)). The

unambiguous language of Section 8 and the accepted rules of statutory construction do not leave room for the limiting construction that eliminates the second sentence. *See Smiley v. Citibank*, 517 U.S. 735, 739 (1996)(citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)); *see also Presley v. Etowah County Comm'n*, 502 U.S. 491, 508-09 (1992); *Trott*, 972 So. 2d at 85.

> When a court reviews an agency's construction [or, in this case, the Alabama Attorney General's interpretation] of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. ***If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress***. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43 (emphasis added); *see also Joiner v. Med. Ctr. E., Inc.*, 709 So. 2d 1209, 1218 (Ala. 1998); *Noonan v. East-West Beltline, Inc.*, 487 So. 2d 237, 239 (Ala. 1986); *Jefferson County v. Dockerty*, 30 So. 2d 469, 474 (Ala. Ct. App. 1947). Nothing in Alabama or federal law allows the court to adopt defendants' proposed limiting construction of Section 8 – to ignore the second sentence – which is contrary to the plain and unambiguous language of the statute.

Section 8 closes Alabama's public postsecondary institutions to aliens who are not lawfully present in the United States ***and*** to lawfully-present aliens who do not have lawful permanent resident status or a nonimmigration visa. This "classification" of aliens for

purposes of determining who is eligible to attend Alabama's public postsecondary institutions is preempted as only Congress may classify aliens. Therefore, Section 8 is preempted.

The court finds plaintiffs have demonstrated a likelihood of success as to their claim that Section 8 is an unconstitutional classification of aliens and is preempted by federal law.[13] The court also finds that plaintiff Haile will suffer an irreparable injury if Alabama is allowed to classify him as "not lawfully present" for purposes of enrolling and/or attending an Alabama public postsecondary education institution. Moreover, this threatened injury is outweighed by any damage enjoining Section 8 may cause defendants and the injunction of a probably preempted statute is not adverse to public interest.

C. SECTION 10

Section 10 provides:

> (a) In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), and the person is an alien unlawfully present in the United States.

[13] As discussed *supra*, Alabama may adopt a definition of "not lawfully present" aliens that follows federal law. Moreover, the court notes that Alabama may, without conflicting with Congress's classification of aliens, exclude unlawfully-present aliens, as determined by federal law, from enrolling in and attending its public postsecondary educational institutions. *See Equal Access Education v. Merten*, 305 F. Supp. 2d at 601-08. However, it cannot, without conflicting with federal law, exclude unlawfully-present aliens from its postsecondary institutions if its definition of unlawfully-present aliens conflicts with Congress's definition.

(b) In the enforcement of this section, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A law enforcement officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.

(c) A law enforcement official or agency of this state or a county, city, or other political subdivision of this state may not consider race, color, or national origin in the enforcement of this section except to the extent permitted by the United States Constitution and the Constitution of Alabama of 1901.

(d) This section does not apply to a person who maintains authorization from the federal government to be present in the United States.

(e) Any record that relates to the immigration status of a person is admissible in any court of this state without further foundation or testimony from a custodian of records if the record is certified as authentic by the federal government agency that is responsible for maintaining the record. A verification of an alien's immigration status received from the federal government pursuant to 8 U.S.C. § 1373(c) shall constitute proof of that alien's status. A court of this state shall consider only the federal government's verification in determining whether an alien is lawfully present in the United States.

(f) An alien unlawfully present in the United States who is in violation of this section shall be guilty of a Class C misdemeanor and subject to a fine of not more than one hundred dollars ($100) and not more than 30 days in jail.

(g) A court shall collect the assessments prescribed in subsection (f) and remit 50 percent of the assessments to the general fund of the local government where the person was apprehended to be earmarked for law enforcement purposes, 25 percent of the assessments to the Alabama Department of Homeland Security, and 25 percent of the assessments to the Department of Public Safety.

H.B. 56 § 10.

Section 10(a) of H.B. 56 creates a state-law crime based on an unlawfully-present alien's "willful failure to complete or carry an alien registration document." H.B. 56 § 10(a).

Subsection (e) defines court procedures for prosecutions of violations under this sections. The procedures set forth in Section 10(e) are identical to Section 11(e) and Section 13(h).

1. Standing

The court finds that plaintiff John Doe #1 has standing to challenge Section 10 of H.B. 56 through Count One, based on the Supremacy Clause, and Counts Seven and Eight, based on the Confrontation Clause and the Compulsory Process Clause of the Sixth Amendment. Plaintiff, John Doe #1, is a minor in the process of being adopted by Webster, an American citizen, and he will not be able to apply for registration documents and lawful immigration status until two years after the adoption process is complete. (Doc. 37-31 at 6, doc. 37-13 at 2.3.) Therefore, he will be considered an unlawfully-present alien under H.B. 56 and subject to arrest under Section 10(a) for failing to carry registration documents and being an unlawfully-present alien. This injury is real and imminent; fairly traceable to defendants; and would be redressed by an injunction enjoining the enforcement of H.B. 56 § 10(a).

Plaintiffs also challenge § 10(e) on the ground that the procedural rules set forth therein violate the Confrontation Clause and the Compulsory Process Clause of the Sixth Amendment. Defendants argue that any injury with regard to a violation of plaintiffs' Sixth Amendment rights is too speculative to support a cause of action; they argue:

> Plaintiffs' claims are actually a step removed from the challenges that required a genuine or credible threat.
>
> Here, we deal with layers of speculation. First, the Plaintiffs speculate that they will be arrested. Then, they take as a given their view of the Sixth Amendment's requirements and speculate that the State courts, during their

> prosecution, will improperly reject their views. Only when these circumstances converge are the Plaintiffs positioned to suffer an infringement of the Sixth Amendment rights. The mere fact of violating any of the new criminal provisions in Act No. 2011-535 is not enough. Even adding an arrest for those violations is not enough. Injury can only befall the Plaintiffs if the State courts wherein their criminal charges are resolved wrongly reject their Sixth Amendment arguments.

(Doc. 82 at 148.)

The court notes that Section 6(b) provides, "All state officials, agencies, and personnel, including, but not limited to, an officer of a court of this state, shall fully comply with and, to the full extent permitted by law, support the enforcement of this act." Also, the record leaves no doubt (1) John Doe #1 will remain in Alabama after the effective date of H.B. 56, and (2) he will violate Section 10(a) because he will not be allowed to register with the federal government. Because of his status as a minor and because he is unable to change his unlawfully-present status until two years after his adoption is complete, the court finds his unlawfully-present status is involuntary and he cannot avoid the "future 'exposure to the challenged course of conduct' in which [defendants] allegedly engage[ ]." *Church v. City of Huntsville,* 30 F.3d 1332, 1338 (11th Cir. 1994)(quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)). Because all law enforcement officials must enforce H.B. 56 to its fullest extent, any encounter with law enforcement officials necessarily will result in the prosecution of John Doe #1 for violating Section 10(a).

Therefore, the court finds the threat of prosecution for violating Section 10(a) is real and imminent, fairly traceable to defendants; and plaintiffs' allegations based on the Sixth Amendment would be redressed by an injunction enjoining the enforcement of Section 10(e).

Therefore, the court finds that John Doe #1 has standing to bring Counts One, Seven, and Eight, challenging Section 10(a).

2. Preemption

For the reasons set forth in the court's Memorandum Opinion denying the United States's Motion for Preliminary Injunction, *United States v. Alabama*, Case No. 2:11-CV-2746-SLB, doc. 93, seeking to enjoin Section 10(a) on preemption grounds, the court finds plaintiff's Motion for Preliminary Injunction is due to be denied as to Section 10(a).

3. Sixth Amendment – Confrontation Clause and Compulsory Process Clause – Sections 10(e), 11(e), and 13(h).

Plaintiffs contend that Sections 10(e), 11(e), and 13(h) of H.B. 56 violate the Confrontation Clause (accused has the right "to be confronted with the witnesses against him") and the Compulsory Process Clause (accused has the right "to have compulsory process for obtaining witnesses in his favor") of the Sixth Amendment.[14] They contend:

---

[14]The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

(continued...)

> HB 56 dramatically and unconstitutionally dictates the manner in which evidence is presented and guilt is determined for the new state crimes it creates. For the crimes of failing to register, soliciting work and harboring, transporting, encouraging/inducing, and renting, immigration status or work authorization status is a central element. HB 56 §§ 10(a), 11(a), 13(a)(1)-(4). The law restricts how this fundamental element can be proven, and in the process violates the Confrontation Clause and Compulsory Process Clause of the Sixth Amendment.

(Doc. 37 at 67.)

Pursuant to H.B. 56, the fact of unlawful presence is "determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c)."[15] H.B. 56 § 10(b); *see also id*. §§ 11(b), (g). The law also provides:

> Any record that relates to the immigration status of a person is admissible in any court of this state without further foundation or testimony from a custodian of records if the record is certified as authentic by the federal government agency that is responsible for maintaining the record. A verification of an alien's immigration status received from the federal government pursuant to 8 U.S.C. § 1373(c) shall constitute proof of that alien's status. A court of this

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[14](...continued)
> accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his [defense].

U.S. Const., amend. VI.

[15]Section 1373(c) states:

> The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

8 U.S.C. § 1373(c).

> state shall consider ***only*** the federal government's verification in determining whether an alien is lawfully present in the United States.

Id. § 10(e)(emphasis added); *see also id*. §§, 11(e), and 13(h).

a. Confrontation Clause

"The Confrontation Clause prohibits the admission of testimonial hearsay unless the declarant is unavailable and there was a prior opportunity for cross-examination." *United States v. Mendez*, 514 F.3d 1035, 1043 (10th Cir. 2008)(citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)). Sections 10(e), 11(e), and 13(h) provide that the verification of immigration status from the federal government, if "certified," may be admitted into evidence "without further foundation or testimony from a custodian of records." H.B. 56 §§ 10(e), 11(e), 13(h). Plaintiffs contend that this violates the Confrontation Clause.

The courts that have addressed the issue have held that immigration files and records are admissible as public records because such records are "routinely completed by Customs and Border Patrol agents in the course of their non-adversarial duties, not in the course of preparing for a criminal prosecution." *United States v. Caraballo*, 595 F.3d 1214, 1226 (11th Cir. 2010); *see Mendez*, 514 F.3d at 1044 ("The ICE database, containing records of requests for permission to reenter, is a public record."). Therefore, such files and records are not ***testimonial*** statements subject to a defendant's Confrontation Clause rights. *Caraballo*, 595 F.3d at 1229 (citing *Davis v. Washington*, 547 U.S. 813, 828, 830 (2006)); *Mendez*, 514 F.3d at 1045 ("We therefore hold the ICE database is not testimonial and not subject to the strictures of the Confrontation Clause."). Therefore, admission of such certified records and

files without requiring the accused to have the opportunity to cross examine the creator of these records and files does not violate the Confrontation Clause.

However, the Supreme Court has recently noted, in *dicta*, that a person certifying that no record was found is "subject to confrontation." The Court held:

> A clerk could by affidavit ***authenticate*** or provide a copy of an otherwise admissible record, but could not do what the analysts did here: ***create*** a record for the sole purpose of providing evidence against a defendant.
>
> Far more probative here are those cases in which the prosecution sought to admit into evidence a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it. . . . [T]he clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the ***nonexistence*** of the record for which the clerk searched . . . . [Under these circumstances], ***the clerk was nonetheless subject to confrontation***.

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2539 (2009) (emphasis added; internal footnotes and original emphasis omitted). Circuit courts, following *Melendez-Diaz,* have held that an accused has the right to confront the person who prepares a "CNR" – certificate of nonexistent record – that is used to establish a fact, such as unlawful presence, that is "necessary to convict." *See United States v. Martinez-Rios*, 595 F.3d 581, 583-84, 586 (5th Cir. 2010)(accused had right to confront clerk who prepared CNR that was used to "establish that there is no record indicating that the alien had obtained government consent to reapply for admission – a fact necessary to convict" under 8 U.S.C. § 1326(a)); *see also Gov't of V.I. v. Gumbs*, No. 10-3342, 2011 WL 1667438, *3 (3d Cir. May 4, 2011)("[T]he *Melendez–Diaz* Court analogized the certificates of analysis to CNRs, and as a result, the Second, Fifth,

Ninth, and D.C. Circuits have held that the Confrontation Clause applies to CNRs, as the certificates are offered as substantive evidence against a defendant whose guilt depends on the document's accuracy." (citing *United States v. Madarikan*, 356 Fed. Appx. 532 (2d Cir. 2009); *Martinez–Rios*, 595 F.3d 581; *United States v. Orozco–Acosta*, 607 F.3d 1156 (9th Cir. 2010); *Tabaka v. District of Columbia*, 976 A.2d 173 (D.C. 2009))).

Therefore, to the extent Sections 10(e), 11(e), and 13(h) of H.B. 56 are interpreted as allowing a defendant to be convicted based on a CNR without testimony from the clerk or officer preparing the report, these sections violate the Confrontation Clause. However, as defendants argue, no one has been accused under these sections, much less tried. As set forth above, H.B. 56 states that records relating to immigration status are public records and are admissible in a court proceeding if "certified as authentic by the federal government agency that is responsible for maintaining the record." H.B. 56 §§ 10(e), 11(e), 13(h). And, "verification of an alien's immigration status" is "proof of that alien's status." *Id*. §§ 10(e), 11(e), 13(h). Under *Melendez-Diaz*, an accused would have the right to confront the person that prepared a CNR should the federal "verification" be based on such a document. The accused would not have a right to confront the person that prepared a certified document or file pulled from ICE public records.

Nothing in the plain language of Sections 10(e), 11(e), or 13(h) indicates that Alabama courts are required to apply these sections in the manner that violates the Confrontation Clause and Supreme Court caselaw. Should such a constitutional violation

befall a criminal defendant, he may assert an as-applied challenge. However, at this point, plaintiffs have not shown that they are likely to be able to succeed on their facial challenge to §§ 10(e), 11(e), and 13(h), based on the Confrontation Clause.

Therefore, plaintiffs' Motion for Preliminary Injunction as to Sections 10(e), 11(e), and 13(h), based on the Confrontation Clause will be denied.

b. Compulsory Process Clause Claim

Plaintiffs contend that Sections 10(e), 11(e), and 13(h) have the effect of denying people charged with the offenses defined in these statutes the right to present a defense because, as written, these sections prohibit an accused from presenting any evidence in his defense. These sections require an Alabama court adjudicating an accused charged with an offense under one of these sections to "consider ***only*** the federal government's verification in determining whether an alien is lawfully present in the United States," which is an essential element of the offenses. H.B. 56 § 10(e)(emphasis added); *see also id.* §§ 11(e), 13(h). Alabama limits its opposition to this contention to its position that these plaintiffs have not demonstrated an actionable injury.

The law is clear that a state has violated the Compulsory Process Clause "if it [has] made all defense testimony inadmissible as a matter of procedural law." *Washington v. Texas*, 388 U.S. 14, 22 (1967). The plain language of Sections 10(e), 11(e), and 13(h), violates the Compulsory Process Clause of the Sixth Amendment by denying the accused the right to present evidence in his or her defense.

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, [410 U.S. 284 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), ***the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense***." *California v. Trombetta*, 467 U.S. [479,] 485 [(1984)]; cf. *Strickland v. Washington*, 466 U.S. 668, 684–685 (1984)("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that ***an essential component of procedural fairness is an opportunity to be heard***. *In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). *See also Washington v. Texas*, *supra*, 388 U.S., at 22–23.

Crane v. Kentucky, 476 U.S. 683, 690-91 (1986) (emphasis added; internal parallel citations omitted).

By limiting evidence admissible in a state-court proceeding to "only" the federal government verification of lawful presence, Sections 10(e), 11(e), and 13(h) deny every person accused of violating Sections 10, 11 or 13 of H.B. 56 the constitutionally-protected right to present a defense. By denying accused individuals the opportunity to prove lawful presence, Alabama has denied all individuals charged under these sections with their right to compulsory process.

"In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered."

Village of Hoffman Estates, 455 U.S. at 494 n.5. Alabama has not offered a limiting construction. Its only argument in opposition to plaintiffs' claim is its assertion that plaintiffs cannot establish they have been injured by these Sections.

For the reasons set forth above, the court finds that John Doe #1 has established a threatened injury in fact for which there is no adequate legal remedy. Section 10(e) and its counterparts, Sections 11(e) and 13(h), require all state courts to deny each person accused under one of these Sections the right to defend against the federal government's verification of unlawfully-present status. These facts are sufficient to establish irreparable harm. *See Church*, 30 F.3d at 1338-39.

The court finds that under no set of circumstances can Alabama refuse a criminal defendant accused of violating Sections 10, 11, or 13 of H.B. 56 the right to present evidence of his lawful presence in defense. Therefore, the court finds that Sections 10(e), 11(e), and 13(h), to the extent they prohibit an accused from presenting evidence to defend against the federal government's verification, violate the Compulsory Process Clause of the United States Constitution.

Based on the foregoing, the court finds that plaintiffs are likely to succeed on the Compulsory Process Clause claim. John Doe #1 has established a threatened injury to which there is no legal remedy and this injury outweighs any harm to defendants caused by enjoining enforcement of the last sentence in Sections 10(e), 11(e), and 13(h). Enjoining this

portion of these subsections, which violates the Compulsory Process Clause of the Sixth Amendment, is in the public's interest.

Plaintiffs' Motion for Preliminary Injunction, (doc. 37), will be denied to the extent it seeks to enjoin Sections 10(e), 11(e), and 13(h) of H.B. 56 as violating the Confrontation Clause and will be granted as to their claim based on the Compulsory Process Clause and enforcement of the last sentence in each of these subsections: "A court of this state shall consider only the federal government's verification in determining an alien is lawfully present in the United States." H.B. 56 § 10 (e); *see also id*. §§ 11(e) and 13(h). The last sentence of Sections 10(e), 11(e) and 13(h) will be enjoined pending resolution of this case.

D. SECTION 11

Section 11 states:

> (a) It is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state.
>
> (b) In the enforcement of this section, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A law enforcement officer shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.
>
> (c) A law enforcement official or agency of this state or a county, city, or other political subdivision of this state may not consider race, color, or national origin in the enforcement of this section except to the extent permitted by the United States Constitution and the Constitution of Alabama of 1901.
>
> (d) This section does not apply to a person who maintains authorization from the federal government to be employed in the United States.

(e) Any record that relates to the employment authorization of a person is admissible in any court of this state without further foundation or testimony from a custodian of records if the record is certified as authentic by the federal government agency that is responsible for maintaining the record. A verification of an alien's immigration status received from the federal government pursuant to 8 U.S.C. § 1373(c) shall constitute proof of that alien's status. A court of this state shall consider only the federal government's verification in determining whether a person is an unauthorized alien.[16]

(f) It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway, or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

(g) It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

(h) A person who is in violation of this section shall be guilty of a Class C misdemeanor and subject to a fine of not more than five hundred dollars ($500).

(i) A court shall collect the assessments prescribed in subsection (h) and remit 50 percent of the assessments to the general fund of the local government where the person was apprehended to be earmarked for law enforcement purposes, 25 percent of the assessments to the Alabama Department of Homeland Security, and 25 percent of the assessments to the Department of Public Safety.

(j) The terms of this section shall be interpreted consistently with 8 U.S.C. § 1324a and any applicable federal rules and regulations.

H.B. 56 § 11.

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[16]For reasons discussed *supra*, the last sentence of § 11(e) is due to be enjoined and will not be further discussed in this section.

H.B. 56 § 11(a) makes it a crime for "a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state." A person is an "unauthorized alien" if he or she does not have "authorization from the federal government to be employed in the United States." *Id*. (d). For the purposes of enforcing of Section 11, "an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c)." *Id*. (b). Also, Section 11 "shall be interpreted consistently with 8 U.S.C. § 1324a and any applicable federal rules and regulations." *Id*. (j). Subsections (f) and (g) prohibit hiring or being hired by the occupant of vehicle stopped in the road if the vehicle blocks traffic and the intended work is to be performed at a different location. *Id*. (f), (g). Neither subsection (f) or (g) requires that the individual hired be an unauthorized alien.

1. Standing

a. Section 11(a).

As set forth above, Section 11(a) seeks to criminalize work by unauthorized aliens. Plaintiff Juan Pablo Black Romero, who is in the United States on an F-1 student visa, contends that he will be subject to criminal prosecution under § 11(a) for soliciting work. Specifically, plaintiffs allege:

> 79. As an F-1 visa holder, Plaintiff Romero is allowed to study in the United States and to get practical work experience (Optional Practical Training or "OPT") directly related to his field of study. He must apply for an OPT after the completion of the requirements of his Ph.D. program but before

> graduation. He therefore must apply for an Employment Authorization Document ("EAD") from the U.S. immigration service, which can take up to three months to receive. Federal authorities do not forbid an applicant for an EAD to apply for jobs prior to receiving the EAD. Plaintiff Romero will begin searching for employment in Alabama for his OPT so that he may start it as soon as he receives his EAD from federal authorities. If HB 56 is implemented, however, Plaintiff Romero will be subject to criminal prosecution for being an "unauthorized alien" who applies for or solicits work.

(Doc. 1 ¶ 79.) Romero's injury is real and imminent, fairly traceable to defendants, and would be redressed by an injunction enjoining the enforcement of Section 11(a). Therefore, the court finds that Romero has standing to challenge Section 11(a) under Counts One, Supremacy Clause, and Count Five, First Amendment.

Also, the court finds that Jane Doe #2 has standing to challenge Section 11(a) under Counts One and Five. Jane Doe #2 has applied for a "U-visa (a form of federal immigration status for crime victims and witnesses that provides a pathway to permanent residence) based on the fact that she and her child cooperated in the criminal prosecution of a school official who sexually assaulted her child." (Doc. 1 ¶ 117.) Until the visa becomes available, Jane Doe #2 is not authorized to work; therefore, under H.B. 56 § 11(a), she may not lawfully "apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in [Alabama]." The court finds Jane Doe #2 has alleged an injury that is real and imminent, fairly traceable to defendants, and would be redressed by an injunction enjoining the enforcement of H.B. 56. Therefore, the court finds that Jane Doe #2 has standing to challenge Section 11(a) under Count One, Supremacy Clause, and Count Five, First Amendment.

b. Sections 11(f) and (g)

The court finds that John Doe #6 has standing to challenge Section 11(f) and (g) under Count Five. John Doe #6 works as a day laborer, performing residential landscaping work. (Doc. 1 ¶¶ 163-64.) He testified, " Potential employers drive by the corner where I wait for work and they stop and pick me up and others if they need help with landscaping tasks around their homes. . . . If HB 56 goes into effect, I fear the police will target and even arrest me for seeking day labor work in Hoover." (Doc. 37-36 ¶¶ 5-6.)

The court finds John Doe #6 has alleged an injury that is real and imminent, fairly traceable to defendants, and would be redressed by an injunction enjoining the enforcement of Section § 11(g). "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source ***and*** to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976)(emphasis added). Therefore, John Doe # 6 has standing to challenge Section 11(f).

The court finds that John Doe #6 has standing to challenge Section 11(f) and (g) under Count Five, First Amendment.

2. Preemption

In its Memorandum Opinion and Order granting the United States's Motion for Preliminary Injunction, the court found that H.B. 56 § 11(a) is preempted and it enjoined enforcement of that section. *United States v. Alabama*, Case No. 2:11-CV-2746-SLB, docs.

93, 94. Therefore, plaintiffs' Motion for Preliminary Injunction to the extent it seeks to enjoin Section 11(a) is moot.

3. First Amendment

a. Section 11(a)

Plaintiffs contend, "Section 11 of HB 56 constitutes an impermissible content-based regulation of speech by criminalizing work-related communications in traditional public fora and by criminalizing the solicitation of work by certain noncitizens." (Doc. 37 at 62-63.) They argue that Section 11(a) "imposes a content-based restriction on speech by criminalizing the application for or solicitation of work in public areas by noncitizens who do not have federal work authorization." (*Id*. at 65.)

Because the court has already determined that Section 11(a) is due to be enjoined on preemption grounds, it pretermits further discussion of whether this subsection should be enjoined on grounds based on the First Amendment.

b. Section 11(f) and (g)

Plaintiffs challenge subsections (f) and (g) of Section 11 as violative of the First Amendment's protection of free speech on the ground that they "are content-based regulations of speech because liability attaches only when individuals engage in speech about day labor." (Doc. 37 at 63 [citing *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1266 (11th Cir. 2005); *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1254-55 (11th Cir.

2004); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998)].) These subsections provide:

> (f) It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway, or highway ***to attempt to hire or hire and pick up passengers for work at a different location*** if the motor vehicle blocks or impedes the normal movement of traffic.
>
> (g) It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway ***in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location*** if the motor vehicle blocks or impedes the normal movement of traffic.

H.B. 56 § 11(f)-(g)(emphasis added).[17] Defendants contend that these subsections do not apply "when individuals engage in speech about day labor," but that they apply whenever the vehicle stops "for the purpose of picking up persons for work at another location" and the vehicle "block[s] or impede[s] the normal movement of traffic." (Doc. 82 at 130 [quoting H.B. 56 § 11(f)-(g)].) The plain language of the subsections requires (1) hiring or attempt to hire (whether for day labor or not), (2) intent to transport the hired individual to another location for work, and (3) blocking or impeding traffic flow. The subsections do not limit "hiring" or "attempt to hire" to unauthorized aliens.

i. Are subsections (f) and (g) content-based restrictions on speech?

"The Supreme Court has articulated and applied various standards for determining whether a law is content based or content neutral. 'As a general rule, laws that by their terms

[17]Section 11(h) provides that persons in violation of Section 11(f) and (g) are guilty of a Class C misdemeanor and subject to a fine of not more than five hundred dollars.

distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.'" *Solantic,* 410 F.3d at 1259 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994)). However, "a content-neutral ordinance is one that 'places no restrictions on . . . either a particular viewpoint or any subject matter that may be discussed.'" *Id*. (quoting *Hill v. Colorado*, 530 U.S. 703, 723 (2000)). Such a law or ordinance has "***nothing*** to do with the content of speech but rather are imposed because of the nature of the regulated conduct." *Burk*, 365 F.3d at 1253 (emphasis added). "[A] content-neutral conduct regulation applies equally to all, and not just to those with a ***particular message or subject matter*** in mind." *Id*. at 1254 (emphasis added). The court finds that subsections (f) and (g) are not content neutral "because [they apply] to a particular subject matter of expression, [solicitation of employment], rather than to particular conduct, such as [blocking or impeding traffic]." *Id*.

ii. Commercial Speech.

"The First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Sorrel v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see also Burk*, 365 F.3d. at 1255. "In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Sorrell*, 131 S. Ct. at 2667.

Alabama contends that the speech at issue is commercial speech. (Doc. 82 at 128.) Commercial speech is protected by the First Amendment. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001). In determining whether particular commercial speech is protected, the Supreme Court has established a four-part test:

> [1] [W]hether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. . . .
>
> [2] [W]hether the asserted governmental interest is substantial.
>
> If both inquiries [1 and 2] yield positive answers . . .
>
> [3] [W]hether the regulation directly advances the governmental interest asserted, and
>
> [4] [W]hether it is not more extensive than is necessary to serve that interest.

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

A. Lawful Activity

Defendants argue that solicitation of work by unlawfully-present aliens is unlawful; therefore, "the First Amendment is not offended." (Doc. 82 at 131.) The court disagrees.

First, as previously explained in the court's Memorandum Opinion in *United States v. Alabama*, Congress has not criminalized unlawfully-present aliens' solicitation of work. *See United States v. Alabama*, Case No. 5:11-CV-2746-SLB, docs. 93, 94 ("Alabama's decision, through H.B. 56 § 11(a), to criminalize work - which Congress explicitly chose not to do through IRCA and the INA – "stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67."). As plaintiffs argue:

> John Doe #5 and John Doe #6 do not engage in illegal activity, as Defendants contend. They do engage in day labor activity and they both lack work authorization, but this does not violate the federal employer verification requirements. *See* 8 U.S.C. § 1324a. Under federal law, an employer must verify work authorization of every employee. *Id*. § 1324a(a). Yet "[t]he term employee . . . does not mean independent contractors . . . or those engaged in casual domestic employment . . . ." 8 C.F.R. § 274a.1(f). "Congress . . . intentionally excluded independent contractors from verification obligations." *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 769 (10th Cir. 2010). The suggestion that by soliciting day labor work John Does #5 and #6 are engaging in impermissible activity is in error, for the kind of work performed by day laborers is precisely the kind of work meant to be exempt from federal employment verification and penalties.

(Doc. 109 at 57-58 [footnotes omitted].) H.B. 56 specifically exempts "the occupant of a household contracting with another person to perform casual domestic labor within the household" from the definition of "employer." H.B. 56 § 3(5). Although work by an unlawfully-present alien may not be authorized, it is not sanctionable under federal law as unlawful activity.

The court has not found, and the parties have not cited to, any decision interpreting the *Central Hudson*'s requirement – that the speech at issue "concern lawful activity" – to reach speech concerning some unauthorized activity that the United States has determined to be unsanctionable. Therefore, the court finds that the solicitation of day labor described in subsections (f) and (g) by unlawfully-present aliens is a "lawful concern."

B. Asserted governmental interest

Plaintiffs contend that the government interest at issue in subsections (f) and (g) is traffic safety, which is a recognized substantial government interest.[18] However, Alabama does not mention traffic safety as its interest at stake in subsections (f) and (g).[19] It contends

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[18]"[S]treets and parks . . . have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)(quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939))(internal quotations omitted). However, "it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650, (1981)(citing *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)); *see Sun-Sentinel Co. v. City of Hollywood*, 274 F. Supp. 2d 1323, 1329-30 (S.D. Fla. 2003)(citing *Ater v. Armstrong*, 961 F.2d 1224, 1229-30 (6th Cir. 1992); *Ass'n of Cmty. Org. for Reform Now v. St. Louis County*, 930 F.2d 591, 593 (8th Cir. 1991); *Int'l Soc'y for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494, 496-97 (5th Cir. 1989); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1262 (9th Cir. 1986), *overruled in part Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 2011 WL 4336667 (9th Cir. Sept. 16, 2011); *Denver Publ'g Co. v. City of Aurora*, 896 P.2d 306, 309 (Colo. 1995)).

[19]Alabama does not assert any governmental interest in that portion of its brief specifically addressing subsections (f) and (g). It argues only that the day-labor transactions of John Doe #5 and John Doe #6 are unlawful and, therefore, not protected:

> The Plaintiffs contend that Section 11(f) and Section 11(g) "mak[e] it unlawful for a person in a vehicle to attempt to hire or hire day laborers" and that they "are content-based regulations of speech because liability attaches only when individuals engage in speech about day labor." Doc. 37 at 63. In fact, neither Section 11(f) nor Section 11(g) refers in any way to day laborers. Instead, the provisions speak only to motor vehicles that are "stopped on a street, roadway, or highway" for the purpose of picking up persons for work at another location and that "block[] or impede[] the normal movement of traffic." Sections 11(f) and (g), Doc. 1-2 at 33. Thus, these provisions are as applicable to prostitutes as they are to the day laborers John Doe #5 and John Doe #6.

(continued...)

that Section 11 is "much less about regulating speech than about limiting the conduct of soliciting work which one is not authorized – by federal government dictate – to perform." (Doc. 82 at 138.) This court may not "supplant the precise interests put forward by the State with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Therefore, for purposes of deciding plaintiffs' Motion for Preliminary Injunction, this court will assume that "solicitati[on] [of] work which one is not authorized . . . to perform" is the "substantial government interest" at stake. (*See* doc. 82 at 138.)

Given the court's discussion in its memorandum Opinion and Order in *United States v. Alabama*, regarding Congress's decision not to sanction the unlawfully-present alien for working, the court finds that Alabama does not have a substantial interest in limiting the solicitation of work by unauthorized aliens. *See United States v. Alabama*, Case No. 2:11-CV-2746-SLB, docs. 93, 94. Moreover, in light of the definition of "employer" in H.B. 56,

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[19](...continued)

> The very idea that it would be a violation of the First Amendment to prohibit solicitation of the services of a prostitute is laughable. At least insofar as applied to immigrants lacking federal authority to work, like John Doe #5 and John Doe #6, doc. 1 at ¶¶ 160, 163, there is no relevant difference here. That is because the underlying transaction is unlawful, and so the First Amendment is not offended.
>
> Whether the provisions would survive a challenge as content-based restrictions on speech if brought by someone who did not propose an unlawful underlying transaction is a question that does not appear to be presented by this record. Instead, it appears that Plaintiffs believe that John Doe #5 and John Doe #6 are the individuals with standing to assert this claim.

(Doc. 82 at 130-32 [internal citations and footnotes omitted].)

which excludes anyone who hires domestic casual labor for their home, the Alabama legislature does not seem to consider prohibiting the work of day laborers performing "domestic casual labor," such as the work performed by John Doe #5 and John Doe #6, to be of substantial interest.

Nevertheless, for purposes of deciding plaintiffs' Motion for Preliminary Injunction, the court will assume that Alabama's interest in limiting solicitation of work by unlawfully-present aliens is substantial.

c. Directly advances the governmental interest asserted

In order "to uphold a restriction on commercial speech" set forth in subsection (f) and (g), Alabama has "the burden of justifying it." *Edenfield*, 507 U.S. 761, 770 (1993) (quoting *Bolger v. Youngs Drug Prods. Corp*., 463 U.S. 60, 71 n. 20 (1983)). "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that ***the harms it recites are real*** and that ***its restriction will in fact alleviate them to a material degree***." *Id*. at 770-71 (emphasis added). In opposition to plaintiffs' Motion for Preliminary Injunction, defendants do not offer evidence to support either an allegation that the harms are real or that enforcement of subsections (f) and (g) will alleviate the harm.

The court notes that the subsections are not limited to solicitations by unlawfully-present aliens, the alleged harm Alabama sought to address. Moreover, only individuals engaged in the solicitation of day labor – those hired or hiring on the street for work at

another location – are affected by subsections (f) and (g). Any other solicitation, even if it stops or impedes traffic, is not actionable under subsections (f) and (g). Also, the subsections do not purport to target only the solicitation of unlawful transactions, the alleged harm Alabama sought to address.

The court finds that the record does not demonstrate that unlawfully-present aliens being hired as day laborers on Alabama streets is a real harm that subsections (f) and (g) will alleviate.

D. More extensive than is necessary to serve that interest

Alabama's stated purpose for Section 11 is to prohibit unlawfully present aliens from working. However, subsections (f) and (g) do not limit their application to transactions that include an unlawfully-present alien. Indeed, they prohibit all solicitations for day labor that stop or impede traffic. "In previous cases addressing this final prong of the *Central Hudson* test, [the Supreme Court has] made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). Alabama has chosen to bar all solicitations for day labor to achieve its interest in barring unlawfully- present aliens from soliciting day labor; this restriction of speech is excessive.

For the foregoing reasons the court finds that plaintiffs have established that they are likely to succeed on the merits with regard to Count Five of their Complaint.

The court notes that plaintiff John Doe #6 will suffer irreparable harm if he is not allowed to solicit work as a day laborer. Moreover, this threatened injury outweighs any damage delaying the enforcement of Sections 11 (f) and (g) may cause defendants. Also, enjoining the enforcement of Sections 11 (f) and (g) is not adverse to the public interest.

Plaintiffs' Motion for Preliminary Injunction, seeking to enjoin Sections 11 (f) and (g) of H.B. 56 will be granted and enforcement of these subsections will be enjoined pending resolution of this case.

E. SECTION 12

Section 12 of H.B. 56 provides:

> (a) Upon any lawful stop, detention, or arrest made by a state, county, or municipal law enforcement officer of this state in the enforcement of any state law or ordinance of any political subdivision thereof, where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the citizenship and immigration status of the person, except if the determination may hinder or obstruct an investigation. Such determination shall be made by contacting the federal government pursuant to 8 U.S.C. § 1373(c) and relying upon any verification provided by the federal government.
>
> (b) Any alien who is arrested and booked into custody shall have his or her immigration status determined pursuant to 8 U.S.C. § 1373(c). The alien's immigration status shall be verified by contacting the federal government pursuant to 8 U.S.C. § 1373(c) within 24 hours of the time of the alien's arrest. If for any reason federal verification pursuant to 8 U.S.C. § 1373(c) is delayed beyond the time that the alien would otherwise be released from custody, the alien shall be released from custody.
>
> (c) A law enforcement officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States. A law enforcement officer may not consider race, color, or national origin in implementing the requirements of this section except to the extent

permitted by the United States Constitution or the Constitution of Alabama of 1901.

(d) A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer any of the following:

(1) A valid, unexpired Alabama driver's license.

(2) A valid, unexpired Alabama nondriver identification card.

(3) A valid tribal enrollment card or other form of tribal identification bearing a photograph or other biometric identifier.

(4) Any valid United States federal or state government issued identification document bearing a photograph or other biometric identifier, if issued by an entity that requires proof of lawful presence in the United States before issuance.

(5) A foreign passport with an unexpired United States Visa and a corresponding stamp or notation by the United States Department of Homeland Security indicating the bearer's admission to the United States.

(6) A foreign passport issued by a visa waiver country with the corresponding entry stamp and unexpired duration of stay annotation or an I-94W form by the United States Department of Homeland Security indicating the bearer's admission to the United States.

(e) If an alien is determined by the federal government to be an alien who is unlawfully present in the United States pursuant to 8 U.S.C. § 1373(c), the law enforcement agency shall cooperate in the transfer of the alien to the custody of the federal government, if the federal government so requests.

H.B. 56 § 12.

1. Standing

The court finds that plaintiff Jane Doe #2 has standing to challenge Section 12 of H.B. 56 through Count One, Supremacy Clause, and Count Two, Fourth Amendment – Unreasonable Search and Seizure. Jane Doe #2 alleges that she does not have an Alabama driver's license. (Doc. 37-26 ¶ 2.) Nevertheless, she contends that she must drive to work and to take her children to school. (*Id.* ¶ 14.) She contends, "if HB 56 is implemented, [she] will be subject to unlawful interrogation and detention by law enforcement officials based on her Latina appearance and lack of state-approved identity documents." (Doc. 1 ¶ 118.) This threat of injury is real and imminent, fairly traceable to the Act, and would be redressed by an injunction enjoining the enforcement of H.B. 56. Therefore, the court finds that Jane Doe #2 has standing to challenge Section 12 of H.B. 56 in Counts One and Two.

2. Preemption

In its Memorandum Opinion and Order granting the United States's Motion for Preliminary Injunction, the court found that H.B. 56 Section 12 is not preempted by federal law. *United States v. Alabama*, Case No. 2:11-CV-2746-SLB, docs. 93, 94. For the same reasons, the court will deny plaintiffs' Motion for Preliminary Injunction to the extent it seeks to enjoin Section 12 on preemption grounds..

3. Fourth Amendment

Plaintiffs allege that Section 12 of H.B. 56 "requires officers to seize, detain, and arrest individuals without reasonable suspicion or probable cause to believe a person has

engaged in criminal activity in violation of the Fourth Amendment." (Doc. 1 ¶ 345.) Plaintiffs bear a substantial burden in mounting their pre-enforcement facial challenge to Section 12 on the basis that it violates their right to be free from unreasonable searches and seizures protected by the Fourth Amendment of the United States Constitution. A "facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Because the Supreme Court has not recognized an overbreadth doctrine outside the context of the First Amendment, the fact that H.B. 56 "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*

Plaintiffs claim that Section 12 violates the Fourth Amendment's prohibition against unreasonable searches and seizures by "mandat[ing] the prolonged detention or arrest of individuals based only on perceived violation of federal civil immigration law." (Doc. 37 at 49-50.) They challenge only subsections (a) and (e) of Section 12.

Section 12 sets out a procedure under which state and local law enforcement officers are required to check the immigration or citizenship status of an individual upon a lawful stop, detention, or arrest "where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States," but only "when practicable." H.B. 56 § 12(a). Officers are not required to check the individual's immigration status "if the determination may hinder or obstruct an investigation." *Id.* "If an alien is determined . . . to be an alien

who is unlawfully present . . . , the law enforcement agency shall cooperate in the transfer of the alien to the custody of the federal government, if the federal government so requests." *Id.* (e).

a. Section 12(a)

Plaintiffs contend, "because unlawful presence is a federal civil violation and not a crime, this scheme [outlined in section 12(a)] violates the Fourth Amendment by requiring seizures without suspicion of or probable cause to believe that a person is engaging in criminal activity." (Doc. 37 at 52 [internal citation omitted].)

Under 8 U.S.C. § 1357, federal immigration officers are authorized to conduct warrantless interrogations and certain detentions based on a reasonable belief that the alien is illegally in the United States. *See* § 1357(a) (authorizing warrantless interrogations of "any alien or person believed to be an alien as to his right to be or to remain in the United States"); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 884-85 (1975) (listing factors that could, if observed, give federal INS officer reasonable suspicion that a person is unlawfully in the United States). The court agrees with plaintiffs that state law enforcement officers do not have the inherent authority to stop and arrest an individual for mere unlawful presence, which is a civil immigration violation. *See Arizona*, 641 F.3d at 362; *see also United States v. Urrieta*, 520 F.3d 569, 574 (6th Cir. 2008) (noting that "local law enforcement officers cannot enforce completed violations of civil immigration law (i.e., illegal presence) unless specifically authorized to do so by the Attorney General").

Plaintiffs claim Section 12(a) will result in prolonged detention during police stops in violation of the Fourth Amendment. Section 12(a) requires only that the law enforcement officer make a "reasonable attempt . . . when practicable" to verify the individual's immigration or citizenship status. H.B. 56 § 12(a). If an officer initiates a verification inquiry but does not receive a response within a reasonable time, the officer is, under the plain language of Section 12(a), entitled to terminate the inquiry. Defendants contend that if an individual is pulled over for a traffic violation, and if "the only way to check the driver's immigration status is to prolong the stop 'beyond the time reasonably required to' write the ticket in violation of the Fourth Amendment, . . . then it is not ***reasonable***, under Act No. 2011-535, to attempt to ascertain the driver's immigration status," and, therefore, the Act would not require the officer to make an immigration status verification in such a circumstance. (Doc. 82 at 98 [emphasis in original].) Certainly, if as defendants contend, officers will not conduct immigration inquiries when doing so will take longer than the time necessary to complete the original purpose of the stop, then implementation of Section 12(a) will not violate the Fourth Amendment. *See Muehler*, 544 U.S. at 101 ("[A] lawful seizure 'can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.'" (*quoting Illinois v. Caballes*, 543 U.S. 405, 407 (2005))).

For purposes a deciding a pre-enforcement facial challenge, a finding that some legitimate application of the statute is constitutional ends the court's inquiry. *Stevens*, 130 S. Ct. at 1587 ("To succeed in a typical facial attack [on other than First Amendment

grounds], [a plaintiff] would have to establish 'that no set of circumstances exists under which [the challenged statute] would be valid,' *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks any 'plainly legitimate sweep,' *Washington v. Glucksberg*, 521 U.S. 702, 740, n.7 (1997)(STEVENS, J., concurring in judgments)(internal quotation marks omitted).")(parallel citations omitted). As noted above, if as defendants contend, officers will not conduct immigration inquiries when doing so will take longer than the time necessary to complete the original purpose of the stop, then implementation of Section 12(a) will not violate the Fourth Amendment. The court also finds that some situations will support a prolonged detention during which time immigration status may be ascertained. Therefore, plaintiffs' pre-enforcement facial challenge to Section 12(a) will not succeed.

Nevertheless, the court notes that Section 12(a) may result in lawsuits based on the application of Section 12(a) by officers who are not trained to discern suspicion of unlawful presence without consideration of the person's race, color, or national origin. At oral argument, defendants asserted that ICE agents are trained to recognize those who are not lawfully present based on facts other than an individual's race or ethnic characteristics. This training takes four weeks and covers subjects including "immigration law, intercultural relations, and how to use DHS databases to help positively identify criminals and immigration violators." (Doc. 37-37 ¶ 6.) However, state and local law enforcement officers have not received such training and nothing in the record indicates that they will be trained

on such techniques before H.B. 56 goes into effect.[20] (*See id*. ¶ 20; doc. 37-38 ¶ 10; 2-10 ¶ 5.) At oral argument defendants conceded that Alabama law enforcement officers had not been trained to avoid racial profiling in determining whether there is a reasonable suspicion of unlawful presence. Without such training and without reasonable guidelines and in light of H.B. 56 § 6(b)'s requirement of enforcement to the fullest extent, Section 12(a) may well be applied in a discriminatory manner and in a manner that constitutes an unreasonable seizure. (*See* doc. 37-37 ¶ 21; doc. 37-38 ¶ 11; *see also United States v. Alabama*, Case No. 2:11-CV-2746, doc. 2-5 ¶ 11.) Any such unlawful actions must await an as-applied challenge; the court cannot strike down Section 12(a) on a facial challenge if some application will be constitutional.

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[20]Sheriff Todd Entrekin of Etowah County testified:

> I am concerned about how to train our Deputies to enforce this law. Our Deputies are comfortable establishing the existence of reasonable suspicion as to criminal conduct generally, but with the exception of our 287(g) "deputies" [who have been trained by DHS], no one else is trained or familiar with reasonable suspicion as to immigration status. I know this is not a trivial process because I had to send out 278(g) deputies through a four-week training before they could be certified on the 287(g) process. Now I am being asked to train all deputies to perform the same tasks, but this is impossible for me to do. Our patrol deputies have never received training on federal immigration law, and I am concerned that any training provided by the State regarding the meaning of the federal immigration laws, or the new state immigration law, will not equip our deputies with the necessary knowledge and expertise that would allow them to reasonably suspect when someone is in the country unlawfully.

(Doc. 37-37 ¶ 20.)

b. Section 12(e)

Section 12(e) of H.B. 56 states: "If an alien is determined by the federal government to be an alien who is unlawfully present in the United States pursuant to 8 U.S.C. § 1373(c), the law enforcement agency shall cooperate in the transfer of the alien to the custody of the federal government, if the federal government so requests." H.B. 56 § 12(e). Plaintiffs argue that Section 12(e) "violates the Fourth Amendment by requiring law enforcement to take custody of individuals" when they receive federal verification that the individual is an alien that is not lawfully present. (Doc. 37 at 52-53.) They contend that, because there is no time limit in Section 12(e), "individuals will be effectively arrested without probable cause of any criminal wrongdoing." (*Id.* at 53.) Defendants respond that Section 12(e) does not direct any law enforcement officer to take custody of anyone, but rather "presumes that the person [who is determined to be an alien unlawfully present by the federal government] is already lawfully in custody and directs cooperation with the federal government." (Doc. 82 at 99.)

The court agrees with defendants' construction of Section 12(e). Under a logical reading of Section 12(e), a state or local law enforcement officer will have custody of an individual at the time that individual is "determined by the federal government to be an alien who is unlawfully present in the United States pursuant to 8 U.S.C. § 1373(c)." H.B. 56 § 12(e). Plaintiffs cite no authority for their assertion that state or local law enforcement agencies may not transport such a lawfully-detained person in their custody. And, regardless

of whether the individual is already in law enforcement custody, the individual will only be transferred if the federal government requests.

Even if the court did not accept defendants' limiting construction, it must find that at least some of the aliens determined to unlawfully present will be "arrested and booked" on probable cause at the time the federal government requests their transfer. *See* H.B. 56 § 12(b). Therefore, some applications of Section 12(e) will be constitutional. Plaintiff's facial challenge to Section 12(e) is not likely to succeed. *See Stevens*, 130 S. Ct. at 1587.

For these reasons, plaintiffs' Motion for Preliminary Injunction on their claim that Section 12(a) violates the Fourth Amendment will be denied.

F. SECTION 13

Section 13 provides:

> (a) It shall be unlawful for a person to do any of the following:
>
> (1) Conceal, harbor, or shield or attempt to conceal, harbor, or shield or conspire to conceal, harbor, or shield an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered, or remains in the United States in violation of federal law.
>
> (2) Encourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that such coming to, entering, or residing in the United States is or will be in violation of federal law.
>
> (3) Transport, or attempt to transport, or conspire to transport in this state an alien in furtherance of the unlawful presence of the alien in the United States, knowingly, or in reckless disregard of the fact, that the alien has come to, entered, or remained in the United States in

violation of federal law. Conspiracy to be so transported shall be a violation of this subdivision.

(4) Harbor an alien unlawfully present in the United States by entering into a rental agreement, as defined by Section 35-9A-141 of the Code of Alabama 1975, with an alien to provide accommodations, if the person knows or recklessly disregards the fact that the alien is unlawfully present in the United States.

(b) Any person violating the provisions of this section is guilty of a Class A misdemeanor for each unlawfully present alien, the illegal presence of which in the United States and the State of Alabama, he or she is facilitating or is attempting to facilitate.

(c) A person violating the provisions of this section is guilty of a Class C felony when the violation involves 10 or more aliens, the illegal presence of which in the United States and the State of Alabama, he or she is facilitating or is attempting to facilitate.

(d) Notwithstanding any other law, a law enforcement agency may securely transport an alien whom the agency has received verification from the federal government pursuant to 8 U.S.C. § 1373(c) is unlawfully present in the United States and who is in the agency's custody to a state approved facility, to a federal facility in this state, or to any other point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency. A law enforcement agency shall obtain judicial or executive authorization from the Governor before securely transporting an alien who is unlawfully present in the United States to a point of transfer that is outside this state.

(e) Notwithstanding any other law, any person acting in his or her official capacity as a first responder or protective services provider may harbor, shelter, move, or transport an alien unlawfully present in the United States pursuant to state law.

(f) Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of this section, and the gross proceeds of such a violation, shall be subject to civil forfeiture under the procedures of Section 20-2-93 of the Code of Alabama 1975.

> (g) In the enforcement of this section, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A law enforcement officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.
>
> (h) Any record that relates to the immigration status of a person is admissible in any court of this state without further foundation or testimony from a custodian of records if the record is certified as authentic by the federal government agency that is responsible for maintaining the record. A verification of an alien's immigration status received from the federal government pursuant to 8 U.S.C. § 1373(c) shall constitute proof of that alien's status. A court of this state shall consider only the federal government's verification in determining whether an alien is lawfully present in the United States.

H.B. 56 § 13.

1. Standing

The court finds plaintiff Webster has standing to raise the challenge Section 13 of H.B. 56 in Count One, Supremacy Clause, of plaintiffs' Complaint. Webster is the guardian of two children who are not lawfully present. (Doc. 1 ¶¶ 63-64.) As a result of his guardianship, Webster alleges, "If HB 56 is implemented, I will be considered a criminal for harboring, encouraging and transporting my own sons to do basic activities a father would do with his sons." (Doc. 37-13 ¶ 6.) This injury is real and imminent, fairly traceable to defendants, and would be redressed by an injunction enjoining the enforcement of Section 13 of H.B. 56. Therefore, the court finds that Webster has standing to challenge Section 13 of H.B. 56 in Count One.

The court also notes that plaintiffs Jeffrey Allen Beck and Michele Cummings allege that they regularly rent to immigrants they believe are not lawfully present and they intend to do so after H.B. 56 takes effect. (Doc. 1 ¶¶ 102, 107.) They contend that they will lose revenue and be subjected to criminal prosecution when Section 13 of H.B. 56 takes effect. (*Id*. ¶¶ 104, 108.) These injuries are real and imminent, fairly traceable to defendants, and would be redressed by an injunction enjoining the enforcement of Section 13 of H.B. 56. Therefore, the court finds that Beck and Cummings have standing to challenge Section 13 of H.B. 56 in Count One.

2. Preemption

In its Memorandum Opinion and Order granting the United States's Motion for Preliminary Injunction, the court found that Section 13 of H.B. 56 is preempted and it enjoined enforcement of that section. *See United States v. Alabama*, Case No. 2:11-CV-2746-SLB, docs. 93, 94. Therefore, plaintiffs' Motion for Preliminary Injunction to the extent it seeks to enjoin Section 13 is moot.[21]

G. SECTIONS 18, 19, AND 20

Section 18 provides:

Section 32-6-9, Code of Alabama 1975, is amended to read as follows:

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[21]In Count Four of plaintiffs' Complaint they raise a claim based on the Due Process Clause of the Fourteenth Amendment, which includes a challenge to Section 13. (Doc. 1 ¶ 356; doc. 104-1 at 6.) However, their Motion for Preliminary Injunction does not raise this claim; therefore, it is not addressed in this Memorandum Opinion.

"§32-6-9.

"(a) Every licensee shall have his or her license in his or her immediate possession at all times when driving a motor vehicle and shall display the same, upon demand of a judge of any court, a peace officer or a state trooper. However, no person charged with violating this section shall be convicted if he or she produces in court or the office of the arresting officer a driver's license theretofore issued to him or her and valid at the time of his or her arrest.

"(b) Notwithstanding the provisions of Section 32-1-4, if a law officer arrests a person for a violation of this section and the officer is unable to determine by any other means that the person has a valid driver's license, the officer shall transport the person to the nearest or most accessible magistrate.

"(c) A reasonable effort shall be made to determine the citizenship of the person and if an alien, whether the alien is lawfully present in the United States by verification with the federal government pursuant to 8 U.S.C. § 1373(c). An officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.

["](d) A verification inquiry, pursuant to 8 U.S.C. § 1373(c), shall be made within 48 hours to the Law Enforcement Support Center of the United States Department of Homeland Security or other office or agency designated for that purpose by the federal government. 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."

H.B. 56 § 18 (underlining in original).

Section 19 provides:

(a) When a person is charged with a crime for which bail is required, or is confined for any period in a state, county, or municipal jail, a reasonable effort shall be made to determine if the person is an alien unlawfully present in the United States by verification with the federal government pursuant to 8 U.S.C. § 1373(c).

> (b) A verification inquiry, pursuant to 8 U.S.C. § 1373(c), shall be made within 48 hours to the Law Enforcement Support Center of the United States Department of Homeland Security or other office or agency designated for that purpose by the federal government. 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.

H.B. 56 § 19.

Section 20 provides:

> If an alien who is unlawfully present in the United States is convicted of a violation of state or local law and is within 30 days of release or has paid any fine as required by operation of law, the agency responsible for his or her incarceration shall notify the United States Bureau of Immigration and Customs Enforcement and the Alabama Department of Homeland Security, pursuant to 8 U.S.C. § 1373. The Alabama Department of Homeland Security shall assist in the coordination of the transfer of the prisoner to the appropriate federal immigration authorities; however, the Alabama Department of Corrections shall maintain custody during any transfer of the individual.

H.B. 56 § 20.

Sections 18 and 19 of H.B. 56 not only authorize but mandate detention of unlawfully present aliens "until prosecution or until handed over to federal immigration authorities." H.B. 56 §§ 18(d), 19(b). Section 20 also mandates continued detention of individuals who have been convicted of state law and are within 30 days of release or have "paid any fine" by stating that the Alabama Department of Homeland Security "shall assist in the coordination of the transfer of the prisoner to the appropriate federal immigration authorities" and that the Alabama Department of Corrections "shall maintain custody during any transfer of the individual." *Id*. § 20. The language of Section 20 implies that aliens may be detained

past the point they would otherwise have been released solely on the basis of their immigration status.

1. Standing

For the reasons set forth above in the court's discussion of Section 12, the court finds that Jane Doe #2 has standing to assert this challenge to Sections 18 and 19, which mandate detention of unlawfully-present aliens stopped for driving without a driver's license and/or confined for any period in jail. Because Section 18 allows for verification of lawful presence up to 48 hours after the stop, Section 19 also applies to any detention under Section 18 because Section 19 mandates detention and verification of immigration status for any person "confined for any period of time in a state, county, or municipal jail." *Id.* §§ 18, 19(a). Because Jane Doe # 2 has alleged that she will continue to drive without a driver's license, the court finds the threat that she will be detained pursuant to Section 18 or Section 19 is concrete and imminent, fairly traceable to Sections 18 and 19, and would be redressed by an injunction enjoining the enforcement of the Act.

Plaintiffs also challenge Section 20, which applies to unlawfully-present aliens that have been "convicted of a violation of state or local law." At this stage of the proceedings, the court finds the fact that one or more of the plaintiffs will be subject to Section 20 based on a criminal conviction is "several steps removed from the threat of prosecution" for violations of H.B. 56. *Osterweil v. Edmonson*, 424 Fed. Appx. 342, 344 (5th Cir. 2011); *see also Stanko v. United States*, No. 95-35289, 1995 WL 499524, at *1 (9th Cir. Aug. 22,

1995)("Although we do not insist that an individual break the law in order to test the constitutionality of a statute, the plaintiff lacks standing when the future harm is hypothetical or based upon a chain of speculative contingencies, particularly a chain that includes the violation of an unchallenged law") (internal quotations, alterations, and citations omitted)).

The court finds that plaintiffs have not established a real and concrete threat of injury arising from the enforcement of Section 20; therefore, plaintiffs lack standing to challenge Section 20 of H.B. 56.

2. Preemption

In its Memorandum Opinion and Order granting the United States's Motion for Preliminary Injunction, the court found that Section 18 of H.B. 56 is not preempted. *United States v. Alabama*, Case No. 2:11-CV-2746-SLB, docs. 93, 94. Moreover, the same reasoning that supports the court's rejection of the preemption argument with regard to Section 18 applies with equal strength to Section 19. For the same reasons, the court will deny plaintiffs' Motion for Preliminary Injunction to the extent it seeks to enjoin Sections 18 and 19.

3. Fourth Amendment

Plaintiffs allege that Sections 18 and 19 of H.B. 56 violate the Fourth Amendment "because they require Alabama jails to maintain custody of a person solely because an immigration status check is pending and absent any lawful basis for detention." (Doc. 37 at 54-55.) In order to determine whether Sections 18 and 19 violate the Fourth Amendment the

court must decide: (1) whether state and local law enforcement officers may send immigration inquiries and notifications to the federal government under the circumstances described in Sections 18 and 19; and (2) whether state law enforcement officers can detain an individual found to be an unlawfully-present alien "until prosecution or until handed over to federal immigration authorities", as mandated by Sections 18(d) and 19(b).

First, the court finds no constitutional issue with regard to the verification requirements in Sections 18 and 19. The act of verifying an individual's citizenship status by contacting the federal government, as required by Sections 18 and 19, does not, without more, constitute a seizure. These sections do not explicitly require that the arrested individual be detained or otherwise restricted during the verification inquiry. *See* H.B. 56 Sections 18, 19(a). Therefore, Sections 18 and 19(a), standing alone, do not violate the Fourth Amendment. *See Terry*, 392 U.S. at 20 n.16 ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

The court finds that plaintiffs have not shown that they are likely to succeed on the merits of their Fourth Amendment pre-enforcement facial challenge to Sections 18 and 19(a). Therefore, their Motion to enjoin those subsections will be denied.

The first sentence of Ala. Code § 32-6-9(d), as amended by H.B. 56 § 18,[22] and the first sentence of Sections 19(b), which both require that verification inquiries be made within 48 hours, are also valid for this same reason. Those sentences, standing alone, do not state that the individual must be unlawfully detained while the verification inquiries are conducted. Plaintiffs contend that under § 32-6-9(d), as amended by H.B. 56 § 18, "[i]ndividuals who would normally be released from custody (because, for example, charges against them were dismissed) will face continued detention based ***solely*** on suspicion of federal civil immigration violations." (Doc. 37 at 54 [emphasis in original].) Likewise, plaintiffs contend that Section 19(b) mandates the continued detention of anyone who has been confined for any period in a state, county, or municipal jail, "regardless of whether the lawful basis for their original custody has ended." (*Id.*) Defendants contend that "the Court should read [§ 32-6-9(d), as amended by H.B. 56 § 18,] to implicitly include the phrase 'whichever is sooner' at the very end, such that a person will only be detained pending prosecution or, in the event that the federal government seeks custody before then, 'until handed over to federal immigration authorities.'" (Doc. 82 at 105.)

Under the plain language of sections 18(d) and 19(b), state law enforcement shall detain unlawfully-present aliens until prosecution or until handed over to federal immigration

[22]Plaintiffs refer to "Section 18(d)," (doc. 37 at 54); however, Section 18 does not have subsections. Rather, as set forth above, Section 18 is amending Ala. Code § 32-6-9, which does have subsections. In this Memorandum Opinion, the court will refer to plaintiffs' Sections 18(d) as Ala. Code § 32-6-9(d), as amended by H.B. 56 § 18.

authorities, regardless of whether the aliens would have been released from custody for the underlying offense. Therefore, as plaintiffs argue, these sections require law enforcement officials to maintain custody of arrestees solely on the basis of unlawful presence, a federal civil immigration violation. Under § 32-6-9(d), as amended by H.B. 56 § 18, and H.B. 56 § 19, state law enforcement officials will maintain custody of some individuals after they would have been released from custody – in other words, past the point detention is permitted under the Fourth Amendment. *See United States v. Soto-Cervantes*, 138 F.3d 1319, 1322 (10th Cir.1998) ("[R]easonable suspicion must exist at all stages of the detention, although it need not be based on the same facts throughout.").

However. the specific determination of a constitutional violation of the Fourth Amendment can only be determined based on the specific facts surrounding the detention. *See Ornelas*, 517 U.S. at 695-96. Unquestionably some individual will be lawfully detained under Ala. Code § 32-6-9, as amended by H.B. 56 § 18, or H.B. 56 § 19. Therefore, plaintiffs' challenge to these laws must await an as-applied challenge. The court finds plaintiffs' Fourth Amendment challenge to Ala. Code § 32-6-9, as amended by H.B. 56 § 18, and H.B. 56 § 19, is not likely to succeed on the merits.

Based on the foregoing, plaintiffs' Motion for Preliminary Injunction as to Ala. Code § 32-6-9, as amended by H.B. 56 § 18, and H.B. 56 §§ 19 and 20 will be denied.

H. SECTION 27

Section 27 provides:

> (a) No court of this state shall enforce the terms of, or otherwise regard as valid, any contract between a 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, and the performance of the contract required the alien to remain unlawfully present in the United States for more than 24 hours after the time the contract was entered into or performance could not reasonably be expected to occur without such remaining.
>
> (b) This section shall not apply to a contract for lodging for one night, a contract for the purchase of food to be consumed by the alien, a contract for medical services, or a contract for transportation of the alien that is intended to facilitate the alien's return to his or her country of origin.
>
> (c) This section shall not apply to a contract authorized by federal law.
>
> (d) In proceedings of the court, the determination of whether an alien is unlawfully present in the United States shall be made by the federal government, pursuant to 8 U.S.C. § 1373(c). The court shall consider only the federal government's determination when deciding whether an alien is unlawfully present in the United States. The court may take judicial notice of any verification of an individual's immigration status previously provided by the federal government and may request the federal government to provide further automated or testimonial verification.

H.B. 56 § 27.

In essence, Section 27 strips an unlawfully-present alien of the capacity to contract except in certain circumstances – *i.e.* the contract could be performed in less than 24 hours. H.B. 56 § 27(a). Section 27(b) excepts from the operation of subsection (a) certain contracts based on the subject matter of the agreement – *i.e.* "lodging for one night, a contract for the purchase of food to be consumed by the alien, a contract for medical services, or a contract

for transportation of the alien that is intended to facilitate the alien's return to his or her country of origin." Capacity to contract is typically understood as established by state law. *See United States v. Yazell*, 382 U.S. 341, 343, 352-53 (1966).

1. Standing

The court finds plaintiffs Robert Barber and Daniel Upton have standing to challenge Section 27 though Count One, Supremacy Clause, and plaintiff Jane Doe #5 has standing to challenge Section 27 through Count 9, § 1981. Both Barber and Upton allege that they represent unlawfully-present aliens and, if Section 27 takes effect, they will not be able to make or enforce contracts for their services. (Doc. 1 ¶¶ 96, 100.) Jane Doe # 5, who is not lawfully present, alleges that she will not be able to obtain "basic necessities," a home, transportation, and a cell phone if Section 27 takes effect. (*Id.* ¶ 134.) These injuries are real and imminent, fairly traceable to defendants, and would be redressed by an injunction enjoining the enforcement of Section 27 of H.B. 56. Therefore, the court finds Barber, Upton, and Jane Doe #5 have standing to challenge Section 27 of H.B. 56 in Count One and Count Nine.

2. Preemption

In its Memorandum Opinion and Order granting the United States's Motion for Preliminary Injunction, the court found that H.B. 56 § 27 is not preempted by federal immigration law. *United States v. Alabama*, Case No. 2:11-CV-2746, docs. 93, 94. For the

same reasons, the court will deny plaintiffs' Motion for Preliminary Injunction to the extent it seeks to enjoin Section 27 on the ground of preemption.

3. Section 1981

Plaintiffs argue that Section 27 is also preempted by 42 U.S.C. § 1981. Section 1981 provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981. Section 1981 protects an individual's right to contract from discrimination on the basis of alienage. *See id.* (a)("All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security

of persons and property as is enjoyed by white citizens."); *see also Takahashi*, 334 U.S. at 419; *Anderson v. Conboy*, 156 F.3d 167, 180 (2d Cir. 1998). However, Section 1981 does not protect a person from discrimination on the basis of unlawful presence. *Anderson*, 156 F.3d at 180 ("If an employer refuses to hire a person because that person is in the country illegally, that employer is discriminating on the basis not of alienage but of noncompliance with federal law."). The court finds that Section 1981 does not conflict with the language or intent of Section 27, which prohibits the enforcement of certain contracts between a party and "an alien unlawfully present in the United States." H.B. 56 § 27(a).

It may well be that some individuals who appear to be of foreign birth will experience discrimination based on Section 27. However, such cases cannot be remedied by a facial challenge to H.B. 56 § 27.

Based on the foregoing, plaintiffs' Motion for Preliminary Injunction as to Section 27 of H.B. 56 will be denied.

I. SECTION 28

Section 28 of H.B. 56 states:

> (a)(1) Every public elementary and secondary school in this state, at the time of enrollment in kindergarten or any grade in such school, shall determine whether the student enrolling in public school was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States and qualifies for assignment to an English as Second Language class or other remedial program.
>
> (2) The public school, when making the determination required by subdivision (1), shall rely upon presentation of the student's original birth certificate, or a certified copy thereof.

(3) 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 parent, guardian, or legal custodian of the student shall notify the school within 30 days of the date of the student's enrollment of the actual citizenship or immigration status of the student under federal law.

(4) Notification shall consist of both of the following:

a. The presentation for inspection, to a school official designated for such purpose by the school district in which the child is enrolled, of official documentation establishing the citizenship and, in the case of an alien, the immigration status of the student, or alternatively by submission of a notarized copy of such documentation to such official.

b. Attestation by the parent, guardian, or legal custodian, under penalty of perjury, that the document states the true identity of the child. If the student or his or her parent, guardian, or legal representative possesses no such documentation but nevertheless maintains that the student is either a United States citizen or an alien lawfully present in the United States, the parent, guardian, or legal representative of the student may sign a declaration so stating, under penalty of perjury.

(5) 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.

(b) Each school district in this state shall collect and compile data as required by this section.

(c) Each school district shall submit to the State Board of Education an annual report listing all data obtained pursuant to this section.

(d)(1) The State Board of Education shall compile and submit an annual public report to the Legislature.

(2) The report shall provide data, aggregated by public school, regarding the numbers of United States citizens, of lawfully present aliens by immigration classification, and of aliens believed to be unlawfully present in the United States enrolled at all primary and secondary public schools in this state. The report shall also provide the number of students in each category participating in English as a Second Language Programs enrolled at such schools.

(3) The report shall analyze and identify the effects upon the standard or quality of education provided to students who are citizens of the United States residing in Alabama that may have occurred, or are expected to occur in the future, as a consequence of the enrollment of students who are aliens not lawfully present in the United States.

(4) The report shall analyze and itemize the fiscal costs to the state and political subdivisions thereof of providing educational instruction, computers, textbooks and other supplies, free or discounted school meals, and extracurricular activities to students who are aliens not lawfully present in the United States.

(5) The State Board of Education shall prepare and issue objective baseline criteria for identifying and assessing the other educational impacts on the quality of education provided to students who are citizens of the United States, due to the enrollment of aliens who are not lawfully present in the United [S]tates, in addition to the statistical data on citizenship and immigration status and English as a Second Language enrollment required by this act. The State Board of Education may contract with reputable scholars and research institutions to identify and validate such criteria. The State Board of Education shall assess such educational impacts and include such assessments in its reports to the Legislature.

(e) Public disclosure by any person of information obtained pursuant to this section which personally identifies any student shall be unlawful, except for purposes permitted pursuant to 8 U.S.C. §§ 1373 and 1644. Any person intending to make a public disclosure of information that is classified as confidential under this section, on the ground that such disclosure constitutes a use permitted by federal law, shall first apply to the Attorney General and receive a waiver of confidentiality from the requirements of this subsection.

> (f) A student whose personal identity has been negligently or intentionally disclosed in violation of this section shall be deemed to have suffered an invasion of the student's right to privacy. The student shall have a civil remedy for such violation against the agency or person that has made the unauthorized disclosure.
>
> (g) The State Board of Education shall construe all provisions of this section in conformity with federal law.
>
> (h) This section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

H.B. 56 § 28. Section 28 requires all children enrolling in a public elementary or secondary school to provide their birth certificate to a school official. H.B. 56 § 28(a)(1)-(2). According to subsections (a)(2) and (3), school officials must rely on the birth certificate to determine "whether 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." *Id*. (a)(2)-(3). Information about the immigration status of a parent is not reflected on Alabama birth certificates. Alabama requires "date, time, and location of birth; name of child; sex; plurality and birth order if not single; mother's information such as name, residence, and date and place of birth; father's information as provided in Code of Ala. 1975, § 22-9A-7(f); attendant's information; and information for legal purposes such as certificate number and date filed." Ala. Admin. Code r. 420-7-1-.03(2)(a)1.; *see also* Ala. Code § 22-9A-7(f)(Information concerning the father is included on the birth certificate based on the mother's marital status and whether paternity has been legally determined.). Other information about the parents, "such as race, ethnicity, and education," is collected for "statistical research and public health purposes,"

but such information is not included on the birth certificate. Ala. Admin. Code r. 420-7-1-.03 (2)(a)2. Nothing in the record indicates that immigration status is reflected on the birth certificates from other states or countries. For purposes of determining the reach of Section 28, the court assumes that school officials will not seek to determine the immigration status of parents beyond examination of the child's birth certificate and that such information is not included on the birth certificate. Therefore, Section 28 does not compel school officials to determine the immigration status of a parent of a student.

If the birth certificate shows the child was "born outside the jurisdiction of the United States" or if the birth "certificate is not available for any reason, "the parent, guardian, or legal custodian of the student shall notify the school within 30 days of the date of the student's enrollment of the actual citizenship or immigration status of the student under federal law."[23] H.B. 56 § 28(a)(3). This "notification" requires the person responsible for the child to "present[ ] for inspection . . . official documentation establishing the citizenship and, in the case of an alien, the immigration status of the student," and a declaration or affidavit swearing that the official documents "state[ ] the true identity of the child." *Id*. (a)(4). If the parent or other person responsible for the child does not have documentation establishing citizenship or lawful presence, he or she "may sign a declaration . . . stating" that the child is a citizen or is otherwise lawfully present. *Id*. (a)(4)(b). From this information,

[23]Although subsection (a)(1) refers to the immigration status of a student's parents, subsection (a)(4) does not require notification or collection of information regarding a parent's immigration status.

the school creates a report listing the number of students that are citizens, lawfully-present aliens and presumed unlawfully-present aliens.[24] *Id*. (b), (c). The number of unlawfully-present alien children includes any student not submitting the required documentation. *Id*. (a)(5). Section 28 states that it "shall be enforced without regard to national origin." *Id*. (h). Section 28(5) requires all children unable to present a birth certificate showing that he or she was born in the United States or whose parent, guardian, or legal custodian does not submit the documentation or declaration required by Section 28(3) and (4) be presumed unlawfully present for reporting purposes. Therefore, for reporting purposes, children will be presumed unlawfully present aliens who are neither aliens not unlawfully present.

Defendants have presented evidence that "enrollment" only occurs when a child enters the Alabama school system. (Doc. 82-3 at 3.) It does not include registration, which occurs at the beginning of each school year. (*Id*.)

The court finds that plaintiffs do not have standing to challenge Section 28.

The only plaintiff with children likely to enter the Alabama school system for the first time in the foreseeable future is Jane Doe #3, who has three children under the age of six. (Doc. 1 ¶ 122.) However, her children are United States citizens. (*Id*.) Their father and the

[24]Also, Sections 28(a)(1) and (d)(2) require schools to determine and report the number of students participating in English as a Second Language [ESL] Programs. This information is already collected and reported under federal law. *See*, *e.g.*, 20 U.S.C. § 6968. Plaintiffs do not challenge the collection and reporting of the number of ESL students, which, the court notes, is not synonymous with a student's national origin or immigration status.

husband of Jane Doe #3 is unlawfully present, but nothing in the record indicates that this fact is shown on the face of the birth certificates of their children. (*Id.*) Therefore, although Jane Doe # 3 has alleged that she is "fearful that if HB 56 takes effect, school officials will report her husband's immigration status to federal officials because he will be required to provide information on his immigration status when enrolling their children in public school," (*id.* ¶ 124), this fear is not well founded, *see* H.B. 56 § 28(a)(1)-(3); Ala. Admin. Code r. 420-7-1-.03(2)(a)1.

Other individual plaintiffs have school age children[25] and John Doe #1 is a minor enrolled in Alabama public schools. However, because John Doe # 1 and the other plaintiffs' children are already enrolled in school, Section 28 will not apply to them. (*See* doc. 82-3 at 3.) Therefore, these plaintiffs do not have a real and concrete threat of injury fairly traceable to the enforcement of H.B. 56 § 28.

Of the plaintiff associations and organizations, only two – DreamActivist.org and Greater Birmingham Ministries – mention any injury to themselves or their members arising from H.B. 56 § 28. (*See* doc. 1 ¶¶ 46-58.) Plaintiffs allege that "younger members [of

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[25]Webster is adopting John Doe # 1 and his brother; both children are already enrolled in public school. (Doc. 1 ¶¶ 143, 144.) Jane Doe #1 and John Doe #2 have a 17 year old son who is undocumented and a 9-year-old daughter who is a United States citizen. (*Id.* ¶¶ 111, 147.) Plaintiff Jane Doe #2 is considering home-schooling her children because she is afraid school officials will report her undocumented status to federal immigration officials. (*Id.* ¶ 120.) Jane Doe #4 is the mother of three children who presumably are in school as their mother has been in the country for eleven years. (*Id.* ¶ 126.) Jane Doe #5 has a 13-year-old son and she is afraid school officials will try to determine her immigration status. (*Id.* ¶¶ 131, 135.)

DreamActivist.org] will be afraid to enroll in public elementary or secondary school because they will have to disclose their or their parents' immigration status in order to enroll." (*Id.* ¶ 50; doc. 37-10 ¶ 8(h).) They also allege:

> Undocumented individuals from GBM [Greater Birmingham Ministries] congregations have also expressed concern that their children may not be able to attend school if they have to register with their child's public school under HB 56. These members fear that their immigration status will be sent to the federal government and lead them to being detained and possibly deported under HB 56.

(Doc. 1 ¶ 56, *see also* doc. 37-11 ¶ 11.) Also, plaintiffs have submitted the declaration of the Executive Director of the Hispanic Interest Coalition of Alabama, in which she states, "Many of the drop-in visitors seek information about the new law's provision regarding K-12 education. Our constituents and members are fearful of enrolling their children in school and we must address these concerns constantly." (Doc. 37-2 ¶ 15.)

The organizations do not identify any member or constituent who is an alien or parent of an alien required to follow the procedures set forth in Section 28(a)(4). Therefore, these organizations do not have standing based on the standing of their members or constituents. *See Summers*, 129 S. Ct. at 1149, 1151-52.

Moreover, the court finds that these plaintiffs do not have associational standing. "Standing is not dispensed in gross. Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)(internal quotations and citations omitted). Therefore, a general reference to an injury engendered by H.B. 56 will not satisfy plaintiffs' obligation

to show standing. Plaintiffs allege that HICA has spent time discussing Section 28 with its members and constituents. Although diversion of resources to fight or counteract a challenged law may be adequate to establish standing, the diversion of HICA resources alleged in this case is only time spent ***discussing*** Section 28. The Eleventh Circuit has found standing based on an association's diversion of resources when the diversion involved activities designed to counteract or compensate for the effects of the challenged law. *See Billups*, 554 F.3d at 1350. ("Because it will divert resources from its regular activities to educate voters about the requirement of a photo identification and assist voters in obtaining free identification cards, the NAACP established an injury sufficient to confer standing to challenge the statute."); *Browning*, 522 F.3d at 1166. ("In this case, the diversion of personnel and time to help voters resolve matching problems effectively counteracts what would otherwise be Subsection 6's negation of the organizations' efforts to register voters. The net effect is that the average cost of registering each voter increases, and because plaintiffs cannot bring to bear limitless resources, their noneconomic goals will suffer. Therefore, plaintiffs presently have standing on their own behalf to seek relief."). This court finds that the general allegation that HICA has spent time discussing the law, without alleging that any of these discussions involved enrollment of an alien, is not a concrete and real injury fairly traceable to Section 28.

Therefore, plaintiffs' Motion for a Preliminary Injunction to the extent they seek to enjoin Section 28 will be denied for lack of standing.

J. SECTION 30

Section 30 provides:

(a) For the purposes of this section, "business transaction" includes any transaction between a person and the state or a political subdivision of the state, including, but not limited to, applying for or renewing a motor vehicle license plate, applying for or renewing a driver's license or nondriver identification card, or applying for or renewing a business license. "Business transaction" does not include applying for a marriage license.

(b) An alien not lawfully present in the United States shall not enter into or attempt to enter into a business transaction with the state or a political subdivision of the state and no person shall enter into a business transaction or attempt to enter into a business transaction on behalf of an alien not lawfully present in the United States.

(c) Any person entering into a business transaction or attempting to enter into a business transaction with this state or a political subdivision of this state shall be required to demonstrate his or her United States citizenship, or if he or she is an alien, his or her lawful presence in the United States to the person conducting the business transaction on behalf of this state or a political subdivision of this state. United States citizenship shall be demonstrated by presentation of one of the documents listed in Section 29(k).[26] An alien's

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[26]These documents are:

(1) The applicant's driver's license or nondriver's identification card issued by the division of motor vehicles or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of United States citizenship.

(2) The applicant's birth certificate that verifies United States citizenship to the satisfaction of the county election officer or Secretary of State.

(3) Pertinent pages of the applicant's United States valid or expired

(continued...)

[26](...continued)
passport identifying the applicant and the applicant's passport number, or presentation to the county election officer of the applicant's United States passport.

(4) The applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States Bureau of Citizenship and Immigration Services by the county election officer or the Secretary of State, pursuant to 8 U.S.C. § 1373(c).

(5) Other documents or methods of proof of United States citizenship issued by the federal government pursuant to the Immigration and Nationality Act of 1952, and amendments thereto.

(6) The applicant's Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number.

(7) The applicant's consular report of birth abroad of a citizen of the United States of America.

(8) The applicant's certificate of citizenship issued by the United States Citizenship and Immigration Services.

(9) The applicant's certification of report of birth issued by the United States Department of State.

(10) The applicant's American Indian card, with KIC classification, issued by the United States Department of Homeland Security.

(11) The applicant's final adoption decree showing the applicant's name and United States birthplace.

(12) The applicant's official United States military record of service showing the applicant's place of birth in the United States.

(continued...)

lawful presence in the United States shall be demonstrated by this state's or a political subdivision of this state's verification of the alien's lawful presence through the Systematic Alien Verification for Entitlements program operated by the Department of Homeland Security, or by other verification with the Department of Homeland Security pursuant to 8 U.S.C. § 1373(c).

(d) A violation of this section is a Class C felony.

(e) An agency of this state or a county, city, town, or other political subdivision of this state may not consider race, color, or national origin in the enforcement of this section except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901.

(f) In the enforcement of this section, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). An official of this state or political subdivision of this state shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.

H.B. 56 § 30 (footnote added).

1. Standing

The court finds plaintiff Maria D. Ceja Zamora has standing to challenge Section 30 through Count One, Supremacy Clause, and through Count 9, Section 1981. Zamora alleges that she was not allowed to renew her Alabama driver's license, despite the fact that she had a Social Security number and an employment authorization document. (Doc. 1 ¶¶ 69-70.)

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[26](...continued)

(13) An extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States.

HB 56 § 29(k).

She testified that it is essential that she drive. (Doc. 37-14 ¶ 6.) However, Section 30 of H.B. 56, which would prohibit her from obtaining a driver's license or to register a vehicle, prevents her from lawfully driving. The court finds this injury is real and imminent, fairly traceable to the Act, and would be redressed by an injunction enjoining the enforcement of Section 30 of H.B. 56. Therefore, the court finds Zamora has standing to challenge Section 30 of H.B. 56 in Count One and Count Nine.

2. Preemption

In its Memorandum Opinion and Order granting the United States's Motion for Preliminary Injunction, in *United States v. Alabama,* Case No. 2:11-CV-2746-SLB, docs. 93, 94, the court found that Section 30 of H.B. 56 is not preempted by federal law. For the same reasons, the court will deny plaintiffs' Motion for Preliminary Injunction to the extent it seeks to enjoin Section 30 on the ground that it is preempted by federal immigration laws.

3. Section 1981

As set forth above, Section 1981 protects an individual's right to contract from discrimination on the basis of alienage. 42 U.S.C. § 1981(a); *see also Takahashi*, 334 U.S. at 419; *Anderson v. Conboy*, 156 F.3d at 180. However, Section 1981 does not protect any person from discrimination on the basis of illegal presence. *See Anderson*, 156 F.3d at 180.

The court finds that Section 1981 does not conflict with the language or intent of Section 30, which prohibits state and local government from engaging in certain "business transactions" with "an alien not lawfully present in the United States." H.B. 56 § 30(b).

Although some individuals who appear to be of foreign birth may experience discrimination, such cases must await an as-applied challenge.

Based on the foregoing, plaintiffs' Motion for Preliminary Injunction as to Section 30 of H.B. 56 will be denied.

CONCLUSION

For the foregoing reasons, the court is of the opinion –

1. Plaintiffs have shown that they are entitled to an injunction preliminarily enjoining the last sentence of Section 10(e), 11(e), and 13(h); and Section 11(f) and (g);

2. Plaintiffs' request for an injunction preliminarily enjoining Section 11(a) and Section 13 of H.B. 56 is moot based on the court's Memorandum Opinion and Order in *United States v. Alabama*, Case No. 2:11-CV-2746-SLB, docs. 93, 94; and

3. Plaintiffs have not shown that they are entitled to an injunction preliminarily enjoining H.B. 56 in its entirety, or the remainder of Section 10, Section 12, Sections 18-10, Section 27, Section 28, and Section 30.

An Order granting in part and denying plaintiffs' Motion for Preliminary Injunction, (doc. 37), and enjoining enforcement of the last sentence of Sections 10(e), 11(e), and 13(h), as well as Section 11(f) and (g), will be entered contemporaneously with this Memorandum Opinion.

DONE this 28th day of September, 2011.

Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
CHIEF UNITED STATES DISTRICT JUDGE

EXHIBIT 2

FILED
2011 Sep-28 PM 12:37
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case Number: 2:11-CV-2746-SLB**
	)	
STATE OF ALABAMA and GOVERNOR ROBERT J. BENTLEY,	)	
	)	
Defendants.	)	
	)	

ORDER

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is hereby **ORDERED** as follows:

1. The United States's Motion for Preliminary Injunction, (doc. 2), is **GRANTED IN PART**. Its Motion is **GRANTED** as to Sections 11(a), 13, 16, and 17 of H.B. 56.

2. Defendants are **ENJOINED** from executing or enforcing Section 11(a) of H.B. 56 – "It is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state," – pending final judgment in this case.

3. Defendants are **ENJOINED** from executing or enforcing Section 13 – which prohibits concealing, harboring, transporting, etc., of unlawfully-present aliens – pending final judgment in this case.

4. Defendants are **ENJOINED** from executing or enforcing Section 16 – which concerns the taking of a state tax deduction for wages paid to an unauthorized alien employee – pending final judgment in this case.

5. Defendants are **ENJOINED** from executing or enforcing Section 17 – which creates a state "discrimination" cause of action based on the retention or hiring of an unauthorized alien – pending final judgment in this case.

6. The United States's Motion for Preliminary Injunction, (doc. 2), is **DENIED IN PART**. Its Motion is **DENIED** as to Sections 10, 12(a), 18, 27, 28, and 30.

DONE, this 28th day of September, 2011.

Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	**Case Number: 2:11-CV-2746-SLB**
STATE OF ALABAMA; GOVERNOR ROBERT J. BENTLEY,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

I. SUMMARY

On June 2, 2011, the Alabama Legislature approved House Bill 56 (H.B. 56), the "Beason-Hammon Alabama Taxpayer and Citizen Protection Act," Ala. Laws Act 2011-535, hereinafter H.B. 56. On June 9, 2011, Governor Robert Bentley signed the Act into law, with the majority of its provisions to become effective on September 1, 2011. On August 29, 2011, this court temporarily enjoined the Act until September 29, 2011.

On August 1, 2011, the United States filed a Complaint against the State of Alabama and Governor Robert J. Bentley seeking declaratory and injunctive relief contending that various provisions of H.B. 56 are preempted by federal law, and, therefore, violate the Supremacy Clause of the United States Constitution. (Doc. 1.)[1] On the same date, the

[1]Reference to a document number, ["Doc. ___"], refers to the number assigned to each document as it is filed in the court's record. References to page numbers in this

United States filed a Motion for Preliminary Injunction, (doc. 2), seeking to preliminarily enjoin the following sections of H.B. 56: 10, 11(a), 12(a), 13, 16, 17, 18, 27, 28, and 30. The Act declares it "a compelling public interest to discourage illegal immigration by requiring all agencies within [Alabama] to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws." H.B. 56 § 2. The term "alien" is defined in the Act as "[a]ny person who is not a citizen or national of the United States, as described in 8 U.S.C. § 1101, *et seq*., and amendments thereto." H.B. 56 § 3.

H.B. 56 includes a severability provision, stating that "If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains." H.B. 56 § 33. Therefore, the court will address the challenges to H.B. 56 on a section-by-section basis. The following sections are challenged by the United States:

> H.B. 56 § 10, which creates a criminal misdemeanor violation under Alabama law for willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a) and is unlawfully present in the United States.
>
> H.B. 56 § 11(a), which makes it a misdemeanor crime for an unauthorized alien to apply for, solicit, or perform work.
>
> H.B. 56 § 12(a), which requires a law enforcement officer to make a reasonable attempt, when practicable, to determine the citizenship and immigration status of a person stopped, detained or arrested when reasonable suspicion exists that the person is an alien who is unlawfully present in the United States.

Memorandum Opinion refer to the page numbers assigned to the document by the court's electronic filing system, not the page number at the bottom of each page.

H.B. 56 § 13, which makes it unlawful for a person to 1) conceal, harbor or shield an alien unlawfully present in the United States, or attempt or conspire to do so; 2) encourage an unlawful alien to come to the State of Alabama; or 3) to transport (or attempt or conspire to transport) an unlawful alien.

H.B. 56 § 16, which forbids employers from claiming as business tax deductions any wages paid to an unauthorized alien.

H.B. 56 § 17, which establishes a civil cause of action against an employer who fails to hire or discharges a U.S. citizen or an alien who is authorized to work while hiring, or retaining, an unauthorized alien.

H.B. 56 § 18, which amends Ala. Code 32-6-9 to include a provision that if a person is arrested for driving without a license, and the officer is unable to determine that the person has a valid driver's license, the person must be transported to the nearest magistrate; a reasonable effort shall be made to determine the citizenship of the driver, and if found to be unlawfully present in the United States the driver shall be detained until prosecution or until handed over to federal immigration authorities.

H.B. 56 § 27, which bars Alabama courts from enforcing a contract to which a person who is unlawfully present in the United States is a party. This section does not apply to contracts for lodging for one night, contracts for the purchase of food, contracts for medical services, or contracts for transportation for an alien to return to his or her country of origin.

H.B. 56 § 28, which requires every public elementary and secondary school in Alabama to determine if an enrolling student was born outside the jurisdiction of the United States or is the child of an unlawfully present alien and qualifies for assignment to an English as second language class or other remedial program.

H.B. 56 § 30, which makes it a felony for an alien not lawfully present in the United States to enter into a "business transaction" with the State of Alabama or any political subdivision thereof.

As discussed more fully below, "[a] preliminary injunction is an extraordinary and drastic remedy." *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of*

Jacksonville, Florida, 896 F.2d 1283, 1285 (11th Cir. 1990) (citations omitted). Moreover, as the Eleventh Circuit has noted

> When a federal court before trial enjoins the enforcement of a municipal ordinance adopted by a duly elected city council, the court overrules the decision of the elected representatives of the people and, thus, in a sense interferes with the processes of democratic government. Such a step can occasionally be justified by the Constitution (itself the highest product of democratic processes). Still, ***preliminary injunctions of legislative enactments – because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits – must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts***.

Id. (emphasis added).

Upon consideration of the Motion for Preliminary Injunction, the memoranda submitted in support of and in opposition to the Motion, the arguments of counsel, the Amici briefs accepted by the court, and the relevant law, the court is of the opinion, as more fully discussed below, that the United States has not met the requirements for a preliminary injunction on its claim that Sections 10, 12(a), 18, 27, 28, and 30 of H.B. 56 are preempted by federal law. Therefore, the motion for preliminary injunction as to these sections will be denied. However, the court is of the opinion, as more fully discussed below, that there is a substantial likelihood that the United States will succeed on the merits of its claim that Sections 11(a), 13, 16, and 17 of H.B. 56 are preempted by federal law. The court further finds that the United States will suffer irreparable harm if these sections of H.B. 56 are not enjoined, the balance of equities favors the entry of an injunction, and its entry would not be

adverse to the public interest. Therefore, the Motion for Preliminary Injunction will be granted as to these sections.

II. PRELIMINARY INJUNCTION STANDARD

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."[2] *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). "A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal quotations and citations omitted). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)(internal quotations and citations omitted). In this Circuit –

> In order to prevail on an application for a preliminary injunction, the plaintiff must clearly establish all of the following requirements:
>
> (1) . . . a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.

[2]"It is always true, by definition, that the status quo is less restrictive than a new regulatory law. It is always less restrictive to do ***nothing*** than to do ***something***." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 684 (2004)(Breyer, J., dissenting)(emphasis in original).

Bloedorn v. Grube, 631 F.3d 1218, 1229 (11th Cir. 2011)(quoting *Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009)). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

III. FEDERAL IMMIGRATION LAW

The Third Circuit in *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), clearly set forth the current federal law regarding immigration and immigrants:

> **1. The Immigration and Nationality Act**
>
> The primary body of federal immigration law is contained in the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101–537, enacted in 1952, and amended many times thereafter. The INA sets forth the criteria by which "aliens," defined as "any person not a citizen or a national of the United States," 8 U.S.C. § 1101(a)(3), may enter, visit, and reside in this country.
>
> Under the INA, there are three primary categories of aliens who may lawfully enter and/or spend time within the United States: (1) "nonimmigrants," who are persons admitted for a limited purpose and for a limited amount of time, such as visitors for pleasure, students, diplomats, and temporary workers, see 8 U.S.C. § 1101(a)(15); (2) "immigrants," who are persons admitted as (or after admission, become) lawful permanent residents of the United States based on, *inter alia*, family, employment, or diversity characteristics, *see* 8 U.S.C. § 1151; and (3) "refugees" and "asylees," who are persons admitted to and permitted to stay for some time in the United States because of humanitarian concerns, *see* 8 U.S.C. §§ 1157–58. Aliens wishing to be legally admitted into the United States must satisfy specific eligibility criteria in one of these categories, and also not be barred by other provisions of federal law that determine inadmissibility. Congress has determined that non-citizens who, *inter alia*, have certain health conditions, have been convicted of certain crimes, present security concerns, or have been recently removed from the United States, are inadmissible, *see* 8 U.S.C. § 1182, and if

detained when attempting to enter or reenter the country, may be subject to expedited removal, *see* 8 U.S.C. § 1225.

Despite the carefully designed system for lawful entry described above, persons lacking lawful immigration status are obviously still present in the United States. As the Supreme Court explained almost thirty years ago: "[s]heer incapability or lax enforcement of the laws barring entry into this country . . . has resulted in the creation of a substantial 'shadow population' . . . within our borders." *Plyler* [*v. Doe*], 457 U.S. [202,] 218 [(1982)]. Such persons may lack lawful status because they entered the United States illegally, either by failing to register with immigration authorities or by failing to disclose information that would have rendered them inadmissible when they entered. *See* 8 U.S.C. § 1227. In addition, aliens who entered legally may thereafter lose lawful status, either by failing to adhere to a condition of admission, or by committing prohibited acts (such as certain criminal offenses) after being admitted. *See id.*

Persons here unlawfully are subject to removal from the country. Removal proceedings are initiated at the discretion of the Department of Homeland Security ("DHS"). [footnote] *See Juarez v. Holder*, 599 F.3d 560, 566 (7th Cir. 2010)("[T]he decision when to initiate removal proceedings is committed to the discretion of immigration authorities." (citing *Reno v. Am.-Arab Anti–Discrimination Comm.*, 525 U.S. 471, 489 (1999))). Although certain aliens are subject to more expedited removal proceedings, for all others, section 240 of the INA sets forth the "sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States." 8 U.S.C. § 1229a(a)(3).

> [Footnote:] Prior to 2003, the Immigration and Naturalization Service ("INS"), which operated under the Department of Justice, administrated both immigration services and immigration enforcement. On March 1, 2003, Congress abolished the INS. Pursuant to the Homeland Security Act of 2002, Pub.L. No. 107–296, 116 Stat. 2135, that agency's functions were transferred to three separate agencies within the newly created Department of Homeland Security: U.S. Citizenship and Immigration Services ("USCIS"), which performs immigration and naturalization services, U.S. Immigration and Customs Enforcement ("ICE"), which enforces federal immigration and customs laws, and U.S. Customs and Border Protection ("CBP"), which monitors and

secures the country's borders. Older documents may continue to refer to the pre–2003 administrative structure, and citations to them should be understood in that context.

Under section 240, an alien facing removal is entitled to a hearing before an immigration judge and is provided numerous procedural protections during that hearing, including notice, the opportunity to present and examine evidence, and the opportunity to be represented by counsel (at the alien's expense). *See* 8 U.S.C. § 1229a. At the conclusion of a removal hearing, the presiding immigration judge must decide, based on the evidence produced during the hearing, whether the alien is removable, *see* 8 U.S.C. § 1229a(c)(1)(A), and if so, whether s/he should be ordered removed, or should be afforded relief from removal. Such relief can include postponement of removal, cancellation of removal, or even adjustment of status to that of lawful permanent resident. *See* 8 U.S.C. §§ 1229a(c)(4), 1229b.

In sum, while any alien who is in the United States unlawfully faces the prospect of removal proceedings being initiated against her/him, whether s/he will actually be ordered removed is never a certainty until all legal proceedings have concluded. Moreover, even after an order of removal issues, the possibility remains that no country will accept the alien. Under such circumstances, the Constitution limits the government's authority to detain someone in anticipation of removal if there is no significant likelihood of removal in the reasonably foreseeable future. *See Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

The INA, as amended, also prohibits the "harboring" of aliens lacking lawful immigration status. It provides that any person who "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection . . . such alien in any place, including any building or any means or transportation" shall be subject to criminal penalties. 8 U.S.C. § 1324(a)(1)(A)(iii).

For decades, the INA contained no specific prohibition against the employment of aliens lacking legal status. Rather, regulation of the employment of aliens not lawfully present was at most a "peripheral concern." *DeCanas v. Bica*, 424 U.S. 351, 360 (1976). This changed in 1986, when Congress amended the INA through enactment of the Immigration Reform and Control Act ("IRCA"), Pub.L. No. 99–603, 100 Stat. 3359 (codified at 8

U.S.C. §§ 1324a–1324b). IRCA "forcefully made combating the employment of illegal aliens central to the policy of immigration law." *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 147(2002) (internal quotation marks and alterations omitted).

2. The Immigration Reform and Control Act

IRCA regulates the employment of "unauthorized aliens," a term of art defined by the statute as those aliens neither "lawfully admitted for permanent residence" nor "authorized to be . . . employed by this chapter or by the Attorney General." 8 U.S.C. § 1324a(h)(3). IRCA makes it unlawful to knowingly hire or continue to employ an unauthorized alien, or to hire anyone for employment without complying with the work authorization verification system created by the statute. 8 U.S.C. § 1324a(a)(1)-(2). This verification system, often referred to as the "I–9 process," requires that an employer examine certain documents that establish both identity and employment authorization for new employees. *See* 8 U.S.C. § 1324a(b). The employer must then fill out an I–9 form attesting that s/he reviewed these documents, that they reasonably appear to be genuine, and that to the best of the employer's knowledge, the employee is authorized to work in the United States. *See id*. Although employers are required to verify the work authorization of all ***employees***, Congress did not extend this requirement to independent contractors. *See* 8 U.S.C. § 1324a(a)(1)(making unlawful the knowing "employment" of an unauthorized alien, and the hiring of an employee for "employment" without verifying the employee's work authorization); 8 C.F.R. § 274a.1(f)(specifically excluding "independent contractors" from the definition of "employee"); 8 C.F.R. § 274a.1(g) (specifically excluding a "person or entity using . . . contract labor" from the definition of "employer").

The I–9 "verification system is critical to the IRCA regime." *Hoffman Plastic Compounds*, 535 U.S. at 147–48. Not only is failure to use the system illegal, but use of the system provides an affirmative defense to a charge of knowingly employing an unauthorized alien. *See* 8 U.S.C. § 1324a(a)(3). Thus, employers who use the I–9 process in good faith to verify the work authorization of employees are presumed not to have knowingly employed someone unauthorized to work in this country. In enacting IRCA, Congress required the President to monitor the security and efficacy of this verification

system. *See* 8 U.S.C. § 1324a(d). Congress also imposed limits on the President's ability to change it. *Id*.

In addition to relying on the I–9 verification system, IRCA uses public monitoring, prosecution, and sanctions to deter employment of unauthorized aliens. IRCA provides for the creation of procedures through which members of the public may file complaints about potential violations; it authorizes immigration officers to investigate these complaints; and it creates a comprehensive hearing and appeals process through which complaints are evaluated and adjudicated by administrative law judges. *See* 8 U.S.C. § 1324a(e)(1)-(3).

Under IRCA, an employer who knowingly hires an unauthorized alien shall be ordered to cease and desist the violation, and to pay between $250 and $2000 per unauthorized alien for a first offense, between $2000 and $5000 per unauthorized alien for a second offense, and between $3000 and $10,000 per unauthorized alien for a third or greater offense. 8 U.S.C. § 1324a(e)(4). An employer who fails to verify the work authorization of its employees can be ordered to pay between $100 and $1000 for each person whose authorization it failed to authenticate. 8 U.S.C. § 1324a(e)(5). Employers who engage in a "pattern or practice" of hiring unauthorized aliens shall be fined up to $3000 per unauthorized alien, imprisoned for not more than six months, or both. 8 U.S.C. § 1324a(f)(1).

IRCA expressly pre-empts states and localities from imposing additional "civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

Because of its concern that prohibiting the employment of unauthorized aliens might result in employment discrimination against authorized workers who appear to be foreign, Congress included significant anti-discrimination protections in IRCA. *See* 8 U.S.C. § 1324b. [Footnote] The statute provides that, with certain limited exceptions, it is an "unfair immigration-related employment practice" to discriminate in hiring on the basis of national origin or citizenship status. 8 U.S.C. § 1324b(a)(1). Congress put teeth into this provision by creating the office of a "Special Counsel" to investigate and prosecute such offenses, and it required that the President fill that position "with the advice and consent of the Senate." 8 U.S.C. § 1324b(c). Congress also authorized immigration judges to punish those who violate IRCA's

anti-discrimination mandate by imposing civil fines equivalent in amount to those imposed for knowingly hiring unauthorized aliens. *Compare* 8 U.S.C. § 1324a(e)(4)(A)(i)-(iii) *with* 8 U.S.C. § 1324b(g)(2)(B)(iv)(I)-(III).

[Footnote:] 8 U.S.C. § 1324b provides in relevant part that:

> [with certain limited exceptions, it] is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment – (A) because of such individual's national origin, or (B) in the case of a protected individual . . . because of such individual's citizenship status.

8 U.S.C. § 1324b(a). Any person adversely-affected by an unfair immigration-related employment practice "may file a charge respecting such practice or violation." 8 U.S.C. § 1324b(b)(1).

3. The Illegal Immigration Reform and Immigrant Responsibility Act

In 1996, Congress again amended the INA by enacting the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in various sections of 8 U.S.C.). In IIRIRA, Congress directed the Attorney General, and later the Secretary of Homeland Security, to conduct three "pilot programs of employment eligibility confirmation" in an attempt to improve upon the I-9 process. IIRIRA § 401(a), 110 Stat. 3009-655. Congress mandated that these programs be conducted on a trial basis, for a limited time period, and in a limited number of states. *See* IIRIRA § 401(b)-(c), 110 Stat. 3009-655-66. Two of these trial systems were discontinued in 2003. However, the third – originally known as the "Basic Pilot Program" but since renamed "E-Verify" – was reauthorized and expanded to all fifty states in 2003. *See* Basic Pilot Program Extension and Expansion Act of 2003, Pub.L. No. 108-156, §§ 2, 3, 117 Stat. 1944. It has been reauthorized several times since, and its current authorization will expire, absent congressional action, on September 30, 2012.

See Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 547, 123 Stat. 2177; Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, Div. A, § 143, 122 Stat. 3580.

E-Verify allows an employer to actually authenticate applicable documents rather than merely visually scan them for genuineness. When using E-Verify, an employer enters information from an employee's documents into an internet-based computer program, and that information is then transmitted to the Social Security Administration and/or DHS for authentication. *See* IIRIRA, as amended, § 403(a)(3). These agencies confirm or tentatively nonconfirm whether the employee's documents are authentic, and whether the employee is authorized to work in the United States. *See* IIRIRA, as amended, § 403(a)(4). If a tentative nonconfirmation is issued, the employer must notify the employee, who may contest the result. *See id*. If an employee does not contest the tentative result within the statutorily prescribed period, the tentative nonconfirmation becomes a final nonconfirmation. *See id*. If the employee does contest it, the appropriate agencies undertake additional review and ultimately issue a final decision. *See id*. An employer may not take any adverse action against an employee until it receives a final nonconfirmation. *See id*. However, once a final nonconfirmation is received, an employer is expected to terminate the employee, or face sanctions.

With only a few exceptions, federal law makes the decision of whether to use E-Verify rather than the default I-9 process entirely voluntary. *See* IIRIRA, as amended, § 402(a). Federal government employers and certain employers previously found guilty of violating IRCA are currently required to use E-Verify; all other employers remain free to use the system of their choice. *See* IIRIRA, as amended, § 402(e). Significantly, in enacting IIRIRA, Congress specifically prohibited the Secretary of Homeland Security from requiring "any person or other entity to participate in [E-Verify]." *See* IIRIRA, as amended, § 402(a). Congress also directed the Secretary to publicize the "voluntary nature" of the program and to ensure that government representatives are available to "inform persons and other entities that seek information about [E-Verify] of [its] voluntary nature." IIRIRA, as amended, § 402(d).

Those employers who elect to use E-Verify and actually do use the system to confirm an employee's authorization to work are entitled to a rebuttable presumption that they did not hire that employee knowing that s/he

> lacks authorization to work in this country. *See* IIRIRA, as amended, § 402(b)(1). Employers who elect to use E-Verify, but in practice continue to use the I-9 process, are not entitled to the E-Verify rebuttable presumption, but can still claim the I-9 affirmative defense. *See* IIRIRA, as amended, § 402(b)(2).

Lozano v. City of Hazleton, 620 F.3d 170, 196-201 and nn.21, 24 (3d Cir. 2010)(emphasis in original; footnotes omitted except where otherwise indicated, parallel Supreme Court citations omitted), *cert. granted and judgment vacated*, 131 S. Ct. 2958 (2011) (Mem).

IV. DISCUSSION

A. PREEMPTION AND THE SUPREMACY CLAUSE

The United States argues that Sections 10, 11(a), 12(a), 13, 16, 17, 18, 27, 28 and 30 of H.B. 56 are preempted under the Supremacy Clause of the United States Constitution and federal immigration law. (Doc. 1 ¶¶ 69-70, 72.) The Supremacy Clause of the U.S. Constitution provides that the Constitution, federal laws, and treaties are "the Supreme Law of the Land." U.S. CONST., art. VI, cl. 2. In certain instances, the Constitution – in its own right – can preempt state action in a field exclusively reserved for the federal government. *DeCanas v. Bica*, 424 U.S. 351, 354-56 (1976) ("[The constitutional] [p]ower to regulate immigration[3] is unquestionably exclusively a federal power."), *superceded by statute as stated in Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1975 (2011).[4] The Supremacy

[3]According to the Supreme Court, a regulation of immigration "is essentially a determination of who should or should not be admitted to the country, and the conditions under which a legal entrant may remain. *DeCanas*, 424 U.S. at 355.

[4]In *DeCanas*, the Supreme Court held that a California law prohibiting an employer from knowingly employing an alien unlawfully present in the United States, if such

Clause also "vests Congress with the power to preempt state law." *Stephen v. Am. Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987); *see also Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).[5]

> Therefore, this court's analysis of preemption claims
>
> must be guided by two cornerstones of [the Supreme Court's] pre-emption jurisprudence. First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, [i]n all preemption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [courts] start with the assumption that the historic

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employment would have an adverse effect on lawful resident workers, was not unconstitutional as a regulation of immigration or as being preempted under the Supremacy Clause by the Immigration and Nationality Act . *DeCanas*, 424 U.S. at 356, 363. In *Whiting*, the Court noted:

> IRCA also restricts the ability of States to combat employment of unauthorized workers; the Act expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." [8 U.S.C.] § 1324a(h)(2). Under that provision, state laws imposing civil fines for the employment of unauthorized workers like the one we upheld in *DeCanas* are expressly preempted.

Whiting, 131 S. Ct. at 1975.

[5]In *Gibbons*, Chief Justice Marshal wrote:

> The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

Gibbons, 22 U.S. at 211.

> police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187, 1194-95 (2009)(quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))(internal quotations and citations omitted).

Preemption may be express or implied, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (O'Connor, J., plurality opinion), and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Express preemption occurs when the text of a federal law is explicit about its preemptive effects. *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1167 (11th Cir. 2008)("Express preemption occurs when Congress manifests its intent to displace a state law using the text of a federal statute.").

Implied preemption falls into two categories: field preemption and conflict preemption. *Gade*, 505 U.S. at 98; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)("Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances."); *see Browning*, 522 F.3d at 1167 ("Field and conflict preemption in turn have been considered under the umbrella term 'implied preemption.'"). Field preemption exists when:

> Congress' intent to supercede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same

> subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.

Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Commn, 461 U.S. 190, 203-04 (1983)(internal quotations omitted). "Conflict preemption" occurs when "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132,142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). These "categories of preemption are not 'rigidly distinct,'" however, as "field pre-emption may be understood as a species of conflict pre-emption." *Crosby*, 530 U.S. at 373 n.6 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79-80 n.5 (1990)).

In their Motion for Preliminary Injunction, the United States argues that some sections of H.B. 56 are due to be enjoined on the basis of express preemption by federal statutes and that other sections are due to be enjoined because the United States contends they are impliedly preempted by federal law.

B. SECTION 10

Section 10(a) of H.B. 56 states:

> (a) In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), and the person is an alien unlawfully present in the United States.

H.B. 56 § 10(a). An "alien unlawfully present in the United States" who violates Section 10 is "guilty of a Class C misdemeanor and subject to a fine of not more than one hundred dollars ($100) and not more than 30 days in jail." *Id.* § 10(f). For the purposes of enforcing Section 10, "an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c)." H.B. 56 § 10(b). Section 10 "does not apply to a person who maintains authorization from the federal government to be present in the United States." *Id.* § 10(d).

To understand H.B. 56 § 10, it is necessary to consult certain provisions of the INA, namely 8 U.S.C. §§ 1302, 1304(e), and 1306(a). As with any question of statutory interpretation, the court "begin[s] by examining the text of the statute to determine whether its meaning is clear." *United States v. Zheng*, 306 F.3d 1080, 1085 (11th Cir. 2011) (quoting *Lewis v. Barnhart*, 285 F.3d 1329, 1331 (11th Cir. 2002)). Section 1302 provides that "every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted . . . , and (3) remains in the United States for thirty days or longer" must "apply for registration and to be fingerprinted before the expiration of such thirty days." 8 U.S.C. § 1302(a). Section 1302 also provides that "every parent or legal guardian of any alien now or hereafter in the United States, who (1) is less than fourteen years of age, (2) has not been registered . . . , and (3) remains in the United States for thirty days or longer" must "apply for the registration of such alien before the expiration of such thirty days." *Id.* (b). An alien described in Section 1302(b) who "attains his fourteenth

birthday in the United States" must, "within thirty days thereafter, apply in person for registration and to be fingerprinted." *Id.*

Section 1304 provides that "[e]very alien in the United States who has been registered and fingerprinted . . . shall be issued a certificate of alien registration or an alien registration card . . . ." 8 U.S.C. § 1304(d). Section 1304 also provides that "[e]very alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him . . . ." *Id.* § 1304(e). An alien who violates Section 1304(e) is "guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed $100 or be imprisoned not more than thirty days, or both." *Id.* Section 1304(e) presupposes that the alien has registered pursuant to § 1302 and been provided documentation pursuant to Section 1304(d). An alien who has never registered or applied for a certificate of alien registration cannot, by the plain language of 8 U.S.C. § 1304(a), be charged with a crime for failure to have in his or her personal possession any registration documents issued to him or her.

Section 1306 provides:

> Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien" is "guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both.

8 U.S.C. § 1306(a).

Essentially, H.B. 56 § 10 creates two Alabama state crimes related to the INA's alien registration scheme. The first state crime has two elements and arises when an alien is "unlawfully present in the United States" ***and*** "in violation of 8 U.S.C. § 1304(e)." H.B. 56 § 10(a). The second state crime has two elements and arises when an alien is "unlawfully present in the United States" ***and*** "in violation of . . . 8 U.S.C. § 1306(a)." *Id.* Although it is a federal crime to violate 8 U.S.C. § 1304(e) and 8 U.S.C. § 1306(a), the state crimes for violating H.B. 56 § 10 arise in a narrower set of circumstances than the federal crimes for violating either 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a). In other words, there may be circumstances when an alien would be in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a) but would not, under the same circumstances, be in violation of H.B. 56 § 10(a).

Section 1304(e) applies to "[e]very alien," whether lawfully present or not, who has registered under Section 1302 and been issued documentation under Section 1304(d) but who fails to carry the documentation as required by Section 1304(e). *See, e.g.*, *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 546 (6th Cir. 2002)(citing 8 U.S.C. § 1304(e))("Failure to carry one's green card on his or her person can subject a legal resident alien to criminal sanctions."); *Etuk v. Slattery*, 936 F.2d 1433, 1444 (2d. Cir. 1991) ("The INA mandates that the Attorney General provide [lawful permanent residents] who register with proof of their legal status." (citing 8 U.S.C. § 1304(d))). Section 10(a) of H.B. 56, on the other hand, applies only to aliens who are "unlawfully present in the United States" and who fail to carry documentation as required by 8 U.S.C. § 1304(e). Unlike 8 U.S.C. §

1304(e), H.B. 56 § 10(a), by its plain language, does not apply to aliens lawfully present in the United States, such as legal permanent residents, who fail to carry their registration documents.

The same reasoning applies to the second state crime created by H.B. 56 § 10(a). Section 1306(a) applies to "any alien," whether lawfully present or not, who has failed to register or be fingerprinted as required by 8 U.S.C. § 1302. Section 10(a) of H.B. 56, on the other hand, applies only to an alien who is "unlawfully present in the United States" and has failed to register and be fingerprinted in violation of 8 U.S.C. § 1306(a). Unlike Section 1306(a), H.B. 56 § 10(a), by its plain language, does not apply to aliens lawfully present in the United States who fail to register or be fingerprinted in violation 8 U.S.C. § 1306(a).

The United States argues that H.B. 56 § 10 is conflict preempted because it interferes with the federal alien registration scheme. (Doc. 2 at 28-31.) As noted, every preemption analysis "must be guided by two cornerstones." *Wyeth*, 129 S. Ct. at 1194. The first is that "'the purpose of Congress is the ultimate touchstone.'" *Id.* (quoting *Lohr*, 518 U.S. at 485.) The second is that a presumption against preemption applies when "Congress has legislated . . . in a field which the States have traditionally occupied." *Id.* Because the states have not traditionally occupied the field of alien registration, the court applies no presumption against preemption for H.B. 56 § 10.

The current federal registration system set forth in 8 U.S.C. §§ 1302, 1304, and 1306, creates a comprehensive scheme for alien registration. *See Hines*, 312 U.S. at 74. The

federal system requires aliens to register, 8 U.S.C. § 1302, and requires registered aliens to obtain a certificate of alien registration or an alien registration card, 8 U.S. C. § 1304(d). The INA provides criminal penalties for aliens who fail to carry a registration card or certificate, 8 U.S.C. § 1304(e), and who willfully fail to register, notify the federal government of a change of address, make fraudulent statements, and produce counterfeit documents. 8 U.S.C. § 1306 (a)-(d).

The United States relies primarily on *Hines* to support its assertion that H.B. 56 § 10 is preempted. (*See* doc. 2 at 28-30.) In *Hines*, the Supreme Court considered whether the federal Alien Registration Act, the precursor to the INA, preempted the Alien Registration Act adopted in Pennsylvania. *Hines*, 312 U.S. at 56. The subject of both the federal Act and the Pennsylvania Act was the registration of aliens. *Id.* at 61. The Court stated:

> [W]here the federal government, in the exercise of its superior authority in [the] field [of immigration], has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, ***inconsistently with the purpose of Congress***, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Id. at 66-67 (emphasis added). On that basis, the Court found that its "primary function" was "to determine whether . . . Pennsylvania's law [stood] as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress" in enacting the federal Act. *Id.* at 67. Although compliance with both the Pennsylvania Act and the federal Act was not

impossible,[6] the Court nonetheless found that the Pennsylvania Act could not be enforced because it stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67, 71-74.

First, the Pennsylvania Act established a separate, state-specific alien registration scheme that was independent from the federal Act. *Id.* at 59-61. Pennsylvania's state-specific registration scheme stood in clear conflict with Congress's objective of having a "uniform national registration system," and "a standard for alien registration in a single integrated and all-embracing system" through the federal Act. *Id.* at 74. Second, the Pennsylvania Act created registration requirements that were different from those provided by Congress in the federal Alien Registration Act. *Id.* at 59-61. For example, the Pennsylvania Act required aliens to carry their registration cards with them at all times. *Id.* at 60-61. Congress had considered and rejected such a provision in the federal Act. *Id.* at 72-73.[7]

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[6] *See Hines*, 312 U.S. at 78 (in his dissent, Justice Stone noted, "It is conceded that the federal act in operation does not at any point conflict with the state statute, and it does not by its terms purport to control or restrict state authority in any particular.")(Stone, J., dissenting); *see also Wyeth*, 129 at 1211-12 ("The Court [in *Hines*] did not find that the two statutes, by their terms, directly conflicted.")(Thomas, J., concurring)(citations and footnote omitted).

[7] The Court in *Hines* explained:

> The requirement that cards be carried and exhibited has always been regarded as one of the most objectionable features of proposed registration systems, for it is thought to be a feature that best lends itself to tyranny and intimidation. Congressman Celler, speaking in 1928 of the repeated defeat of registration bills and of an attempt by the Secretary of Labor to require

This case is distinguishable from *Hines*. As the State Defendants note "there was a clear conflict between Pennsylvania law and the federal scheme" in *Hines* and "[i]n contrast, no such conflict exists between Section 10 of [H.B. 56] and 8 U.S.C. §§ 1304(e) and 1306(a)." (Doc. 38 at 65-66.) First, unlike the Pennsylvania Act in *Hines*, H.B. 56 § 10 does not create an independent, state-specific registration scheme, attempt to register anyone, or create registration requirements in addition to the rights established by Congress in the INA. The standard for registration provided by Congress remains uniform. H.B. 56 § 10, consistent with the Court's recent decision in *Chamber of Commerce v. Whiting*, expressly defers to the federal alien registration scheme and federal immigration status determinations. *See Whiting*, 131 S. Ct. at 1981. It does so by: (1) requiring that "an alien's immigration status . . . be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c)," H.B. 56 § 10(b); (2) exempting "a person who maintains authorization from the federal government to be present in the United States," *id.* (d); and (3) providing penalties that closely track those provided by federal law, *compare* 8 U.S.C. § 1306(a) (providing that a person who willfully fails to register is "guilty of a

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> registration of incoming aliens by executive order, said: ["]But here is the real vice of the situation and the core of the difficulty: 'The admitted alien,' as the order states, 'should be cautioned to present (his card) for inspection if and when subsequently requested so to do by an officer of the Immigration Service.[']" 70 Cong. Rec. 190.

Hines, 312 U.S. at 71 n.32. In 1952, after the *Hines* decision, 8 U.S.C. §§ 1304 and 1306 were adopted to add the requirement that aliens carry their registration documents. *See* H.R. Rep. 82-1365, 2d Session, 1952, 1952 U.S.C.C.A.N. 1653, 1723.

misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both") *and* 8 U.S.C. § 1304(e) (providing that a person who fails to carry his registration documents is "guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed $100 or be imprisoned not more than thirty days, or both") *with* H.B. 56 § 10(f) (providing that an alien unlawfully present in the United States and who is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a) is "guilty of a Class C misdemeanor and subject to a fine of not more than one hundred dollars ($100) and not more than 30 days in jail"). Second, the current federal alien registration scheme requires that aliens carry their registration documents. *See* 8 U.S.C. § 1304(e). In 1952, Congress amended the alien registration laws to require aliens to carry their registration documents. *See* 8 U.S.C. § 1304(e). When Congress passed the 1952 law making an alien's failure to carry his registration documents a crime, it stated, "the provisions have been modified . . . to require . . . the registration . . . and fingerprinting of all aliens in the country and to assist in the enforcement of those provisions." *See* H.R. Rep. 82-1365, 2d Session, 1952, 1952 U.S.C.C.A.N. 1723. Congress explicitly recognized that the 1952 amendments to the scheme made it a crime for aliens not to carry their registration documents. *See* 98 Cong. Rec. 4432-33 (1952)("Alien registration cards are not new in the law, yet this is the first time where it becomes a necessity for an alien to carry the card with him and, if he does not, it becomes a crime." (statement of Rep. Chudoff)). As a result, H.B. 56 § 10 does not suffer the same obstacle preemption problem as the Pennsylvania Act.

Although the penalties provided by H.B. 56 § 10 "complement" the INA's registration provisions by making it a state crime for "alien[s] unlawfully present" to violate 8 U.S.C. §§ 1304(e) or 1306(a), this "complement[ing]" is not "inconsistent[] with the purpose of Congress." *See Hines*, 312 U.S. at 66-67. The penalties provided by H.B. 56 § 10 apply in narrow circumstances that are completely encompassed by the federal scheme. It is already a crime under the federal alien registration scheme for an unlawfully present alien to violate 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a). Unless Congress has occupied the field through the INA – a conclusion the Supreme Court appears to have rejected, *seeDeCanas ,* 424 U.S. at 358; *United States v. Arizona*, 703 F. Supp. 2d 980, 999 (D. Ariz. 2010) ("[In *DeCanas*] the Supreme Court rejected the possibility that the INA is so comprehensive that it leaves no room for state action that impacts aliens.") – it is not "inconsistent[] with the purpose of Congress" to do that which Congress has already done. *See Hines*, 312 U.S. at 66. The Court has uniformly held that the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own 'inherent sovereignty,' not from the Federal Government. *Heath v. Alabama*, 474 U.S. 82, 89 (1985). The fact that states can enact laws which impose state penalties for conduct that federal law also sanctions, without being preempted, is "too plain to need more than statement." *Westfall v. United States*, 274 U.S. 256, 258 (1927).

The United States argues, "The federal alien registration scheme has been held by the Supreme Court to represent the quintessential example of a pervasive and comprehensive

scheme of federal regulation that leaves no room for state legislation in this area," and, "*Hines* squarely held that Congress intended the federal government to exercise exclusive control over all issues related to alien registration." (Doc. 2 at 29.) However, it does not address whether the provisions of H.B. 56 § 10 are "inconsistent[] with the purpose of Congress." *See Hines*, 312 U.S. at 66. The court does not read *Hines* as holding that Congress has "occupied the field" of alien registration. *Id.* at 67 ("Our primary function is to determine whether, ***under the circumstances of this particular case***, Pennsylvania's law ***stands as an obstacle*** to the accomplishment and execution of the full purposes and objectives of Congress.") (emphasis added); *see also Wyeth*, 129 S. Ct. at 1213 (Thomas, J., concurring).[8] The United States has not directed this court to any authority for the proposition that Congress intended ***exclusivity***, rather than ***uniformity***. "[S]ilence on the part of Congress ***alone*** is not only insufficient to demonstrate field preemption, it actually weighs in favor of holding that it was the intent of Congress ***not*** to occupy the field." *Frank Bros.,*

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[8] The court notes that in *Wyeth*, Justice Thomas stated:

> According to Justice Stone, the *Hines* majority's analysis resembled an inquiry into whether the federal act "'***occupied the field***,'" rather than an application of simple conflict pre-emption principles. *Id.*, at 78 (dissenting opinion). Regardless of whether *Hines* involved field or conflict pre-emption, the dissent accurately observed that in assessing the boundaries of the federal law – *i.e.,* the scope of its pre-emptive effect – the Court should look to the federal statute itself, rather than speculate about Congress' unstated intentions. *Id.* at 78-79.

Wyeth, 129 S. Ct. at 1213 n.4 (Thomas, J., concurring) (parallel citations omitted).

Inc. v. Wisconsin Dept. of Transp., 409 F.3d 880, 891 (7th Cir. 2005)(emphasis added). Although the *Hines* Court "relied on the comprehensiveness of the federal regulatory scheme[] in finding" intent to preempt a state-specific alien registration scheme, *see DeCanas*, 424 U.S. at 362-63, this court does not interpret the comprehensiveness of the federal alien registration scheme as evidence of Congress's intent to preempt state laws that do not affect the uniformity of the national standard for alien registration. Consequently, the court sees no reason why Alabama, pursuant to its dual sovereignty, cannot, consistent with the purpose of Congress, make violations of 8 U.S.C. §§ 1304(e) and 1306(a) by unlawfully present aliens, state crimes in Alabama.[9]

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[9] The court's conclusion is consistent with the decision in *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995). There, the district court considered various constitutional challenges to California's Proposition 187. *Id.* at 763. As relevant here, plaintiffs had challenged Sections 2 and 3 of Proposition 187, which made "it a crime to manufacture, distribute, sell or use false documents to conceal true citizenship or immigration status." *Id.* at 786. Violations of Sections 2 and 3 were "punishable by imprisonment for up to five years or, in the case of manufacturing, distributing or selling false documents, a fine of up to $75,000 and for use of such documents, a fine of up to $25,000." *Id.* The court stated:

> Plaintiffs argue that by imposing different penalties than those already imposed under federal laws regulating the production or use of false citizenship, naturalization and alien registration papers and the misuse or forgery of passports and visas, sections 2 and 3 conflict with federal law. ***There has been no showing that the criminal penalties contemplated by sections 2 and 3 conflict with or impede the objectives of federal law. Sections 2 and 3 are not preempted under the third De Canas test.***

Id. (emphasis added; footnote omitted).

The United States contends, though not in certain terms, that the court should follow the recent decision in *United States v. Arizona*. (Doc. 2 at 29, 31 [citing *United States v. Arizona*, 641 F.3d 339, 354-57 (9th Cir. 2011)].) In that case, the United States had challenged the constitutionality of Arizona's Support Our Law Enforcement and Safe Neighborhoods Act in the United States District Court for the District of Arizona and moved to enjoin the Act. *See Arizona*, 703 F. Supp. 2d 980. Section 3 of the Arizona Act, A.R.S. § 13-1509(A), which is substantially similar to H.B. 56 § 10(a), was among the challenged provisions. *Id.* at 998-99. Section 3 of the Arizona Act provides: "In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a)." *Id*. at 998. This section of the Arizona Act did not, as H.B. 56 § 10 does, apply only to those "unlawfully present." The district court preliminarily enjoined Section 3, reasoning that:

> Section 3 attempts to supplement or complement the uniform, national registration scheme by making it a state crime to violate the federal alien registration requirements, which a state may not do "inconsistently with the purpose of Congress." *Hines,* 312 U.S. at 66-67; *see also* A.R.S. § 13-1509(A). While Section 3 does not create additional registration requirements, the statute does aim to create state penalties and lead to state prosecutions for violation of the federal law. Although the alien registration requirements remain uniform, Section 3 alters the penalties established by Congress under the federal registration scheme. Section 3 stands as an obstacle to the uniform, federal registration scheme and is therefore an impermissible attempt by Arizona to regulate alien registration. *See Hines,* 312 U.S. at 67.

Arizona, 703 F. Supp. 2d at 999 (parallel citations omitted). Arizona appealed. *See Arizona*, 641 F.3d at 354-57.

On appeal, the Ninth Circuit affirmed the district court's decision to enjoin Section 3. *Id.* at 357. The Ninth Circuit reasoned:

> S.B. 1070 Section 3 plainly stands in opposition to the Supreme Court's direction: "where 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, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines,* 312 U.S. at 66-67. In *Hines,* the Court considered the preemptive effect of a precursor to the INA, but the Court's language speaks in general terms about "a complete scheme of regulation," – as to registration, documentation, and possession of proof thereof – which the INA certainly contains. Section 3's state punishment for federal registration violations fits within the Supreme Court's very broad description of proscribed state action in this area – which includes "complement[ing]" and "enforc[ing] additional or auxiliary regulations." *Id.*

Arizona, 641 F.3d at 355-56 (alteration in original; footnote and parallel citations omitted).

This court is not persuaded by the decisions in the *Arizona* cases regarding Section 3 of the Arizona Act. The Arizona district court and the Ninth Circuit both found that "Section 3's state punishment for federal registration violations fits within the Supreme Court's very broad description of proscribed state action in this area – which includes 'complement[ing]' and 'enforc[ing] additional or auxiliary regulations.'" *Arizona*, 641 F.3d at 356 (quoting *Hines*, 312 U.S. at 66-67); *Arizona*, 703 F. Supp. 2d at 999. Neither court, however, explained how the "additional or auxillary regulations" were "inconsistent[] with the purpose of Congress." *See Hines*, 312 U.S. at 66-67. As the Ninth Circuit noted,

"Nothing in the text of the INA's registration provisions indicates that Congress ***intended*** for states to participate in the enforcement or punishment of federal immigration registration rules." *Arizona*, 641 F.3d at 355 (emphasis added). However, this lack of affirmative evidence that Congress intended the states to participate is not dispositive of the preemption issue. *See Saleh v. Titan Corp.*, 580 F.3d 1, 24 (D.C. Cir. 2009)("*Wyeth v. Levine,* the Supreme Court's most recent preemption case, further reflects the Court's unwillingness to read broad preemptive intent from congressional silence."). Affirmative evidence that Congress intended the states to participate would negate any inference of preemptive intent,[10] but the absence of such affirmative evidence does not, without more, support a finding of any inference of preemptive intent. The fact that "Congress provided very specific directions for state participation" in matters not relating to alien registration, *Arizona*, 641 F.3d at 355 (referring to 8 U.S.C. § 1357), "demonstrating that it knew how to ask for help where it wanted help," *id*., says very little about Congress's preemptive intent regarding state penalties for violations of the federal registration scheme. *See Camps Newfound / Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 616 (1997)("[E]ven where Congress ***has*** legislated in an area subject to its authority, our pre-emption jurisprudence explicitly rejects the notion that

[10] For instance, in *DeCanas*, the Court found "affirmative evidence . . . that Congress sanctioned concurrent state legislation" with respect to the employment of illegal aliens. *DeCanas*, 424 U.S. 361-63. Similarly, in *Whiting*, the Court found "Congress expressly preserved the ability of the States to impose their own sanctions through licensing" and noted that such preservation "necessarily entails the prospect of some departure from homogeneity." *Whiting*, 131 S. Ct. at 1979-80.

mere congressional silence on a particular issue may be read as preempting state law") (emphasis in original). The court declines to construe Congress's silence in this instance as evidence of its preemptive intent.

H.B. 56 § 10 creates Alabama state crimes for unlawfully present aliens who engage in conduct that constitutes ***existing*** federal crimes under the INA. Section 10 does ***not*** criminalize mere unlawful presence because it also requires a violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), both of which carry criminal penalties under federal law. Although "unlawful presence in the United States is not a federal crime," *see Arizona*, 703 F. Supp. 2d at 988, and criminalizing mere unlawful presence might impair or impede the United States foreign policy goals, (*see* doc. 2-1 ¶¶ 9, 35), the Supreme Court has recognized that "***entering or remaining*** unlawfully in this country is itself a crime." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)(citing 8 U.S.C. §§ 1302, 1306, and 1325) (emphasis added; citations omitted). That "there [is no] federal criminal statute making unlawful presence in the United States, alone, a federal crime, *Martinez-Medina v. Holder*, 2011 WL 855791, *6 (9th Cir. Mar. 11, 2011), is of little moment here. As noted above, an alien in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a) is not necessarily "unlawfully present" under federal law. Mere unlawful presence may subject an alien to civil removal, but not criminal penalties, in a narrow set of circumstances, such as where an "alien has overstayed a valid visa or otherwise remains in the country after the expiration of a period authorized by the Department of Homeland Security." *Martinez-Medina*, 2011 WL 855791 at *6 n.4.

Section 10 does not seek to alter those narrow circumstances. The court finds H.B. 56 § 10 does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. For all these reasons, the court finds that the United States is not likely to succeed in showing that H.B. 56 § 10 is impliedly preempted.

The United States also argues that Section 10 is unlawful because it seeks to criminalize unlawful presence[11] and this creates an obstacle to the accomplishment of the foreign policy goals of the United States. (Doc. 2 at 31-33.) The court rejects this argument.

The United States argues that H.B. 56 inherently interferes with the Federal Government's foreign policy objectives concerning international diplomatic relations as well as the uniform enforcement of national immigration laws. (*See* doc. 2 at 12-13, 18, 25, 33-34, 56, 81-83.) In support of this argument the United States submitted the Declaration of William J. Burns, Deputy Secretary of State, (doc. 2-1), who states that H.B. 56 threatens to disrupt "uniform foreign policy regarding the treatment of foreign nations" and "risks negative reciprocity of the treatment of U.S. citizens abroad, among other deleterious effects." (Doc. 2 at 32-33 [citing doc 2-1 at ¶¶ 9, 35; quoting *id.* ¶ 35].) Legislation affecting the treatment and movement of another country's citizens living abroad necessarily touches the foreign relations between the visiting and the host nations; however, something more is required before the court can enjoin an otherwise valid state law on foreign policy grounds.

[11]As noted, Section 10 does not criminalize unlawful presence.

The United States has not cited the court to a specific conflict between Section 10, or any other Section of H.B. 56, and some Congressionally-granted Executive Branch authority directly relating to foreign policy. Nevertheless, it argues that H.B. 56 interferes with the Executive Branch's "fundamental authority to conduct foreign affairs." (Doc. 2 at 33.) However, Supreme Court cases that have found conflict preemption when a state law obstructs the Executive Branch's authority to conduct foreign affairs are limited to instances where the Executive Branch's action has been specifically authorized by Congress and is intended as a means of achieving key national foreign policy goals. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420-25 (2003); *Crosby*, 530 U.S. at 380-85.

The Supreme Court has taken varying positions regarding the weight to be given statements of Executive Branch officials seeking to preempt a state law on the basis of foreign policy. *Compare Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 328-31 (1994) (rejecting Executive Branch statements and amicus filings in deciding that state tax law with international implications was not preempted), *with Garamendi*, 539 U.S. at 424-25 (considering letters from the Deputy Secretary of State as well as statements submitted by other foreign governments in the Court's decision to preempt a state law in conflict with executive agreements between the United States and European nations); *and Crosby*, 530 U.S. at 385-88 (distinguishing *Barclays* and finding statements by Executive Branch officials and foreign powers persuasive in deciding that a state law, which limited transactions with a foreign nation, was preempted by a conflicting federal statute). These decisions

demonstrate that, in a conflict preemption analysis, the Supreme Court will rely on statements of Executive Branch officials to invalidate an otherwise valid state law based on preemption only when there is evidence that such statements demonstrate a national foreign relation policy. *See Garamendi*, 539 U.S. at 421 (noting preemption was properly grounded on the "***national position***, expressed unmistakably in the executive agreement" between the President of the United States and the German Chancellor). Statements from Executive Branch officials and other evidence of foreign discontent or threats of reprisal are insufficient to establish the national position. *See Barclays*, 512 U.S. at 327-28. The evidence must show that the foreign policy concerns expressed by the Executive Branch are within "Congress's ***express*** command to the President to take the initiative for the United States among the international community," *Crosby*, 530 U.S. at 380-81 (emphasis added), as demonstrated by statements from Congress, ratified treaties, or international agreements. *See Garamendi*, 539 U.S. at 420 (emphasis added); *see also Arizona*, 641 F.3d at 381 (Bea, J., concurring in part and dissenting in part).

Thus, to base a finding of preemption of Section 10 based on Executive Branch foreign policy, the court must have some evidence of a national foreign policy – either some evidence of Congress's intent or a treaty or international agreement establishing the national position. This is the position raised in Judge Bea's dissent in *Arizona*, in which he noted:

> Neither does the Supreme Court's preemption jurisprudence in the field of foreign relations change the conclusion that Section 2(B) is not preempted. . . . .

. . . . [A]s *Crosby* and *Garamendi* demonstrate, it is not simply any effect on foreign relations generally which leads to preemption, as the majority asserts. *See* Maj. Op. at 352–54. Instead, a state law is preempted because it conflicts with federal law only when the state law's effect on foreign relations conflicts with federally established foreign relations goals. In *Crosby*, the state law conflicted with the degree of trade Congress decided to allow with Burma, and the discretion explicitly given to the Executive to make trade decisions. In *Garamendi*, the state law imposed an investigatory and litigation burden inconsistent with the rules the Executive Agreement had created. **Here, however, there is no established foreign relations policy goal with which Section 2(B) may be claimed to conflict.** The majority contends that Section 2(B) "thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs." Maj. Op. at 354.

First, the majority fails to identify a federal foreign relation policy which establishes the United States must avoid "spillover effects," if that term is meant to describe displeasure by foreign countries with the United States' immigration policies. The majority would have us believe that Congress has provided the Executive with the power to veto any state law which happens to have some effect on foreign relations, as if Congress had not weighed that possible effect in enacting laws permitting state intervention in the immigration field. To the contrary, here Congress has established – through its enactment of statutes such as 8 U.S.C. §§ 1357(g)(10), 1373(c), and 1644 – a policy which encourages the free flow of immigration status information between federal and local governments. Arizona's law embraces and furthers this federal policy; any negative effect on foreign relations caused by the free flow of immigration status information between Arizona and federal officials is due not to Arizona's law, but to the laws of Congress. Second, the Executive's desire to appease foreign governments' complaints cannot override Congressionally-mandated provisions – as to the free flow of immigration status information between states and federal authorities – on grounds of a claimed effect on foreign relations any more than could such a foreign relations claim override Congressional statutes for (1) who qualifies to acquire residency in the United States, 8 U.S.C. § 1154, or (2) who qualifies to become a United States citizen, 8 U.S.C. § 1421 et seq.

Arizona, 641 F.3d at 380-82 (Bea, J., concurring in part and dissenting in part) (emphasis added).

There is no evidence before the court that Section 10, or any other provision of H.B. 56, conflicts with Congressional intent regarding national foreign policy goals or with an international agreement "identify[ing] a federal foreign relation policy". *See id.* at 381 (Bea, J., concurring in part and dissenting in part). The statement submitted in this case by the Deputy Secretary of State, alleging that foreign policy is hindered, is insufficient. Without evidence of Congressional intent, the United States must show specifically a national foreign policy "addressed in Executive Branch diplomacy and formalized in treaties and executive agreements." *Garamendi*, 539 U.S. at 421. There is no such evidence before the court. Therefore, the court finds that the United States has not shown that it is likely to succeed on its claim that Section 10 is preempted due to interference with the nation's foreign relations policy.

Based on the foregoing, the court finds the United States has not established a likelihood of success on its claim that H.B. 56 § 10 is preempted by federal law.

C. SECTION 11(a)

Section 11(a) of H.B. 56 states:

> It is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state.

H.B. 56 § 11(a). A person who violates Section 11 is "guilty of a Class C misdemeanor and subject to a fine of not more than five hundred dollars ($500)." *Id.* (h). For the purposes of enforcing Section 11, "an alien's immigration status shall be determined by verification of

the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c)." *Id.* Section 11 "does not apply to a person who maintains authorization from the federal government to be employed in the United States." *Id.* (d). Also, Section 11 "shall be interpreted consistently with 8 U.S.C. § 1324a and any applicable federal rules and regulations." *Id.* (j).

The United States argues that Section 11(a) is conflict preempted because it seeks to override Congress's determination that criminal sanctions should not attach to the solicitation or performance of work by unlawfully present aliens. (Doc. 2 at 33.) As noted above, every preemption analysis "must be guided by two cornerstones." *Wyeth*, 129 S. Ct. at 1194. The first is that "the purpose of Congress is the ultimate touchstone." *Id.* The second is that a presumption against preemption applies when "Congress has legislated . . . in a field which the States have traditionally occupied." *Id.* Because the power to regulate the employment of aliens not authorized to work is "within the mainstream" of the states' historic police power, a presumption against preemption applies. *DeCanas*, 424 U.S. at 356; *Arizona*, 641 F.3d at 357. Therefore, with respect to Section 11(a), the court "start[s] with the assumption that the historic police powers of [Alabama to regulate the employment of unauthorized aliens will not] be superseded . . . unless that [is] the clear and manifest purpose of Congress." *Wyeth,* 129 S. Ct. at 1194-95 (quoting *Lohr,* 518 U.S. at 485)(internal quotations and citations omitted).

In 1986, Congress amended the INA through enactment of the Immigration Reform and Control Act ("IRCA"), Pub. L. No. 99–603, 100 Stat. 3359 (codified at 8 U.S.C. §§ 1324a to1324b), which is "a comprehensive scheme prohibiting the employment of illegal aliens in the United States." *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 147 (2002). IRCA "was . . . designed to deter aliens from entering [the United States] illegally." *Zheng*, 306 F.3d at 1087 (internal citations and quotations omitted). IRCA "forcefully made combating the employment of illegal aliens central to the policy of immigration law. *Hoffman Plastic Compounds*, 535 U.S. at 147 (quoting *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.,* 502 U.S. 183, 194, and n.8 (1991))(internal quotations omitted). The Senate Report explained that "[t]he primary incentive for illegal immigration is the availability of U.S. employment," and that IRCA was "intended to increase control over illegal immigration." S. REP. NO. 99-132, 99th Cong., 1st Sess. 1 (1985).

IRCA makes it "unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien." 8 U.S.C. § 1324a(a)(1)(A); *see also id.* (a)(2) (making it unlawful for an employer to continue "to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment"); *id*. (a)(4) (making it unlawful for an employer to use a "contract, subcontract, or exchange . . . to obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien . . . with respect to performing such labor"). An "unauthorized alien" is defined under IRCA as an alien who

is not "lawfully admitted for permanent residence" or not otherwise authorized by the Attorney General to be employed in the United States. *Id*. (h)(3). IRCA requires employers to review documents establishing an employee's eligibility for employment. *Id.* (b). An employer can confirm an employee's authorization to work by reviewing, among other things, the employee's United States passport, resident alien card, alien registration card, or other document approved by the Attorney General. *Id.* (b)(1)(B)-(D). The employer must attest under penalty of perjury on Department of Homeland Security ["DHS"] Form I–9 that he "has verified that the individual is not an unauthorized alien" by reviewing these documents. *Id.* (b)(1)(A). The I–9 form itself "and any information contained in or appended to [it] . . . may not be used for purposes other than for enforcement of" IRCA and other specified provisions of federal law. *Id.* (b)(5).

The text of IRCA reflects a clear choice on the part of Congress to deter the employment of unauthorized aliens through a detailed scheme of civil and criminal sanctions against ***employers***, not ***employees***. *See id.* (e)(4)-(5), (f)(1); 8 C.F.R. § 274a.10. An employer who knowingly hires an unauthorized alien shall be ordered to "cease and desist from such violations," and to pay a civil penalty in an amount "not less than $250 and not more than $2,000 for each unauthorized alien" for a first offense, "not less than $2,000 and not more than $5,000 for each [unauthorized] alien" for a second offense, and "not less than $3,000 and not more than $10,000 for each [unauthorized] alien" for a third or greater offense. 8 U.S.C. § 1324a(e)(4). An employer who fails to verify the work authorization

of its employees "shall [be required] to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred." *Id.* (e)(5). Employers who engage in a "pattern or practice" of hiring unauthorized aliens "shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both." *Id.* (f)(1).

Congress has demonstrated the sanctions that it deems appropriate for unauthorized aliens who perform work by providing only narrowly-tailored sanctions against such aliens, including deportation, and special sanctions for the presentation of false or fraudulent documents. *See* 8 U.S.C. § 1227(a)(1)(C)(i) (making failure to maintain immigrant status is a deportable offense); 8 U.S.C. § 1324c (making it a civil violation to make or use a false document or to use a document belonging to another person, in the context of unlawful employment of an unauthorized alien); 8 C.F.R. § 214.1(e) (prohibiting non-immigrant aliens from unauthorized employment and classifying such conduct as a failure to maintain status under the INA).

Other sections in IRCA that provide affirmative protections to unauthorized alien workers counsel against a finding that Congress intended to permit the criminalization of applying for, soliciting, or performing work by unauthorized aliens. Section 1324a(d)(2)(C) provides that "[a]ny personal information utilized by the [authorization verification] system may not be made available to Government agencies, employers, and other persons except to

the extent necessary to verify that an individual is not an unauthorized alien." 8 U.S.C. § 1324a(d)(2)(C). This section would prohibit Alabama from using personal information in the verification system for the purpose of investigating or prosecuting violations of H.B. 56 § 11(a). Also, subsection (g)(1) provides, "It is unlawful for a person or other entity, in the hiring . . . of any individual, to require the individual to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring . . . of the individual." *Id*. (g)(1) Section 1324a(e) provides for a system of complaints, investigation, and adjudication by administrative judges for employers who violate subsection (g)(1). *Id.* (e). The penalty for a violation of (g)(1) is "$1,000 for each violation" and "an administrative order requiring the return of any amounts received . . . to the employee or, if the employee cannot be located, to the general fund of the Treasury." "Congress could have required that employers repay only ***authorized*** workers from whom they extracted a financial bond. Instead, Congress required employers to repay ***any*** employee including undocumented employees." *Arizona*, 641 F.3d at 359 (emphasis added).

The legislative history of IRCA reflects a deliberate decision on the part of Congress not to criminalize work by unauthorized alien. In *Nat. Center for Immigrants' Rights, Inc. v. I.N.S.,* 913 F.2d 1350 (9th Cir.1990), *rev'd on other grounds,* 502 U.S. 183 (1991), the Ninth Circuit thoroughly reviewed IRCA's legislative history. The Ninth Circuit found that the determination to reduce or deter employment of unauthorized workers by sanctioning

employers, rather than employees, was "a congressional policy choice clearly elaborated in IRCA." *Id.* at 1370.

The court stated:

> While Congress initially discussed the merits of fining, detaining or adopting criminal sanctions against the ***employee,*** it ultimately rejected all such proposals. *Immigration Reform and Control Act of 1985: Hearings before the Senate Subcommittee on Immigration and Refugee Policy,* 99th Cong., 1st Sess. (1985), S. Hrg. 99-273, at 56, 59 (In response to the proposal that aliens be fined or detained as a deterrence to illegal immigration, Senator Simpson, the Chairman of the Senate Judiciary Committee, stated that this was not a new recommendation, but one that had previously been suggested and rejected). *See also* 118 *Cong. Rec.* H30155 (daily ed. Sept. 12, 1972) (statement of Rep. Rodino) (the House Judiciary Committee decided not to impose any additional criminal sanctions or other penalties on employees, believing that such penalties "would serve no useful purpose"). Instead, it deliberately adopted sanctions with respect to the ***employer*** only. Congress quite clearly was willing to deter illegal immigration by making jobs less available to illegal aliens but not by incarcerating or fining aliens who succeeded in obtaining work. During the extensive debates and hearings conducted during earlier attempts to enact similar legislation, the INS specifically agreed that employee sanctions, such as denying aliens employment pending deportation hearings or detaining aliens, should be rejected. James Hennessey, the Executive Assistant to the INS Commissioner, testified that the INS would not attempt to control employment during deportation proceedings:
>
> > Rep. Rodino: [During deportation proceedings] the fact that an illegal alien is a holder of a job or some employment, means that there is no such surveillance on the part of the Service or anybody that he won't be holding the job?
> >
> > Mr. Hennessey: He will undoubtedly continue. In fact, having still the right to go before the Board [of Immigration Appeals], I don't think we could attempt or ask for any legislation that he not hold the job. We will not expect the individual to starve in the United States while he is exhausting both the administrative and judicial roads that the legislation gives him.

> Illegal Aliens, Hearings before Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives, 92d Cong., Serial No. 13 pts. 1-5, pt. 1 at 46. Even an INS District Director for Detroit, Michigan who favored administrative action against illegal aliens who worked, explicitly rejected detention as a means of curtailing immigration:
>
> > Mr. Pederson: I believe that we ought to impose a penalty against the alien to help stop him [from working].
> >
> > Rep. Rodino: What kind of penalty would you impose on the alien?
> >
> > Mr. Pederson: Well, I do not feel that a fine or imprisonment is the answer but I do feel that there should be some form of sanction. It could be possible to deny administrative relief of some form.
>
> *Id.*, pt. 3 at 919. The House Judiciary Committee concluded at the end of this round of hearings that "[t]he illegal entrant should not be subject to additional penalties . . . ." *Id.,* pt. 1, at 90.
>
> Although some continued to argue for restraints against the employee, the approach of controlling employment through ***employer*** not ***employee*** sanctions was adjudged by Congress to provide the only realistic and appropriate solution. As stated in the final House report, employer sanctions, "coupled with improved border enforcement, is the ***only*** effective way to reduce illegal entry and in the Committee's judgment it is the most practical and cost-effective way to address this complex problem." H.R. Rep. No. 99-682(I), 99th Cong., 2nd Sess. 49, *reprinted in* 1986 *U.S. Code Cong. & Admin. News.* 5653 (emphasis added).

Nat'l Center for Immigrants' Rights, 913 F.2d at 1367-69 (footnote omitted; emphasis in original); *see also* H.R. Rep. No. 99-682(I), *reprinted in* 1986 U.S.C.C.A.N. 5650 ("The Committee remains convinced that legislation containing employer sanctions is the most humane, credible and effective way to respond to the large-scale influx of undocumented aliens.").

In *United States v. Arizona*, the United States challenged Section 5(C) of the Arizona Act, A.R.S. § 13-2928(C), which is similar to H.B. 56 § 11(a). *See Arizona*, 703 F. Supp. 2d at 1001-02. Section 5(C) of the Arizona Act provides that it "is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." A.R.S. § 13-2928(C). The district court, relying on IRCA's text and the Ninth Circuit's interpretation of congressional intent set forth in *National Center for Immigrants' Rights,* found that the United States was likely to succeed on its claim that Arizona's new crime for working without authorization conflicts with a comprehensive federal scheme and is preempted. *Id.* at 1002. Arizona appealed.

On appeal, the Ninth Circuit affirmed the decision of the district court. Finding that it was bound by its holding regarding congressional intent in *National Center for Immigrants' Rights*, the Court of Appeals "conclude[d] that the text of 8 U.S.C. § 1324a, combined with legislative history demonstrating Congress' affirmative choice not to criminalize work as a method of discouraging unauthorized immigrant employment, likely reflects Congress' clear and manifest purpose to supercede state authority in this context." *Arizona*, 641 F.3d at 359.

This court agrees with the Ninth Circuit's holdings in *National Center for Immigrants' Rights* and its decision in *Arizona*. Based on IRCA's text and legislative history, this court concludes that the clear and manifest purpose of Congress was to

supercede Alabama's authority to enact H.B. 56 § 11(a) sanctioning work by unauthorized aliens.

The State Defendants argue that IRCA's text and legislative history show "that Congress did ***not*** intend to preempt State laws that criminalized the solicitation and acceptance of work by unauthorized workers." (Doc. 38 at 71.) They maintain that the United States is "attempt[ing] to revive the discredited theory of 'preemption by omission.'" (*Id.*) The court disagrees. The arguments advanced by the United States are not based solely on the inaction or omission of Congress. Rather, the arguments of the United States are based on "inaction joined with action." *See Puerto Rico Dept't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). In *Isla Petroleum Corp.*, the Supreme Court explained:

> [D]eliberate federal inaction could always imply preemption, which cannot be. There is no federal preemption *in vacuo,* without a constitutional text or a federal statute to assert it. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, ***then*** the preemptive inference can be drawn — not from federal inaction alone, but from inaction joined with action.

Id. at 503.

Isla Petroleum Corp. involved an Energy Policy Conservation Act ("EPCA") provision that terminated the President's authority to implement federal price controls on petroleum products that had been granted under the older Emergency Petroleum Allocation Act ("EPAA"). *Id.* at 497-98. After the President's regulatory authority terminated, Puerto Rico implemented price controls on petroleum products. *Id.* at 498-99. Several oil

companies filed suit, arguing that the price controls were preempted; they argued that the EPAA "evinced a federal intent to enter the field of petroleum allocation and price regulation, and that the EPCA never countermanded that intent." *Id.* at 500. The oil companies argued that the EPCA simply changed the nature of the federal control of petroleum allocation and price regulation from "one of federal hands-on regulation to one of federally mandated free-market control." *Id.*

Justice Scalia, writing for the Court, rejected that argument, stating that, the preemption analysis must begin with the assumption that "the historic police powers of the States" are not to be pre-empted "unless that was the clear and manifest purpose of Congress." *Id.* at 500. The Court determined that there was no text in "any extant federal regulation that might plausibly be thought to imply exclusivity." *Id.* at 501. "Without a text that can . . . plausibly be interpreted as ***prescribing*** federal pre-emption it is impossible to find that a free market was mandated by federal law." *Id.* The Court further determined that, with the EPCA, Congress had "withdrawn from all substantial involvement in petroleum allocation and price regulation. There being no extant action that can create an inference of pre-emption in an unregulated segment of an otherwise regulated field, preemption, if it is intended, must be explicitly stated." *Id.* at 504.

In *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi*, 474 U.S. 409 (1986), which was discussed at length in *Isla Petroleum Corp.*, the Court considered whether the states could impose conditions on the first sale of natural gas which,

by direct statutory exemption, was placed beyond regulation by the Federal Energy Regulatory Commission ("FERC"). Prior to 1978 regulation by FERC preempted any state regulation. *See N. Natural Gas Co. v. State Corporation Comm'n of Kansas,* 372 U.S. 84 (1963). In the Natural Gas Policy Act of 1978, Pub.L. 95-621, 92 Stat. 3351, Congress substantially restricted FERC's regulatory authority. The *Transcontinental* Court noted that a "decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left ***un***regulated, and in that event would have as much preemptive force as a decision ***to*** regulate." *Transcontinental*, 474 U.S. at 422 (quoting *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)). The Court refused to accept the argument that Congress "in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC." *Id.*

Here, unlike in *Isla Petroleum Corp.*, there is "extant action that can create an inference of pre-emption in an unregulated segment of an otherwise regulated field." *Isla Petroleum Corp.*, 485 U.S. at 504. "Congress' ***inaction*** in not criminalizing work, joined with its ***action*** of making it illegal to hire unauthorized workers, justifies a preemptive inference that Congress intended to prohibit states from criminalizing work." *Arizona*, 641 F.3d at 359 (emphasis added). Congress's "decision to forego" criminalizing unauthorized work, as revealed by IRCA's text and legislative history, implies "an authoritative federal determination that the area is best left ***un***regulated," and that decision has "as much

preemptive force as a decision ***to*** regulate." *Transcontinental*, 474 U.S. at 422 (citations omitted). "Far from the situation in *Isla,* Congress has not 'withdrawn all substantial involvement' in preventing unauthorized immigrants from working in the United States. It has simply chosen to do so in a way that purposefully leaves part of the field unregulated." *Arizona*, 641 F.3d at 359-60.

Alabama's decision, through Section 11(a) of H.B. 56, to criminalize work – which Congress explicitly chose not to do through IRCA and the INA – "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines,* 312 U.S. at 67. Section 11(a) is not saved from preemption simply because it may further the strong federal policy of prohibiting unauthorized aliens from seeking employment in the United States. As the Supreme Court recognized in *Crosby*, "[t]he fact of a common end hardly neutralizes conflicting means." *Crosby*, 530 U.S. at 379; *cf. id.* at 380 ("'[C]onflict is imminent' when 'two separate remedies are brought to bear on the same activity'")(quoting *Wis. Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986)). For these reasons, the court finds that the United States is likely to succeed on its claim that Section 11(a) is preempted.

In addition to demonstrating a likelihood of success on the merits, the United States must also establish that it will suffer an irreparable injury if the injunction does not issue, that the threatened injury to the United States outweighs whatever damage the proposed injunction may cause the state defendants, and that, if issued, the preliminary injunction will not adversely effect the public's interest.

The United States must establish that it will suffer irreparable harm if the preliminary injunction is not granted. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000). "'Even if the movant establishes a substantial likelihood of success on the merits, his failure to establish irreparable injury 'would, standing alone, make preliminary injunctive relief improper.'" *Windsor v. United States*, 379 Fed. App'x 912, 915-16 (11th Cir. 2010)(quoting *Siegel*, 234 F.3d at 1176); *see also Snook v. Trust Co. of Ga. Bank of Savannah*, 909 F.2d 480, 486-87 (11th Cir. 1990)(although movants proved they would likely succeed on the merits, denying preliminary injunctive relief was proper due to failure to show irreparable injury); *United States v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983)("The Government's success in establishing a likelihood it will prevail on the merits does not obviate the necessity to show irreparable harm."). The harm at issue at this stage of the proceeding is the harm that will occur in the time between the filing of the action and a final judgment. *Lambert*, 695 F.2d at 540. The focus of the court's inquiry is directed to whether this harm is irreparable. *N.E. Fla. Chapter of the Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Whether an injury is irreparable may depend on whether it can "be undone through monetary remedies." *Id.* The availability of remedial measures, including monetary relief, only increases the burden of proving irreparable harm:

> Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a [an injunction], are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

City of Jacksonville, 896 F.2d at 1285 (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

The court finds that the United States will endure irreparable harm during the pendency of this litigation if Section 11(a) is not preliminarily enjoined.

The United States argues that "H.B. 56 effects ongoing irreparable harm to the constitutional order" by disrupting the "Constitution's structural reservation of authority to the federal government to set immigration policy." (Doc. 2 at 77.) As a preliminary matter, the court notes that the Eleventh Circuit has clearly stated that not every alleged constitutional infringement *per se* constitutes irreparable harm. *Siegel*, 234 F.3d at 1177 ("Plaintiffs also contend that a violation of constitutional rights always constitutes irreparable harm. Our case law has not gone that far, however."); *see also City of Jacksonville*, 896 F.2d at 1285 ("No authority from the Supreme Court or the Eleventh Circuit has been cited to us for the proposition that the irreparable injury needed for a preliminary injunction can properly be presumed from a substantially likely equal protection violation."). Although in *United States v. Lambert*, the Eleventh Circuit found the United States suffered no irreparable injury stemming from the defendant's likely violation of the Clean Water Act, the decision to uphold denial of preliminary injunctive relief turned, in part, on the availability of environmental restoration and monetary relief following a trial on the merits. *Lambert*, 695 F.2d at 540. The *Lambert* court was not satisfied that the harm was truly irreparable because the evidence indicated that any injury suffered in the interim would only "make restoration

more difficult, more expensive, and more uncertain," but not impossible. *Id.* (internal quotations omitted).

By contrast, the injury United States alleges is definite and irreparable – it cannot be remediated or "undone through monetary remedies." *City of Jacksonville*, 896 F.2d at 1285. The court finds that Section 11 is likely preempted by federal law and thus invalid. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) ("state laws that conflict with federal law are 'without effect'" (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981))). To allow Section 11(a) to take effect would be to allow a law of Alabama to be "supreme" over federal law; this is an irreparable constitutional injury.

A preliminary injunction is an extraordinary remedy, but because the court finds Section 11(a) is preempted, preliminary injunctive relief is warranted. The United States will be irreparably harmed if this section is enforced during the pendency of this action and the "public interest will perforce be served by enjoining the enforcement of the invalid provision of state law." *Bank of America v. Sorrell*, 248 F. Supp. 2d 1196, 1200 (N.D. Ga. 2002)(quoting *Bank One, Utah v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999)); *see also Guttau*, 190 F.3d at 847-48 ("If [plaintiff] proves that the relevant provisions of the [state

law] are preempted by the [federal law] and that it will suffer irreparable harm if the State is not enjoined from enforcing those provisions, then the question of harm to the State and the matter of the public interest drop from the case, for [plaintiff] will be entitled to injunctive relief no matter what the harm to the State, and the public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law.")

Therefore, for these reasons, the court finds the United States has shown its entitlement to an injunction of Section 11(a) of H.B. 56 pending final judgment in this case. The United States's Motion for Preliminary Injunction as to Section 11(a) will be granted.

D. SECTION 12(a)

Section 12 of H.B. 56 sets forth circumstances under which state, county, and municipal law enforcement officers must attempt to verify the citizenship and immigration status of persons detained or arrested. Section 12(a) provides:

> Upon any lawful stop, detention, or arrest made by a state, county, or municipal law enforcement officer of this state in the enforcement of any state law or ordinance of any political subdivision thereof, where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the citizenship and immigration status of the person, except if the determination may hinder or obstruct an investigation.

Section 12(a) requires citizenship and immigration status determinations "be made by contacting the federal government pursuant to 8 U.S.C. § 1373(c) and relying upon any verification provided by the federal government."[12] A person "is presumed not to be an alien

[12]H.B. 56 defines a person as unlawfully present in the United States "only if the

who is unlawfully present in the United States" if the person provides to the law enforcement officer any one of six forms of identification.[13] *Id*. (d). In carrying out the requirements of Section 12, law enforcement officers are prohibited from considering "race, color, or national origin . . . except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901." *Id*. (c). "A law enforcement officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States." *Id*. "If an alien is determined by the federal government to be an alien who is unlawfully present in the United States pursuant to 8 U.S.C. § 1373(c), the law enforcement agency shall

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person's unlawful immigration status has been verified by the federal government pursuant to 8 U.S.C. § 1373(c)." H.B. 56 § 3(10).

[13] These forms of identification are:

> (1) A valid, unexpired Alabama driver' license,
> (2) A valid, unexpired Alabama nondriver identification card.
> (3) A valid tribal enrollment card or other form of tribal identification bearing a photograph or other biometric identifier.
> (4) Any valid United States federal or state government issued identification document bearing a photograph or other biometric identifier, if issued by an entity that requires proof of lawful presence in the United States before issuance.
> (5) A foreign passport with an unexpired United States Visa and a corresponding stamp or notation by the United States Department of Homeland Security indicating the bearer's admission to the United States.
> (6) A foreign passport issued by a visa waiver country with the corresponding entry stamp and unexpired duration of stay annotation or an I-94W form by the United States Department of Homeland Security indicating the bearer's admission to the United States.

H.B. 56 § 12(d).

cooperate in the transfer of the alien to the custody of the federal government, if the federal government so requests." *Id.* (e).

The United States claims that Section 12(a) is preempted by federal law because it "represent[s] a systematic effort by Alabama to inject itself into the enforcement of the federal government's own immigration laws in a manner that is non-cooperative with the Secretary, and therefore is impermissible." (Doc. 2 at 59.) Specifically, it contends that "Alabama's mandatory verification scheme promises to disrupt (i) federal control and discretion over immigration enforcement, (ii) the operation of DHS enforcement priorities generally, and (iii) the conditions of residence of lawfully present aliens." (*Id*. at 60.) As the United States correctly points out, Congress has provided for state assistance in enforcement of federal immigration law in limited circumstances. In the criminal context, state and local law enforcement are specifically authorized to arrest aliens who are unlawfully present in the United States and who have previously left the country or were deported after being convicted of a felony, 8 U.S.C. § 1252c, and to make arrests for violations of federal smuggling and harboring laws, 8 U.S.C. § 1324(c). Federal law also authorizes the Attorney General to confer upon state or local law enforcement the powers of a federal immigration officer "[i]n the event the Attorney General determines that an actual or mass influx of aliens" arriving near a water or land border of the United States "presents urgent circumstances requiring an immediate Federal response." 8 U.S.C. § 1103(a)(10). Aside from those provisions, federal law also provides certain circumstances under which state

officers and employees can perform functions of federal immigration officers. 8 U.S.C. § 1357(g).

Under section 1357(g), the Attorney General "may enter into a written agreement with a State . . . pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . , may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law." *Id.* (g)(1). Named after section 287(g) of the Immigration and Nationality Act, such written agreements are known as "287(g) agreements". State officers performing an immigration function pursuant to such a written agreement with the Attorney General are required to "have knowledge of, and adhere to, Federal law relating to that function," *id.* (g)(2), and "shall be subject to the direction and supervision of the Attorney General," *id.* (g)(3). Further, "the specific powers and duties that may be, or are required to be, exercised or performed by the individual [who is authorized to perform a federal immigration function], the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision." *Id.* (g)(5). Subsection (g)(10) provides that no written agreement is required under section 1357(g) in order for any state officer or employee –

> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

Id. (g)(10).

The aforementioned federal provisions allowing certain state involvement in federal immigration enforcement must be read in conjunction with 8 U.S.C. § 1373(c). Section 1373(c) states that the INS (now Immigrations and Customs Enforcement or "ICE"), "***shall respond***" to inquiries from federal, state, or local governments "seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." 8 U.S.C. § 1373(c) (emphasis added).

The United States argues that, in the absence of a written agreement under Section 1357(g)(1), states can only assist in the "identification, apprehension, detention, or removal of aliens not lawfully present" ***in cooperation with*** the Attorney General under section 1357(g)(10)(B)." (Doc. 2 at 61.) According to the United States, the mandatory language regarding verification of immigration status contained in Section 12 of H.B. 56 would serve as an "obstacle . . . to the ability of individual state and local officers to cooperate with federal officers administering federal policies and discretion as the circumstances in the particular case require." (*Id*. at 64.) The United States contends that it –

> is not challenging Alabama's power to ***authorize*** its officers to ***assist*** federal officers in their enforcement of the immigration laws. However, the prospect of such authorization does not allow a state to systematically mandate enforcement of federal immigration law in particular circumstances. Any such state-dictated mandate would function as a parallel or contradictory direction, in competition with the Secretary's direction, as to how to enforce immigration law, thereby eroding the federal government's exclusive authority over immigration enforcement. It would also force the federal government to divert resources away from the enforcement priorities it has set.

(*Id.* at 65 n.12.) The United States contends that the mandated submission of verification requests for individuals who violate even minor crimes would result in a "substantial uptick in verification requests [that] would interfere with federal operations," and place "real, impermissible burdens on the federal government." (*Id.* at 69, 70.) It further argues that Alabama's mandatory verification scheme impedes the enforcement discretion of the federal government and interferes with the federal government's priorities in enforcing immigration law by pursuing "[a]liens who pose a danger to national security or a risk to public safety." (*Id.* at 68 [alteration in original; internal quotation and citation omitted].)

The State Defendants respond that 8 U.S.C. § 1357(g)(10) reveals Congress's intent to allow states to assist in immigration enforcement without express authorization from Congress. They point to 8 U.S.C. § 1373 as evidence of Congressional intent to require ICE to respond to inquiries from the state seeking verification of the citizenship or immigration status of a person. Also, the State Defendants contend that a presumption against preemption should apply because Section 12 simply sets forth "stop-and-arrest protocols" that are "a fundamental attribute of internal law enforcement operations within a State." (Doc. 69 at

72.) They argue that an "arrest [under Sections 12 and 18] is an exercise of state authority to enforce ***state and local laws***," (*id.*); however, Section 12 reaches beyond arrest protocols into the field of identification of unlawfully present aliens. Identifying unlawfully present aliens is not "a field which the States have traditionally occupied." *Wyeth*, 129 S. Ct. at 1194 (internal quotations and citations omitted). Accordingly, there is no presumption against preemption of Section 12.

Nothing in the text of the INA expressly preempts states from legislating on the issue of verification of an individual's citizenship and immigration status. There is also nothing in the INA which reflects Congressional intent that the United States occupy the field as it pertains to the identification of persons unlawfully present in the United States. Therefore, the court must consider whether Section 12 is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Hines,* 312 U.S. at 67. As noted above in the discussion of Section 10, in *Arizona*, the United States challenged the constitutionality of, and moved to preliminarily enjoin, Arizona's Support Our Law Enforcement and Safe Neighborhoods Act. *See generally Arizona*, 703 F. Supp. 2d 980. Section 2(B) of the Arizona Act, A.R.S. § 11-1051(B), which is nearly identical to Section 12(a) and (b), was among the challenged provisions. *Id*. at 993-98. As quoted by the Ninth Circuit in *United States v. Arizona*, Section 2(B) of Arizona S.B. 1070 provides:

> For any lawful stop, detention or arrest made by [an Arizona] law enforcement official or a law enforcement agency . . . in the enforcement of any other law

> or ordinance of a county, city or town [of] this state where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The persons immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c) . . . A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:
>
> 1. A valid Arizona driver license.
>
> 2. A valid Arizona nonoperating identification license.
>
> 3. A valid tribal enrollment card or other form of tribal identification.
>
> 4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

641 F.3d at 346 n.5.

As in the instant case, the United States had argued that this section was "preempted because it [would] result in the harassment of lawfully present aliens and [would] burden federal resources and impede federal enforcement and policy priorities." *Arizona*, 703 F. Supp. 2d at 993. The district court preliminarily enjoined Section 2(B), finding the United States had demonstrated a likelihood of success on its claim that the mandatory immigration verification requirements were preempted by federal law. *Id.* at 993-998. The court reasoned in part as follows:

> Federal resources will be taxed and diverted from the federal enforcement priorities as a result of the increase in requests for immigration status determination that will flow from Arizona if law enforcement officials are

> required to verify immigration status whenever, during the course of a lawful stop, detention or arrest, the law enforcement official has reasonable suspicion of unlawful presence in the United States. In combination with the impermissible burden this provision will place on lawfully-present aliens, the burden on federal resources and priorities also leads to the inference of preemption.

Id. at 998.

On appeal, the Ninth Circuit, in a 2-1 decision on this point, affirmed the district court's decision to enjoin Section 2(B). However, Judge Bea, the dissenting judge, noted the majority had affirmed the district court, not based on its findings, but on the majority's interpretation of 8 U.S.C. § 1357(g), "which prescribes the process by which Congress intended state officers to play a role in the enforcement of federal immigration laws." *Arizona*, 641 F.3d at 372-73 (Bea, J., concurring in part and dissenting in part).

According to the Ninth Circuit majority, Section 1357(g) demonstrated that "Congress intended for state officers to systematically aid in the immigration enforcement ***only*** under the close supervision of the Attorney General–to whom Congress granted discretion in determining the precise conditions and direction of each state officer's assistance." *Id*. at 350. Arizona had argued that 8 U.S.C. § 1373(c), which requires the Department of Homeland Security "to respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual . . . for any purpose authorized by law," reflects the intent of Congress for states to assist in immigration enforcement. The majority rejected this argument, however, finding that a reading of all sections of the INA revealed a Congressional intent "that systematic state

immigration enforcement will occur under the direction and close supervision of the Attorney General . . . [and that] the mandatory nature of Section 2(B)'s immigration status checks is inconsistent with the discretion Congress vested in the Attorney General to supervise and direct State officers in their immigration work according to federally-determined priorities." *Arizona*, 641 F.3d at 352.

The reasoning of the majority in *Arizona* was followed in *Georgia Latino Alliance for Human Rights v. Deal*, Civil Action File No. 1:11–CV–1804–TWT, 2011 WL 2520752 (N.D. Ga. June 27, 2011), in which the court preliminarily enjoined Section 8 of a Georgia statute, which is similar to Section 12 of H.B. 56 and Section 2(B) of the Arizona Act. Section 8 of the Georgia Act provides in part –

> [W]hen an officer has probable cause to believe that a suspect has committed a criminal violation, the officer shall be authorized to seek to verify such suspect's immigration status when the suspect is unable to provide one of five specified identity documents.

Id. at *9 (internal quotations and alterations omitted). The Georgia district court stated: "Section 8 attempts an end-run — not around federal criminal law-but around federal statutes defining the role of state and local officers in immigration enforcement." *Id*. at *11. It found:

> 8 U.S.C. § 1357 and § 1103 clearly express Congressional intent that the Attorney General should designate state and local agents authorized to enforce immigration law. Indeed, Congress has provided that local officers may enforce civil immigration offenses only where the Attorney General has entered into a written agreement with a state, . . . or where the Attorney General has expressly authorized local officers in the event of a mass influx of aliens.

Id. at *10 (internal citations omitted). The court held, "Section 8 circumvents Congress' intention to allow the Attorney General to authorize and designate local law enforcement officers to enforce civil immigration law." *Id*. at *11. Because Section 8 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the court held it was preempted by federal law. *Id*. (internal quotations omitted).

This court is not persuaded by these decisions on this point. It agrees that Congressional intent should be determined by the intent of Congress as found in 8 U.S.C. §§ 1357 and 1373(c). However, this court is of the opinion that the dissent in *United States v. Arizona*, 641 F.3d 339, 371-82 (Bea, J., concurring in part and dissenting in part), correctly analyzed the relationship between Federal law and State and local law enforcement. Judge Bea dissented from the majority's holding in *Arizona* that Section 2(B) of Arizona's S.B. 1070, containing a verification provision very similar to Section 12(a) of H.B. 56, was preempted by federal law. Focusing on the intent of Congress as expressed in 8 U.S.C. §§ 1357 and 1373, he rejected arguments in favor of preemption similar to those raised in this case and which the majority had accepted. Judge Bea wrote:

> [T]his court is tasked with determining whether Congress intended to fence off the states from any involvement in the enforcement of federal immigration law. **It is *Congress's* intent we must value and apply, not the intent of the Executive Department, the Department of Justice, or the United States Immigration and Customs Enforcement**. Moreover, it is the *enforcement* of immigration laws that this case is about, not whether a state can decree who can come into the country, what an alien may do while here, or how long an alien can stay in this country.

By its very enactment of statutes, Congress has provided important roles for state and local officials to play in the enforcement of federal immigration law. First, the states are free, even without an explicit agreement with the federal government, "to communicate with the Attorney General regarding the immigration status of any individual." 8 U.S.C. § 1357(g)(10)(A). Second, to emphasize the importance of a state's involvement in determining the immigration status of an individual, Congress has commanded that federal authorities "*shall* respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual." *Id.* § 1373(c) . . . Third, putting to one side communications from and responses to a state regarding an individual's immigration status, no agreement with the federal government is necessary for states "otherwise [than through communications regarding an individual's immigration status] to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." *Id.* § 1357(g)(10)(B). Finally, Congress has even provided that state officers are authorized to arrest and detain certain illegal aliens. *Id.* § 1252c.

. . . .

I dissent from the majority's determination that Section 2(B) of Arizona S.B. 1070 is preempted by federal law and therefore is unconstitutional on its face. **As I see it, Congress has clearly expressed its intention that state officials *should* assist federal officials in checking the immigration status of aliens, *see* 8 U.S.C. § 1373(c), and in the "identification, apprehension, detention, or removal of aliens not lawfully present in the United States," 8 U.S.C. § 1357(g)(10)(B)**. The majority comes to a different conclusion by minimizing the importance of § 1373(c) and by interpreting § 1357(g)(10) precisely to invert its plain meaning "*Nothing* in this subsection shall be construed to require an agreement . . . to communicate with the Attorney General regarding the immigration status of any individual" (emphasis added) to become "*Everything* in this subsection shall be construed to require an agreement."

. . . .

. . . . **Congress has clearly stated its intention to have state and local agents assist in the enforcement of federal immigration law, at least as to the identification of illegal aliens, in two federal code sections.** First is 8

U.S.C. § 1373(c) . . . The title of § 1373(c) is "Obligation to respond to inquiries." Thus, § 1373(c) *requires* that United States Immigration and Customs Enforcement ("ICE") respond to an inquiry by *any* federal, state, or local agency seeking the immigration status of any person. The Report of the Senate Judiciary Committee accompanying the Senate Bill explained that the "acquisition, maintenance, and *exchange* of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act." S.Rep. No. 104–249, at 19–20 (1996) (emphasis added).

. . . .

Section 1373(c) does not limit the number of inquiries that state officials can make, limit the circumstances under which a state official may inquire, nor allow federal officials to limit their responses to the state officials. Indeed, as established by the declaration of the United States' own Unit Chief for the Law Enforcement Support Center ("LESC"), the LESC was established "to provide alien status determination support to federal, state, and local law enforcement on a 24-hours-a-day, seven-days-a-week basis." Section 1373(c) demonstrates Congress's clear intent for state police officials to communicate with federal immigration officials in the first step of immigration enforcement – identification of illegal aliens.

. . . .

The second federal code section which states Congress's intention to have state authorities assist in identifying illegal aliens is 8 U.S.C. § 1357(g), entitled "Performance of immigration officer functions by State officers and employees." Subsections (g)(1)-(9) provide the precise conditions under which the Attorney General may "deputize" state police officers (creating, in the vernacular of the immigration field, "287(g) officers") for immigration enforcement pursuant to an explicit written agreement. For example, § 1357(g)(1) defines the scope of any such agreement, § 1357(g)(3) provides that the Attorney General shall direct and supervise the deputized officers, § 1357(g)(6) prohibits the Attorney General from deputizing state officers if a federal employee would be displaced, and § 1357(g)(7)-(8) describe the state officers' liability and immunity. Section 1357(g)(9) clarifies that no state or locality shall be required to enter into such an agreement with the Attorney General. Finally, § 1357(g)(10) explains what happens if *no* such

agreement is entered into: it recognizes the validity of certain conduct by state and local officers, and explicitly excepts such conduct from a requirement there be a written agreement between the state and federal authorities . . . . The majority's error is to read § 1357(g)(1)-(9), which provides the precise conditions under which the Attorney General *may* enter into written agreements to "deputize" officers, as the *exclusive* authority which Congress intended state officials to have in the field of immigration enforcement. That reading is made somewhat awkward in view of § 1357(g)(10), which explicitly carves out certain immigration activities by state and local officials as *not* requiring a written agreement.

. . . .

To determine Congress's intent, we must attempt to read and interpret Congress's statutes on similar topics together. . . . In light of this, I submit that a more natural reading of § 1357(g)(10), together with § 1373(c), leads to a conclusion that Congress's intent was to provide an important role for state officers in the enforcement of immigration laws, especially as to the *identification* of illegal aliens.

. . . .

I agree with the majority that "we must determine how the many provisions of [the] vastly complex [INA] function together." Maj. Op. at 351. However, the majority opinion's interpretation of § 1357(g)(10), which requires the Attorney General to "call upon" state officers in the absence of "necessity" for state officers to have any immigration authority, makes § 1373(c) a dead letter. Congress would have little need to obligate federal authorities to respond to state immigration status requests if it is those very same federal officials who must call upon state officers to identify illegal aliens. Further, there is no authority for the majority's assertion that § 1357(g) establishes the "boundaries" within which state cooperation pursuant to § 1373(c) must occur. Maj. Op. at 351. Indeed, "communicat[ions] with the Attorney General regarding the immigration status of any individual" were explicitly excluded from § 1357(g)'s requirement of an agreement with the Attorney General. 8 U.S.C. § 1357(g)(10)(A). Congress intended the free flow of immigration status information to continue despite the passage of § 1357(g), and so provided in subsection (g)(10). The majority's interpretation turns § 1357(g)(10) and § 1373(c) into: "Don't call us, we'll call you," when what

Congress enacted was "When the state and local officers ask, give them the information."

. . . .

Further, to "cooperate" means, I submit, "to act or operate jointly, with another or others, to the same end; to work or labor with mutual efforts to promote the same object." *Webster's New Twentieth Century Dictionary of the English Language Unabridged* (Jean L. McKechnie ed., 1979). It does not mean that each person cooperating need be capable of doing all portions of the common task by himself. We often speak of a prosecution's "cooperating witness," but it doesn't occur to anyone that the witness himself cannot be "cooperating" unless he is able to prosecute and convict the defendant himself. Hence, the inability of a state police officer to "remove" an alien from the United States does not imply the officer is unable to cooperate with the federal authorities to achieve the alien's removal.

The provision of authority whereby the Attorney General may "deputize" state police officers allows the Attorney General to define the scope and duration of the state officers' authority, as well as "direct[ ] and supervis[e]" the state officers in performing immigration functions. 8 U.S.C. § 1357(g)(1)-(9). However, this is merely *one of two forms* of state participation in federal immigration enforcement provided for by Congress in § 1357(g). **Congress provided for *another* form of state participation, for which no agreement is required – states are free "to communicate with the Attorney General regarding the immigration status of any individual," *id.* § 1357(g)(10)(A), and are also free "otherwise [than by communication] to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," *id.* § 1357(g)(10)(B)**.

This conclusion is confirmed by a close comparison of the language in each part of § 1357(g). **As to the authority of the Attorney General to enter explicit written agreements, these agreements are limited to deputizing state officers to perform immigration-related functions "in relation to the investigation, apprehension, or detention of aliens in the United States." *Id.* § 1357(g)(1). Notably absent from this list of functions is the "identification" of illegal aliens.** However, **Congress recognized state officers' authority even in the absence of a written agreement with federal authorities both "to communicate with the Attorney General regarding**

the immigration status of any individual" and "to cooperate with the Attorney General in the *identification* . . . of aliens not lawfully present in the United States." *Id.* § 1357(g)(10) (emphasis added). "We normally presume that, where words differ as they differ here, Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63, 126 S. Ct. 2405, 165 L.Ed.2d 345 (2006). **The exclusion of illegal alien identification from the restraints of explicit written agreements under § 1357(g)(1)-(9), and the inclusion of this identification function in the state's unrestrained rights under § 1357(g)(10), leads to the conclusion that Congress intended that state officers be free to inquire of the federal officers into the immigration status of any person, without any direction or supervision of such federal officers – and the federal officers "*shall* respond" to any such inquiry. 8 U.S.C. § 1373(c) (emphasis added).**

. . . .

The majority also finds that state officers reporting illegal aliens to federal officers, Arizona would interfere with ICE's "priorities and strategies." . . . **The power to preempt lies with Congress, not with the Executive; as such, an agency such as ICE can preempt state law only when such power has been delegated to it by Congress.** *See North Dakota v. United States*, 495 U.S. 423, 442, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990) ("It is Congress – not the [Department of Defense] – that has the power to pre-empt otherwise valid state laws. . . ."). Otherwise, evolving changes in federal "priorities and strategies" from year to year and from administration to administration would have the power to preempt state law, despite there being no new Congressional action. Courts would be required to analyze statutes anew to determine whether they conflict with the newest Executive policy. Although Congress *did* grant some discretion to the Attorney General in entering into agreements pursuant to § 1357(g), Congress explicitly withheld any discretion as to immigration status inquiries by "obligat[ing]" the federal government to respond to state and local inquiries pursuant to § 1373(c) and by excepting communication regarding immigration status from the scope of the explicit written agreements created pursuant to § 1357(g)(10). Congress's statutes provide for calls and order the calls be returned.

641 F.3d at 369-80 (footnotes omitted; italic emphasis in original; bold emphasis added).

This court agrees with the above-quoted analyses of Congressional intent as expressed in 8 U.S.C. §§ 1357 and 1373(c). As it did in the *Arizona* case, the United States argues that federal law preempts Section 12 because, while Section 1357(g) authorizes states to assist in enforcement of federal immigration law, Section 1357(g) only provides such authorization when state officials execute immigration duties under the close supervision and direction of the Attorney General. (Doc. 2 at 60-62.) The United States argues that the verification scheme in H.B. 56 § 12(a) eliminates the supervision and direction of the Attorney General required for the state's involvement in enforcement of federal immigration law. However, under Section 1357(g)(10), local law enforcement may cooperate with the Attorney General in identifying immigration status of individuals, and otherwise cooperate in the "identification, apprehension, detention, or removal of aliens not lawfully present in the United States." The plain language of this subsection reveals that local officials have some inherent authority to assist in the enforcement of federal immigration law, so long as the local official "cooperates" with the federal government. H.B. 56 § 12 reflects an intent to cooperate with the federal government, in that all final determinations as to immigration status are made by the federal government, § (a), unlawful presence is defined by federal law, *id.* (e), and state law enforcement will only transfer illegal aliens to the federal government's custody at the federal government's request. *Id.*

Under Section 12, Alabama law enforcement officers are instructed under certain circumstances to communicate with the federal government regarding the immigration and

citizenship status of certain individuals who are stopped, detained, or arrested. The statute does not require the federal government to act upon this information; therefore, the federal government still retains discretion as to whether it wishes to pursue those found to be unlawfully present.

The United States also argues that the mandatory verification scheme of Section 12 imposes "substantial burdens on lawful immigrants in a way that conflicts with the INA's provision of nationally uniform rules governing the treatment and registration of aliens throughout the country" and that has been held preempted by *Hines*. (Doc. 2 at 72.) Even if states are not ***required*** to make immigration status requests under §§ 1357 or 1373, they have the option to do so and to require their local officials to do the same. *See Whiting*, 131 S. Ct. at 1986. Unlike *Hines*, where the Court found the Pennsylvania Statute to be ***inconsistent*** with the purposes of Congress, this court finds Section 12(a) is consistent with the purposes of Congress, as discussed at length in Judge Bea's concurring and dissenting opinion. The court is not persuaded that H.B. 56 § 12 must be preempted because it will result in "substantial burdens on lawful immigrants," as discussed in *Hines*.

Finally, the United States argues that Section 12 is preempted by foreign policy goals. However, for the reasons set forth above, the court finds the United States has not submitted sufficient evidence that Section 12 conflicts with federally-established foreign policy goals.

For the foregoing reasons, the court concludes that the United States is not likely to succeed on its claim that H.B. 56 § 12 conflicts with Congressional intent as expressed in the

provisions of the INA. Therefore, its Motion for Preliminary Injunction as to Section 12 will be denied.

E. SECTION 13

Section 13(a) provides:

> (a) It shall be unlawful for a person to do any of the following:
> (1) Conceal, harbor, or shield or attempt to conceal, harbor, or shield or conspire to conceal, harbor, or shield an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered, or remains in the United States in violation of federal law.
>
> (2) Encourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that such coming to, entering, or residing in the United States is or will be in violation of federal law.
>
> (3) Transport, or attempt to transport, or conspire to transport in this state an alien in furtherance of the unlawful presence of the alien in the United States, knowingly, or in reckless disregard of the fact, that the alien has come to, entered, or remained in the United States in violation of federal law. Conspiracy to be so transported shall be a violation of this subdivision.
>
> (4) Harbor an alien unlawfully present in the United States by entering into a rental agreement, as defined by Section 35-9A-141 of the Code of Alabama 1975, with an alien to provide accommodations, if the person knows or recklessly disregards the fact that the alien is unlawfully present in the United States.

H.B. 56 § 13(a). "Any person" who violates Section 13(a) is "guilty of a Class A misdemeanor for each unlawfully present alien, the illegal presence of which in the United States and the State of Alabama, he or she is facilitating or attempting to facilitate." *Id.* (b). "A person" who violates Section 13 is "guilty of a Class C felony when the violation involves 10 or more aliens, the illegal presence of which in the United States and the State of

Alabama, he or she is facilitating or attempting to facilitate." *Id.* (c). "Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation" of Section 13(a), "and the gross proceeds of such a violation," are "subject to civil forfeiture under the procedures of Section 20-2-93 of the Code of Alabama 1975." *Id.* (f). "Any person acting in his or her official capacity as a first responder or protective services provider" may "harbor, shelter, move, or transport an alien unlawfully present in the United States pursuant to state law." *Id.* (e). For purposes of Section 13, "an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c)." *Id*. (g).

The United States argues that Section 13 is an impermissible regulation of immigration, and that it "violate[s] the dormant Commerce Clause," (Doc. 2 at 43-45, 46.) It also argues that Section 13 is conflict preempted because it "undermine[s] the purposes and objectives of Congress." (Doc. 81 at 15.) The court will address each argument in turn.

1. Preemption

As the Supreme Court has instructed, every preemption analysis "must be guided by two cornerstones." Wyeth, 129 S. Ct. at 1194. The first is that "the purpose of Congress is the ultimate touchstone." *Id*. (citation omitted). The second is that a presumption against preemption applies when "Congress has legislated . . . in a field which the States have traditionally occupied." *Id*. (citation omitted). Because the states have not traditionally

occupied the field in the areas covered by Section 13, no presumption against preemption applies.

a. Regulation of Immigration

The United States argues that Section 13 is " preempted because, by criminalizing the transportation, harboring, and concealment of unlawfully present aliens, the State is improperly imposing its own substantive regulation over facets of alien entry into the United States." (Doc. 2 at 45.) As noted above, in *DeCanas* the Court recognized that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas*, 424 U.S. at 354. At the same time, however, the Court noted that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355. According to the Court, "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration." *Id.* It explained that a regulation of immigration "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.*; *see also Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (internal quotation marks and citations omitted) ("The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.").

In *Arizona*, the United States challenged Section 5 of the Arizona Act "which makes it illegal for a person who is in violation of a criminal offense to: (1) transport or move or attempt to transport or move an alien in Arizona in furtherance of the alien's unlawful presence in the United States; (2) conceal, harbor, or shield or attempt to conceal, harbor, or shield an alien from detection in Arizona; and (3) encourage or induce an alien to come to or live in Arizona." *Arizona*, 703 F. Supp. 2d at 1002 (citing A.R.S. § 13-2929(A)(1)-(3)). In order to violate Section 5, "a person must also know or recklessly disregard the fact that the alien is unlawfully present in the United States." *Id*. The United States, as it does here with regard to Section 13 of H.B. 56, had argued that Section 5 of the Arizona Act was an impermissible regulation of immigration because it "attempt[s] to regulate entry into the nation – a definitively federal area of concern in which state regulations are barred by the U.S. Constitution." *Id*. The district court rejected the United States's argument, reasoning that Section 5 does not attempt to regulate who should or should not be admitted into the United States, and it does not regulate the conditions under which legal entrants may remain in the United States." *Id*. at 1003 (citing *DeCanas*, 424 U.S. at 355). On that basis, the court concluded that the United States was not likely to succeed on its claim that Section 5 was an impermissible regulation of immigration. *Id.*

The court finds the *Arizona* district court's preemption analysis regarding Section 5 to be persuasive. Section 13 of H.B. 56, like Section 5 of the Arizona Act is not an impermissible regulation of immigration. Section 13 does not attempt to regulate "who

should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas*, 424 U.S. at 355. Therefore, the United States is not likely to succeed on its claim that H.B. 56 § 13 is preempted because it infringes on Congress's exclusive authority to regulate alien entry.

b. Conflict Preemption

The United States also argues Section 13 impermissibly conflicts with the operation of federal immigration law. (Doc. 81 at 13.) Congress has provided a uniform, comprehensive scheme of sanctions for those who unlawfully enter the United States. *See*, *e.g.*, 8 U.S.C. § 1325 (penalizing persons for illegal entry into the United States, marriage fraud, and immigration-related entrepreneurship fraud). Congress has enacted a detailed sanctions scheme for third parties who aid the entry and stay of those who unlawfully enter. 8 U.S.C. § 1323 (penalizing persons for unlawfully bringing aliens into the United States); 8 U.S.C. § 1324 (penalizing persons for bringing in or harboring aliens); 8 U.S.C. § 1327 (penalizing persons who assist certain inadmissible aliens to enter the country); 8 U.S.C. § 1328 (penalizing the importation of aliens for immoral purposes). The federal scheme also creates a narrow exemption for "a religious denomination having a bona fide nonprofit, religious organization in the United States." 8 U.S.C. § 1324(a)(1)(C).

The State Defendants argue that Section 13 is not preempted because its provisions constitute "perfect concurrent enforcement against the same criminal activity that is already prohibited by federal law." (Doc. 38 at 75.) They maintain that the language in Section

13(a)(1)-(3) is "taken directly from 8 U.S.C. § 1324(a)(1)(A)(ii)-(iv)," and that it is a "mirror image of the equivalent provisions of 8 U.S.C. § 1324(a)(1)(A)." (Doc. 38 at 75.) They cite several cases, including *Whiting*; *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *Arizona Contractors Ass'n., Inc. v. Napolitano*, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW, 2007 WL 4570303, *13-14 (D. Ariz. Dec. 21, 2007) (unpublished), and *Gray v. City of Valley Park, Mo.*, No. 4:07CV00881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008) (unpublished), for the proposition that "[s]tates are not preempted in the immigration arena when they prohibit the same activity that is already prohibited by federal law." (Doc. 38 at 76-83.) However, none of these cases support the State Defendants' authority to enact the specific harboring and transportation scheme of Section 13. Although Section 13 purports to regulate the same conduct covered by 8 U.S.C. § 1324, its language actually prohibits conduct allowed under federal law and criminalizes conduct that is lawful under federal law.

In *Whiting*, the Court found that "Congress expressly preserved the ability of the States to impose their own sanctions through licensing," and it noted that such preservation "necessarily entail[ed] the prospect of some departure from homogeneity." *Whiting*, 131 S. Ct. at 1979-80; *see also Arizona Contractors Ass'n.*, 2007 WL 4570303 at *13-14. Likewise, *Gray* concerned the authority of the states to impose additional sanctions on employers through licensing laws, an authority expressly preserved to states by Congress. 2008 WL

294294 at *19. The court in *Gray*, as the State Defendants do here, cited *Gonzales* for the proposition that "generally, a state has concurrent jurisdiction with the federal government to enforce federal laws." Id. (citing *Gonzales*, 722 F.2d at 474). In *Gonzales*, the Ninth Circuit, construing Congress's intent with respect to 8 U.S.C. §§ 1324, 1325, and 1326, had held that "federal law does not preclude local enforcement of the criminal provisions of the [INA]." *Gonzales*, 722 F.2d at 475. The court found the legislative history of 8 U.S.C. § 1324(c), which allows "officers whose duty it is to enforce criminal laws" to make arrests for violations of 8 U.S.C. § 1324, supported a finding "that federal law does not preclude enforcement of the criminal provisions of the [INA]." *Id.*

Unlike *Whiting*, *Arizona Contractors Ass'n., Inc.*, and *Gray*, which all concerned the authority of the states to act in areas where Congress specifically has preserved such authority, Congress has not preserved the authority of any state to regulate alien harboring and transportation in the manner provided in H.B. 56 § 13. The justification for a departure from homogeneity with federal law in the cases cited by the State Defendants – the specific preservation of state authority to act – is absent in this case. In addition, Section 13 is not a "mirror image" of federal law as the State Defendants claim. It does not represent "a situation where [Alabama] . . . is aiding in the enforcement of federal immigration law based on federal standards through the means set forth by federal law; rather, [Alabama] . . . is attempting to enforce its own scheme " and impose penalties and burdens on aliens and

citizens that conflict with the purposes and objectives of Congress. *See Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 701 F. Supp. 2d 835, 859 (N.D. Tex. 2010).

H.B. 56 § 13 seeks to regulate the same subject matter covered by 8 U.S.C. § 1324; however, in doing so, it criminalizes conduct specifically allowed under federal law. Congress, through 8 U.S.C. § 1324(a)(1)(C), provided that "[e]xcept where a person encourages or induces an alien to come to or enter the United States," "a religious denomination having a bona fide nonprofit, religious organization in the United States . . . [may] invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, . . . provided the minister or missionary has been a member of the denomination for at least one year." 8 U.S.C. § 1324(a)(1)(C). Section 13, in contrast, only creates exemptions for first responders and protective service providers. H.B. 56 §13(e). Therefore, H.B. 56 § 13 "impose[s] prohibitions or obligations which are in direct contradiction to Congress' primary objectives, as conveyed with clarity in the federal legislation." Gade, 505 U.S. at 110, 112 (Kennedy, J., concurring).

Furthermore, Section 13, in addition to criminalizing conduct specifically authorized by federal law, creates new regulations for conduct not prohibited by federal law. These regulations, which have no parallel counterpart in the federal scheme, impose burdens on aliens not contemplated by Congress. In *Georgia Latino Alliance for Human Rights v. Deal,*

2011 WL 2520752 (N.D. Ga. 2011) (hereinafter "GLAHR"), various nonprofit organizations, business associations, and individuals challenged several provisions of Georgia's Illegal Immigration Reform and Enforcement Act of 2011 (the "Georgia Act"). Section 7 of the Georgia Act was challenged as unconstitutional under the Supremacy Clause. *GLAHR*, 2011 WL 2520752 at *11. Section 7 created three state criminal violations:

> (1) transporting or moving an illegal alien in a motor vehicle, O.C.G.A. 16-11-200(b); (2) concealing, harboring or shielding an illegal alien from detection, O.C.G.A. § 16-11-201(b); and (3) inducing, enticing, or assisting an illegal alien to enter Georgia, O.C.G.A. § 16-11-202(b). All three crimes require knowledge that the person being transported, harbored, or enticed is an illegal alien. Also, all three sections require that the defendant be engaged in another criminal offense.

GLAHR, 2011 WL 2520752 at *11. The defendants argued that Section 7 "simply reinforces § 1324's parallel provisions." *Id.* at *13. The district court disagreed; it held:

> Despite superficial similarities, however, Section 7 is not identical to § 1324. *See Whiting*, 131 S. Ct. at 1982 (noting that state law traces federal law). For example, O.C.G.A. § 16-11-202 prohibits knowingly inducing, enticing or assisting illegal aliens to enter Georgia. Section 1324's corresponding "inducement" provision prohibits inducing an alien to "come to, enter, or reside in the United States." 8 U.S.C. § 1324. Once in the United States, it is not a federal crime to induce an illegal alien to enter Georgia from another state.
>
> Similarly, O.C.G.A. § 16-11-201 defines "harboring" as "any conduct that tends to substantially help an illegal alien to remain in the United States in violation of federal law," subject to several exceptions. Under § 1324, federal courts have also discussed the bounds of "harboring," developing a significantly different definition. *See Hall v. Thomas*, 753 F. Supp. 2d 1113, 1158 (N.D. Ala. 2010)("The plain language reading of 'harbor' to require provision of shelter or refuge, or the taking of active steps to prevent authorities from discovering that the employee is unauthorized or illegally remaining in the country, should control."); *United States v. Kim*, 193 F.3d

567, 573-74 (2d Cir. 1999)(harboring defined as "conduct tending substantially to facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence."); *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298-99 (11th Cir. 2010)(discussing whether hiring illegal alien constituted harboring under § 1324). . . .

Still, the Defendants contend that HB 87 does not create new crimes, but rather "creates a mechanism by which [immigration crimes] could be prosecuted at a local level." (Defs.' Br. in Opp'n to Pls.' Mot. for Prelim. Injunction, at 17.) No doubt the Defendants believe such a mechanism is necessary. Indeed, the Defendants assert that "every day that passes with passive enforcement of the federal law is a day that drains the state coffers." (*Id*. at 14.) In response to this concern, Section 7 creates a state system for prosecuting and interpreting immigration law, just as Section 8 creates a state system for policing civil immigration offenses. Under Section 7, state agents will exercise prosecutorial discretion. Decisions about when to charge a person or what penalty to seek for illegal immigration will no longer be under the control of the federal government. Similarly, Georgia judges will interpret Section 7's provisions, unconstrained by the line of federal precedent mentioned above. Thus, although Section 7 appears superficially similar to § 1324, state prosecutorial discretion and judicial interpretation will undermine federal authority "to establish immigration enforcement priorities and strategies." *United States v. Arizona*, 641 F.3d at 352.

. . . .

Further, whereas the Arizona statute in *Whiting* imposed licensing laws specifically authorized by a statutory savings clause, HB 87 imposes additional criminal laws on top of a comprehensive federal scheme that includes no such carve out for state regulation. *See Whiting*, 131 S.Ct. at 1981 (noting that Congress "specifically preserved" states' authority to enact licensing laws). Finally, unlike in *DeCanas* and *Whiting*, HB 87 does not address an area traditionally subject to state regulation. *See Whiting*, 131 S.Ct. at 1971; *DeCanas*, 424 U.S. at 356 ("[T]o prohibit the knowing employment by California employers of persons not entitled to lawful residence in the United States, let alone to work here, is certainly within the mainstream of such police power regulation."). Rather, unlike concurrent state and federal regulations in other areas, the movement of unauthorized aliens is not a traditional area of state regulation. Thus, "[a]ny concurrent state power that may exist is

> restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax." *Id*. at 68.

GLAHR, 2011 WL 2520752 at *13-14 (parallel citations omitted).

The court finds the *GLAHR* decision with respect to Section 7 of the Georgia Act persuasive. First, H.B. 56 § 13(a)(2), in a manner similar to Section 7 of the Georgia Act, prohibits encouraging or inducing aliens to enter Alabama, while 8 U.S.C. 1324(a)(1)(A)(iv)'s corresponding provision only prohibits inducing an alien to "come to, enter, or reside in the United States." "Once in the United States, it is not a federal crime to induce an illegal alien to enter [Alabama] from another state." *GLAHR*, 2011 WL 2520752 at *13. Second, Section 13(a)(3) permits Alabama to criminally punish an unlawfully-present alien for furthering his or her own unlawful presence by providing that "[c]onspiracy to be so transported shall be a violation" of Section 13(a)(3). By contrast, the corresponding federal provision in 8 U.S.C. § 1324(a)(1)(A)(ii) has no such "[c]onspiracy" provision and does not extend to the smuggled or transported alien. *See United States v. Hernandez-Rodriguez*, 975 F.2d 622, 626 (9th Cir. 1992)(recognizing that unlawfully-present aliens who are transported "are not criminally responsible for smuggling under 8 U.S.C. § 1324"). Third, Section 13(a)(4) reaches beyond the provisions of the Georgia harboring law by criminalizing the "entering into a rental agreement, as defined by Section 35-9A-141 of the Code of Alabama 1975, with an alien to provide accommodations." H.B. 56 § 13(a)(4). By

contrast, nothing in 8 U.S.C. § 1324 or any other federal immigration law criminalizes such rental agreements.[14]

The State Defendants contend that Section 13(a)(4) "prohibits a type of 'harboring' that is equally prohibited by federal law." (Doc. 69 at 45 [citing 8 U.S.C. § 1324(a)(1)(A)(iii)].) Neither Congress nor the Supreme Court has defined the term "harboring." However, the Circuit Courts of Appeal have consistently defined "harboring" as facilitating the alien remaining unlawfully in the United States. *See, e.g.*, *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999)(holding that harboring "encompasses conduct tending substantially to facilitate an alien's remaining in the United States illegally *and* to prevent government authorities from detecting his unlawful presence."); *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977).[15] In *Cantu*, the former Fifth Circuit held that Section 1324 prohibits conduct "tending substantially to facilitate an alien's remaining in the United States illegally." *Cantu*, 557 F.2d at 1180 (citation omitted). It does not appear the Eleventh

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[14] Indeed, federal law and regulations explicitly or implicitly permit landlords to provide housing and other services to unlawfully present aliens. *See, e.g.*, 42 U.S.C. §§ 10401-10500 (providing federal funding to assist the states in providing domestic violence victims "shelter" without any restrictions on immigration status and defining "shelter" as "the provision of temporary refuge and supportive services in compliance with applicable state law (including regulation) governing the provision, on a regular basis, of shelter, safe homes, meals, and supportive services to victims of family violence, domestic violence, or dating violence, and their dependents"); 24 C.F.R. § 5.508(e) (providing that households in which some, but not all, family members establish eligible immigration status may nonetheless receive federal housing assistance).

[15] In *Bonner v. Prichard*, the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit announced prior to October 1, 1981. *See* 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

Circuit has altered this standard in the years following *Cantu*. *See, e.g.*, *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1299 (11th Cir. 2010); *Zheng*, 306 F.3d at 1086 (referring to harboring in the general sense of facilitating an alien's presence in the United States). Therefore, the court will follow *Cantu*.

Under the standard articulated in *Cantu*, no Fifth Circuit or Eleventh Circuit case has held that the mere provision of ***rental*** housing to someone he knew or had reason to know was an unlawfully-present alien constitutes "substantial facilitation," of the alien remaining in the United States and this court declines to so hold. The State Defendants cite a list of cases to show that the act of providing housing to unlawfully present aliens constitutes harboring under federal law. (*See* doc. 38 at 80-82.) However, none of these cases supports a finding that providing rental housing to unlawfully present aliens, ***without more***, constitutes harboring within the meaning of 8 U.S.C. § 1324. For instance, the State Defendants cite, *inter alia*, *United States v. Tipton*, 518 F.3d 591 (8th Cir. 2008), *Zheng*, 306 F.2d 1080, and *United States v. Varkonyi*, 645 F.2d 453 (5th Cir. 1981), to show that H.B. 56 is no more restrictive than federal law. These cases, however, involved more than the mere provision of rental housing. *See Tipton,* 518 F.3d at 595 (finding employer violated 8 U.S.C. § 1324(a)(1)(A)(iii) where it ***employed and housed*** six unauthorized alien employees, provided them with transportation and money to purchase necessities, and ***maintained counterfeit immigration papers*** for them)*; Zheng,* 306 F.3d at 1086 (finding defendants "harbored the illegal aliens by providing ***both housing and employment***") (emphasis added); *Varkonyi*, 645

F.2d at 459 (finding a violation of Section 1324's harboring provision where the defendant provided ***both*** employment ***and*** lodging to illegal aliens ***and*** forcibly interfered with INS agents to prevent the aliens' apprehension). While the act of providing housing to unlawfully present aliens may be significant evidence that the provider has "harbored" an illegal alien in violation of §1324(a)(1)(A)(iii), that evidence, without more, is not sufficient to constitute "substantial facilitation," of the alien's unlawful presence to support a conviction. *cf. Hall v. Thomas*, 753 F. Supp. 2d 1113, 1160 (N.D. Ala. 2010). As the United States correctly points out, "if the federal anti-harboring provisions 'already prohibited' all renting to unlawfully present aliens, Section 13(a)(4) would not prohibit anything beyond what Sections 13(a)(1)-(3) already prohibit, and would have been unnecessary to enact."[16] (Doc. 81 at 16 n.9.)

In sum, H.B. 56 § 13 is preempted because it prohibits conduct specifically authorized under the federal harboring and transportation scheme, creates "additional" regulations for conduct not prohibited by the federal harboring and transportation scheme, "inconsistently with the purpose of Congress," *Hines*, 312 U.S. at 66, and allows the Alabama courts to interpret an Alabama-specific transportation and harboring scheme

[16] The court does not agree with the United States's assertion that "[b]ecause Section 13(a)(4) purports to reach every housing rental agreement involving unlawfully present aliens, Alabama impermissibly seeks to decide who may reside within its borders." (Doc. 81 at 18.) H.B. 56 § 13(a)(4) does not seek to decide which aliens may live in the United States. Instead, it provides criminal penalties for ***landlords*** who provide rental housing under certain circumstances. The distinction, though subtle, is an important distinction nonetheless.

"unconstrained by the line of federal precedent" interpreting the federal harboring and transportation scheme. *GLAHR*, 2011 WL 2520752 at *13. H.B. 56 § 13 thus represents a significant departure from homogeneity, which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67. Section 13 creates an Alabama-specific harboring scheme that "remove[s] any federal discretion and impermissibly places the entire operation – from arrest to incarceration – squarely in the State's purview." (Doc. 2 at 45-46.) Unlike Section 10, which constrains the Alabama courts to the line of federal precedent interpreting 8 U.S.C. §§ 1304 and 1306, Section 13 imposes no obligation on Alabama courts to take guidance from federal courts and agencies in interpreting the word "harboring" as H.B. 56 § 13 is state law. For all these reasons, the court finds the United States is likely to succeed in showing that Section 13 is preempted.

For the reasons set forth above with regard to Section 11(a), the court finds the United States will suffer irreparable harm if Section 13 is not enjoined during the pendency of this action. Also, the court finds the balance of equities and the public's interest support granting the United States's Motion for Preliminary Injunction.

Based on the foregoing, the United States's Motion for Preliminary Injunction will be granted as to Section 13.

2. Dormant Commerce Clause

The United States also argues that Subsections 13(a)(1)-(3) of H.B. 56 "violate the dormant Commerce Clause." (Doc. 2 at 46.) The Commerce Clause vests Congress with the power to "regulate Commerce . . . among the several States." U.S. CONST. art I, § 8, cl. 3. The Supreme Court has interpreted the Commerce Clause "to have a 'negative' aspect," *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994), which is often referred to as the "dormant Commerce Clause." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). The dormant Commerce Clause "prohibits states from enacting statutes that impose 'substantial burdens' on interstate commerce." *Locke v. Shore*, 634 F.3d 1185, 1192 (11th Cir. 2011)(citing *Dennis v. Higgins*, 498 U.S. 439, 447 (1991)). A review of a state statute under the dormant Commerce Clause:

> involves two levels of analysis. *Bainbridge v. Turner*, 311 F.3d 1104, 1108-09 (11th Cir. 2002). We first must determine whether the state law discriminates against out-of-state residents on its face. *Id.* Laws that facially discriminate against out-of-state residents are analyzed under heightened scrutiny and are rarely upheld. *Id.* (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986)). Second, state laws that do not facially discriminate against out-of-state residents are struck down only if "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Bainbridge*, 311 F.3d at 1109.

Locke, 634 F.3d at 1192 (parallel citations omitted).

The United States argues that Section 13 violates the dormant commerce clause by "restrict[ing] the movement of people between states." (Doc. 2 at 46.) The United States has not established that Section 13 discriminates against out-of-state residents on its face.

Nor has it established that any burden imposed on interstate commerce "is clearly excessive in relation to the putative local benefits," argued by the State Defendants. (*See* doc. 89 at 44.) Therefore, the United States is not likely to succeed on its claim that Section 13 violates the dormant Commerce Clause. However, as noted, Section 13 is due to be enjoined because it is preempted under federal law.

F. SECTION 16

Section 16 provides:

> (a) No wage, compensation, whether in money or in kind or in services, or remuneration of any kind for the performance of services paid to an unauthorized alien shall be allowed as a deductible business expense for any state income or business tax purposes in this state. This subsection shall apply whether or not an Internal Revenue Service Form 1099 is issued in conjunction with the wages or remuneration.
>
> (b) Any business entity or employer who knowingly fails to comply with the requirements of this section shall be liable for a penalty equal to 10 times the business expense deduction claimed in violation of subsection (a). The penalty provided in this subsection shall be payable to the Alabama Department of Revenue.

H.B. 56, § 16.

The United States contends Section 16 is expressly preempted by 8 U.S.C. § 1324a(h)(2), which states, "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." (Doc. 2 at 36-38 [citing 8 U.S.C. § 1324a(h)(2)].) The Supreme Court has held, "IRCA expressly preempts States from imposing 'civil or criminal sanctions' on those who employ

unauthorized aliens, 'other than through licensing and similar laws.'" *Whiting*, 131 S. Ct. at 1977 (quoting 8 U.S.C. § 1324a(h)(2)).

In *Whiting*, the Supreme Court noted:

> IRCA . . . restricts the ability of States to combat employment of unauthorized workers. The Act expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." § 1324a(h)(2). Under that provision, state laws imposing civil fines for the employment of unauthorized workers like the one we upheld in *De Canas* are now expressly preempted.

Id. at 1975. Section 16 is not a licensing law; therefore, if Section 16 ***sanctions*** "those who employ, or recruit or refer for a fee for employment, unauthorized aliens," it is expressly preempted by § 1324a(h)(2).

The State Defendants argue that Section 16(a) is not a sanction because it is merely Alabama's "definition of what expenses may be deducted" under Alabama's tax code. (Doc. 69 at 78.) To be sure, "[t]he 'creation of a tax deduction is an exercise of legislative grace under which no substantive rights may vest.'" (*Id*. [quoting *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1085 (11th Cir. 2004)].) However, such "legislative grace" – in the face of § 1324a(h)(2) – does not allow Alabama to deny an employer a tax deduction to which it otherwise qualifies on the basis of the immigration status of its employee. The State Defendants argue, by analogy, "If the United States' reasoning [that denial of the deduction is a sanction on employers of unauthorized aliens] [is] correct, then any federal taxpayer who owns a home free and clear, or who lives in an apartment, is being 'sanctioned' by the

Internal Revenue Code because he or she is not eligible for the home-mortgage deduction." (*Id*. at 78-79.) However, using the State Defendant's analogy, Section 16 is more akin to the denial of a home-mortgage deduction to someone who actually pays a home mortgage than to the denial of the same deduction to someone who does not have the expense of a home mortgage.

Section 16(a) denies an employer a tax deduction for "wage[s], compensation, whether in money or in kind or in services, or remuneration of any kind for the performance of services" based on the immigration status of the employee, a deduction to which the employer would be eligible but for the immigration status of its employee. In the opinion of the court, denying a tax deduction to which the employer is otherwise eligible based on the immigration status of an employee fits within the meaning of a "sanction" against an employer of an unauthorized alien found in 8 U.S.C. § 1324a(h)(2).

The Supreme Court has held that "the meaning of 'sanction' is spacious enough to cover not only what we have called punitive fines, but coercive ones as well." *United States Dept. of Energy v. Ohio*, 503 U.S. 607, 621-22 (1992). Indeed, the House Report on Section 1324a(h)(2) stated,

> [t]he penalties contained in this legislation are intended to specifically preempt any state or local laws providing civil fines and/or criminal sanctions on the hiring, recruitment or referral or undocumented aliens. They are not intended to preempt or prevent lawful state or local processes concerning the suspension, revocation or refusal to reissue a ***license*** to any person who has been found to have violated the sanctions provisions in this legislation. Further, the Committee does not intend to preempt ***licensing*** or "***fitness to do business laws***," such as state farm labor contractor laws or forestry laws,

> which specifically require such licensee or contractor to refrain from hiring, recruiting or referring undocumented aliens.

Lozano, 620 F.3d at 208 n.29 (quoting H.R. Rep. No. 99–682(I), at 12, 1986 U.S.C.C.A.N. 5649, 5662)(original emphasis omitted; emphasis added). The Tenth Circuit, interpreting "sanction" as used in Section 1324a(h)(2), stated:

> IRCA does not define "sanction," but by its ordinary meaning, a sanction is "a ***restrictive measure used to punish a specific action or to prevent some future activity***." Webster's Third New Int'l Dictionary 2009 (1993). Moreover, the statutory context does not evince an intent to narrowly define "sanction" as requiring a punitive component. Title 8, Section 1324a(e)(4)(A) outlines a series of "penalties" for employers hiring unauthorized aliens, ranging from $250 to $10,000. Penalties are ordinarily understood as serving punitive purposes. Yet, in § 1324a(h)(2) Congress used the term "sanctions" rather than "penalty" as it did in § 1324a(e)(4)(A). ***Had Congress intended to preempt only those state laws that are punitive, we would have expected it to use "penalties"*** in § 1324a(h)(2). Had it used "sanctions" in § 1324a(e)(4), we might reach a similar conclusion. It did neither.

Chamber of Commerce of United States v. Edmondson, 594 F.3d 742, 765 (10th Cir. 2010)(emphasis added). By enacting Section 1324a(h)(2), Congress preempted state and local governments from using any "sanctions" – other than licensing or similar laws – to affect an employer's future behavior with regard to the employment of unauthorized aliens.

By denying a tax deduction to an employer for the wages paid to an unauthorized alien – a tax deduction to which the employer is entitled for wages paid to all other employees – Alabama has ***sanctioned*** that employer for employing the unauthorized alien. This sanction, set forth in Section 16(a) of H.B. 56, is not in the nature of a licensing law; therefore, Section 16(a) is expressly preempted by federal law. *See* 8 U.S.C. § 1324a(h)(2).

Because the court finds Section 16(a) is a "sanction" against employing an unauthorized alien expressly preempted by Section 1324a(h)(2), the court has no need to discuss separately Section 16(b), which imposes a tax penalty "equal to 10 times the business expense deduction claimed in violation of subsection (a)."

The court finds the United States has established a likelihood of success on its claim that Section 16 is expressly preempted by federal law. Also, for the reasons set forth above with regard to Section 11(a), the court finds the United States will suffer irreparable harm if Section 16 is not enjoined during the pendency of this action. The court further finds the balance of equities and the public's interest support granting the United States's Motion for Preliminary Injunction.

Based on the foregoing, the United States's Motion for Preliminary Injunction will be granted as to Section 16.

G. SECTION 17

Section 17 of H.B. 56 provides:

> (a) It shall be a discriminatory practice for a business entity or employer to fail to hire a job applicant who is a United States citizen or an alien who is authorized to work in the United States as defined in 8 U.S.C. § 1324a(h)(3) or discharge an employee working in Alabama who is a United States citizen or an alien who is authorized to work in the United States as defined in 8 U.S.C. § 1324a(h)(3) while retaining or hiring an employee who the business entity or employer knows, or reasonably should have known, is an unauthorized alien.
>
> (b) A violation of subsection (a) may be the basis of a civil action in the state courts of this state. Any recovery under this subsection shall be

limited to compensatory relief and shall not include any civil or criminal sanctions against the employer.

(c) The losing party in any civil action shall pay the court costs and reasonable attorneys fees for the prevailing party; however, the losing party shall only pay the attorneys fees of the prevailing party up to the amount paid by the losing party for his or her own attorneys fees.

(d) The amount of the attorneys fees spent by each party shall be reported to the court before the verdict is rendered.[17]

(e) In proceedings of the court, the determination of whether an employee is an unauthorized alien shall be made by the federal government, pursuant to 8 U.S.C. § 1373(c). The court shall consider only the federal government's determination when deciding whether an employee is an unauthorized alien. The court may take judicial notice of any verification of an individual's immigration status previously provided by the federal government and may request the federal government to provide further automated or testimonial verification.

H.B. 56 § 17 (footnote added).

Section 17(b) creates a cause of action in favor of a United States citizen or a lawfully-present alien against a business entity or employer. This cause of action arises when a business entity/employer fails to hire or terminates the citizen or authorized alien at a time when it has an employee that it knows or should know is unlawfully present according to federal law, irrespective of considerations such as cause for the termination or qualification for the position. H.B. 56 § 17(a). Damages for a violation of Section 17(a) are limited to compensatory damages and costs, including attorneys' fees. *Id.* (b), (c).

[17]The court notes that discrimination cases in federal court are often taken by attorneys on a contingency-fee basis. Assuming the same holds true in cases filed under Section 17, most, if not all, plaintiffs will not have "spent" any money on attorneys' fees before a verdict.

The United States contends that Section 17 is expressly preempted by 8 U.S.C. § 1324a(h)(2). As set forth above, Section 1324a(h)(2) preempts any state or local law that "impos[es] civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." The State Defendants argue that Section 17 is not preempted because (1) it is not a "sanction" as it imposes only compensatory damages to "victims of a newly[-]defined discriminatory practice" and "expressly disclaims an intent to punish or deter conduct," (doc. 69 at 83), and (2) it "merely establish[es] a private right of action [and] does not *guarantee* success at litigation" by the suing employee, (*id*. at 84 [emphasis in original]).

As set forth above, a "sanction" under § 1324a(h)(2) includes all government penalties and coercive conduct designed to affect an employer's behavior with regard to the employment of unauthorized aliens. Therefore, establishing a law that makes an employer liable to an unsuccessful applicant or terminated citizen/authorized alien based ***only*** on the employment of an unauthorized alien, despite Section 17's disclaimer of any "intent to punish or deter conduct," has the effect of creating a sanction based on the employment of an unauthorized alien.[18]

[18]The court notes that it is not required to assume that Section 17 is ***not*** a sanction merely because it says that any "recovery" does not include a sanction. *See* H.B. 56 § 17(b).

In *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 766 (10th Cir. 2010), the Tenth Circuit considered whether an Oklahoma statute, similar to H.B. 56 § 17 was expressly preempted by Section 1324a(h)(2).

> Section 7(C) of the [Oklahoma] Act made it a discriminatory practice for an employer to discharge an employee working in Oklahoma who is a United States citizen or permanent resident alien while retaining an employee who the employing entity knows, or reasonably should have known, is an unauthorized alien.

Id. at 754. The Tenth Circuit found that "cease and desist orders, reinstatement, back pay, costs, and attorneys' fees" were "'restrictive measures' that fall within the meaning of 'sanctions' as used in § 1324a(h)(2)." *Id*. at 765. Moreover, the court held:

> Additionally, we conclude that Section 7(C) sanctions are imposed "upon those who employ . . . unauthorized aliens," 8 U.S.C. § 1324a(h)(2). An employer is subject to sanction under Section 7(C) if it terminates a legal worker while retaining a worker the employer knows, or should reasonably know, is an unauthorized alien. Okla. Stat. tit. 25, § 1313(C)(1). Sanctions are therefore contingent on the employment of an unauthorized alien. *See id*. We are not persuaded by Oklahoma's contention that Section 7(C) merely creates a cause of action for the termination of legal residents. While that is a necessary prerequisite, an employer is subject to sanction *only* if the employer retains an unauthorized alien. *Id*. The [Plaintiffs] are thus likely to succeed on the merits of this portion of their express preemption claim.

Id. at 766. In a separate opinion concurring in the majority's decision that Section 7(C) was expressly preempted, Judge Hartz stated that he considered reinstatement, back pay, costs, and attorney fees not to be civil sanctions within the meaning of Section 1324a(h)(2). *Id*. at 777 (Hartz, J., concurring in part and dissenting in part). However, he considered Section 7(C) to be preempted by Section 1324a(h)(2) because other provisions of the Oklahoma law

provided for "civil penalties" for "discriminatory practices." *Id*. The court agrees with the reasoning of the majority of the Tenth Circuit, which held that neither the contingent nature of litigation nor the form of damages saved the Oklahoma statute from the express preemption of Section 1324a(h)(2).

Although this court believes that back pay and attorneys fees should be classified as "sanctions" despite their compensatory nature, this court finds Section 1324a(h)(2) is not limited to money "sanctions". By creating a cause of action in favor of citizens and authorized aliens based ***solely*** on the hiring or retention of an unauthorized alien, Alabama has sanctioned the employment of an unauthorized alien beyond its licensing laws.

According to federal law, employment discrimination is typically divided into two categories: "Disparate-treatment," which "occur[s] where an employer has treated a particular person less favorably than others because of a protected trait," and "disparate impact," which occurs where "an employer uses a particular employment practice that causes a disparate impact on the basis of [a protected trait]." *Ricci v. DeStefano*, 129 S. Ct. 2658, 2672-73 (2009) (internal quotations omitted). The Alabama Supreme Court has similarly described "discrimination." *Alabama Power Co. v. Aldridge*, 854 So. 2d 554, 569 (Ala. 2002)("The necessary element of discriminatory treatment in the context of claims alleging excessive monitoring is ***disparate treatment of wrongdoers***, not merely getting caught doing wrong.")(emphasis added); *Ex parte Branch*, 526 So. 2d 609, 623 (Ala. 1987)(Among the factors relevant to consideration of a *Batson* challenge include:

"***Disparate treatment*** of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner;" and "***Disparate examination*** of members of the venire")(emphasis added); *Ex parte Wooden*, 670 So. 2d 892, 894 (Ala. 1995)(In certain contexts, at least, evidence of such a ***disparate impact*** on an ethnic group permits a strong inference of invidious discrimination.")(emphasis added). In other words, to constitute "discrimination," the decision being challenged must be based on a protected class or status as opposed to a decision on the merits.[19]

To create a cause of action in state courts for discrimination based, not on an employer's purposeful disparate treatment based on a protected class, but on mere presence of a single unauthorized alien employee is to sanction employment of that unauthorized alien. However, what Alabama has called "discrimination" does not describe a decision by the employer ***based on*** immigration status – the targeted classification. Indeed, liability

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[19]Black's Law Dictionary defines "discrimination" as:

> 1. The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability. • Federal law, including Title VII of the Civil Rights Act, prohibits employment discrimination based on any one of those characteristics. Other federal statutes, supplemented by court decisions, prohibit discrimination in voting rights, housing, credit extension, public education, and access to public facilities. State laws provide further protections against discrimination. 2. Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.

BLACK'S LAW DICTIONARY 534 (9th ed. 2009).

may be established pursuant to Section 17 if the plaintiff, the United States citizen or authorized alien, shows only (1) he or she was not hired or was fired for any reason, irrespective of qualifications, and (2) an unauthorized-alien employee was hired or retained.

For example, Alabama has determined that "[a]n individual shall be ***disqualified*** for total or partial unemployment . . . [i]f he was discharged or removed from his work for a dishonest or criminal act committed in connection with his work or for sabotage or an act endangering the safety of others or for the use of illegal drugs after previous warning or for the refusal to submit to or cooperate with a blood or urine test after previous warning." ALA. CODE § 25-4-78(3)(a)(1975)(emphasis added). Under Section 17(a), an employer could be found liable for terminating a citizen or authorized alien for any of these reasons – if the employer has retained or hired an unauthorized alien. Also, an employer is liable for not hiring a citizen or authorized alien that lacks the required education, experience, or license for the position – if it has hired or retained an unauthorized alien. Therefore, the ***only*** basis for the employer's liability in such situations is the employment of an unauthorized alien. Clearly such "liability" is a sanction for the employment of an unauthorized alien, rather than liability for a business decision based on consideration of a protected classification.

The court is not called upon to decide today whether Section 17 could evade preemption if it had created a cause of action designed to compensate qualified employees and applicants for discrimination based on their citizenship and/or authorized alien status. Federal employment discrimination laws allow an employer to choose any candidate or to

prefer one employee over another as long as its decision is not based on "unlawful criteria," such as a protected characteristic. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). And, the Supreme Court has found that "undocumented status" is not protected under the Equal Protection Clause. *See Plyler*, 457 U.S. at 220 ("Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action.") It may be that such a statute would not be considered a "sanction" for the employment of an unauthorized alien. Nevertheless, the plain language of Section 17 creates employer liability based ***solely*** on hiring or retaining an unauthorized alien. This is a sanction expressly preempted by Section 1324a(h)(2).

Based on the foregoing the court finds the United States has established a likelihood of success on the merits of its challenge to Section 17 of H.B. 56. Also, for the reasons set forth above with regard to Section 11(a), the court finds the United States will suffer irreparable harm if Section 17 is not enjoined during the pendency of this action. The court further finds the balance of equities and the public's interest support granting the United States's Motion for Preliminary Injunction.

Based on the foregoing, the United States's Motion for Preliminary Injunction will be granted as to Section 17.

H. SECTION 18

Section 18 amends Section 32-6-9, Code of Alabama 1975, which requires drivers of motor vehicles to have their drivers' licenses in their possession at all times. Section 32-6-9 currently states:

> Every licensee shall have his or her license in his or her immediate possession at all times when driving a motor vehicle and shall display the same, upon demand of a judge of any court, a peace officer, or a state trooper. However, no person charged with violating this section shall be convicted if he or she produces in court or the office of the arresting officer a driver's license theretofore issued to him or her and valid at the time of his or her arrest.

Ala. Code § 32-6-9. Section 18 of H.B. 56 adds the following subsections to Section 32-6-9 of the Code of Alabama:

> (b) Notwithstanding the provisions of Section 32-1-4,[20] if a law officer arrests a person for a violation of this section and the officer is unable to determine by any other means that the person has a valid driver's license, the officer shall transport the person to the nearest or most accessible magistrate.
>
> (c) A reasonable effort shall be made to determine the citizenship of the person and if an alien, whether the alien is lawfully present in the United States by verification with the federal government pursuant to 8 U.S.C. § 1373(c). An officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.
>
> (d) A verification inquiry, pursuant to 8 U.S.C. § 1373(c), shall be made within 48 hours to the Law Enforcement Support Center of the United States Department of Homeland Security or other office or agency designated for that purpose by the federal government. If the

[20] Ala. Code § 32-1-4 governs the right to hearings and court appearances for those arrested for a misdemeanor related to motor vehicles and traffic violations.

> 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.

H.B. 56 § 18 [footnote added].

The United States argues that Section 18 is preempted by federal law and represents "a systematic effort by Alabama to inject itself into the enforcement of the federal government's own immigration laws in a manner that is ***non-cooperative*** with the Secretary," and therefore is preempted. (Doc. 2 at 59 [emphasis added].) Relying on 8 U.S.C. § 1357(g)(10)(B), the United States makes the identical argument for preemption with regard to Section 18 that it does with regard to Section 12: "The INA requires that states or local officers 'cooperate with' the Secretary if they choose to assist federal officers in immigration enforcement, and states may not enact their own mandatory schemes for verifying immigration status or otherwise identifying unlawfully present aliens." (*Id.* at 62.) Again, the United States relies on the language of 8 U.S.C. § 1357(g)(10)(B) for the proposition that mandatory verification is non-cooperative and thus impermissible under the INA.

Identifying unlawfully present aliens is not "a field which the States have traditionally occupied." *Wyeth*, 129 S. Ct. at 1194 (internal quotations and citations omitted). Therefore, there is no presumption against preemption of Section 18. As the court noted in its discussion with regard to Section 12, nothing in the text of the INA expressly preempts states from legislating on the issue of verification of an individual's

citizenship and immigration status. And, as the State Defendants note, prior to the enactment of H.B. 56, federal law permitted state law enforcement officers to request information concerning "the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law" and the federal government is required to respond "by providing the requested verification or status information." *See* 8 U.S.C. § 1373(c).

For the reasons discussed more fully with regard to Section 12, this court agrees with the State Defendants that the verification requirements of Ala. Code § 32-6-9(c), as amended by Section 18, do not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Therefore, the court finds the United States has not shown a likelihood of success on its claim that Section 18 is impliedly preempted by federal law.

The United States's Motion for Preliminary Injunction as to Section 18 will be denied.

I. SECTION 27

Section 27 provides:

> (a) No court of this state shall enforce the terms of, or otherwise regard as valid, any contract between a 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, and the performance of the contract required the alien to remain unlawfully present in the United States for more than 24 hours after the time the contract was entered into or performance could not reasonably be expected to occur without such remaining.

(b) This section shall not apply to a contract for lodging for one night, a contract for the purchase of food to be consumed by the alien, a contract for medical services, or a contract for transportation of the alien that is intended to facilitate the alien's return to his or her country of origin.

(c) This section shall not apply to a contract authorized by federal law.

(d) In proceedings of the court, the determination of whether an alien is unlawfully present in the United States shall be made by the federal government, pursuant to 8 U.S.C. § 1373(c). The court shall consider only the federal government's determination when deciding whether an alien is unlawfully present in the United States. The court may take judicial notice of any verification of an individual's immigration status previously provided by the federal government and may request the federal government to provide further automated or testimonial verification.

H.B. 56 § 27.

In essence, Section 27 strips an unlawfully-present alien of the capacity to contract except in certain circumstances – i.e. the other party to the agreement did not know the alien was unlawfully present and the contract could be performed in less than 24 hours. H.B. 56 § 27(a). Section 27(b) excepts from the operation of subsection (a) certain contracts based on the subject matter of the agreement – *i.e.* "lodging for one night, a contract for the purchase of food to be consumed by the alien, a contract for medical services, or a contract for transportation of the alien that is intended to facilitate the alien's return to his or her country of origin." Capacity to contract is typically understood as established by state law. *See United States v. Yazell*, 382 U.S. 341, 343, 352-53 (1966).

The United States argues that Section 27 is preempted by federal immigration laws contending that "Alabama has impermissibly altered the conditions imposed by Congress

upon admission, naturalization and *residence* of aliens in the United States or the several states." (Doc. 2 at 51[emphasis in original; internal quotation and citation omitted].) As set forth above, federal immigration law has not occupied the entire field with regard to all laws touching immigrants. The United States argues that "there is no evidence that Congress intended as a categorical matter, unlawfully present aliens' contracts to be unenforceable." (Doc. 2 at 52.) However, this argument is inadequate to find implied preemption because nothing shows Congress intended that such contracts would be enforceable. Federal immigration law does not prohibit Alabama from passing a law regarding the enforceability of contracts involving aliens unlawfully present in the United States.

Therefore, the court finds that the United States has not established a likelihood of success on its claim that Section 27 is preempted by federal law. Its Motion for Preliminary Injunction will be denied as to Section 27.

J. SECTION 28

Section 28 of H.B. 56 states:

> (a)(1) Every public elementary and secondary school in this state, at the time of enrollment in kindergarten or any grade in such school, shall determine whether the student enrolling in public school was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States and qualifies for assignment to an English as Second Language class or other remedial program.
>
> (2) The public school, when making the determination required by subdivision (1), shall rely upon presentation of the student's original birth certificate, or a certified copy thereof.

(3) 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 parent, guardian, or legal custodian of the student shall notify the school within 30 days of the date of the student's enrollment of the actual citizenship or immigration status of the student under federal law.

(4) Notification shall consist of both of the following:

a. The presentation for inspection, to a school official designated for such purpose by the school district in which the child is enrolled, of official documentation establishing the citizenship and, in the case of an alien, the immigration status of the student, or alternatively by submission of a notarized copy of such documentation to such official.

b. Attestation by the parent, guardian, or legal custodian, under penalty of perjury, that the document states the true identity of the child. If the student or his or her parent, guardian, or legal representative possesses no such documentation but nevertheless maintains that the student is either a United States citizen or an alien lawfully present in the United States, the parent, guardian, or legal representative of the student may sign a declaration so stating, under penalty of perjury.

(5) 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.

(b) Each school district in this state shall collect and compile data as required by this section.

(c) Each school district shall submit to the State Board of Education an annual report listing all data obtained pursuant to this section.

(d)(1) The State Board of Education shall compile and submit an annual public report to the Legislature.

(2) The report shall provide data, aggregated by public school, regarding the numbers of United States citizens, of lawfully present aliens by immigration classification, and of aliens believed to be unlawfully present in the United States enrolled at all primary and secondary public schools in this state. The report shall also provide the number of students in each category participating in English as a Second Language Programs enrolled at such schools.

(3) The report shall analyze and identify the effects upon the standard or quality of education provided to students who are citizens of the United States residing in Alabama that may have occurred, or are expected to occur in the future, as a consequence of the enrollment of students who are aliens not lawfully present in the United States.

(4) The report shall analyze and itemize the fiscal costs to the state and political subdivisions thereof of providing educational instruction, computers, textbooks and other supplies, free or discounted school meals, and extracurricular activities to students who are aliens not lawfully present in the United States.

(5) The State Board of Education shall prepare and issue objective baseline criteria for identifying and assessing the other educational impacts on the quality of education provided to students who are citizens of the United States, due to the enrollment of aliens who are not lawfully present in the United states, [sic] in addition to the statistical data on citizenship and immigration status and English as a Second Language enrollment required by this act. The State Board of Education may contract with reputable scholars and research institutions to identify and validate such criteria. The State Board of Education shall assess such educational impacts and include such assessments in its reports to the Legislature.

(e) Public disclosure by any person of information obtained pursuant to this section which personally identifies any student shall be unlawful, except for purposes permitted pursuant to 8 U.S.C. §§ 1373 and 1644. Any person intending to make a public disclosure of information that is classified as confidential under this section, on the ground that such disclosure constitutes a use permitted by federal law, shall first apply to the Attorney General and receive a waiver of confidentiality from the requirements of this subsection.

> (f) A student whose personal identity has been negligently or intentionally disclosed in violation of this section shall be deemed to have suffered an invasion of the student's right to privacy. The student shall have a civil remedy for such violation against the agency or person that has made the unauthorized disclosure.
>
> (g) The State Board of Education shall construe all provisions of this section in conformity with federal law.
>
> (h) This section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

H.B. 56 § 28.

Section 28 requires all children enrolling in a public elementary or secondary school to provide their birth certificate to a school official. *Id.* (a)(1)-(2). According to subsection (a)(2) and (3), school officials must rely on the birth certificate to determine "whether the student enrolling in public school was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States." *Id.* (a)(2)-(3). Information about the immigration status of a parent is not reflected on Alabama birth certificates. Alabama requires "date, time, and location of birth; name of child; sex; plurality and birth order if not single; mother's information such as name, residence, and date and place of birth; father's information as provided in Code of Ala. 1975, § 22-9A-7(f); attendant's information; and information for legal purposes such as certificate number and date filed." ALA. ADMIN. CODE r. 420-7-1-.03(2)(a)1 (2007); *see also* ALA. CODE § 22-9A-7(f)(1975)(Information concerning the father in included on the birth certificate based on the mother's marital status and whether paternity has been legally determined.). Other

information about the parents, "such as race, ethnicity, and education," is collected for "statistical research and public health purposes," but such information is not included on the birth certificate. Ala. Admin. Code r. 420-7-1-.03(2)(a)2. Nothing in the record indicates that immigration status is reflected on the birth certificates from other states or countries. For purposes of determining the reach of H.B. 56 § 28, the court assumes that school officials will not seek to determine the immigration status of parents beyond examination of the child's birth certificate (*see* Section 28(a)(2)), and that such information is not included on the birth certificate. Therefore, Section 28 does not compel school officials to determine the immigration status of a parent of a student.

If the birth certificate shows the child was "born outside the jurisdiction of the United States" or if the birth "certificate is not available for any reason, the parent, guardian, or legal custodian of the student shall notify the school within 30 days of the date of the student's enrollment of the actual citizenship or immigration status of the student under federal law."[21] H.B. 56 § 28(a)(3). This "notification" requires the person responsible for the child to "present[ ] for inspection . . . official documentation establishing the citizenship and, in the case of an alien, the immigration status of the student," and a declaration or affidavit swearing that the official documents "state[ ] the true identity of the child." *Id.* (a)(4). If the parent or other person responsible for the child does not have documentation

[21]Although subsection (a)(1) refers to the immigration status of a student's parents, subsection (a)(3) does not require notification or collection of information regarding a parent's immigration status.

establishing citizenship or lawful presence, he or she "may sign a declaration . . . stating" that the child is a citizen or is otherwise lawfully present. *Id*. (a)(4)(b). From this information, the school creates a report listing the number of students who are citizens, lawfully-present aliens and presumed unlawfully-present aliens.[22] *Id*. (a)(5). The number of unlawfully-present alien children includes any student not submitting the required documentation. *Id*. (a)(5)(a). Section 28 states that it "shall be enforced without regard to . . . national origin." *Id*. (h). The effect of Section 28 is that all children unable to present a birth certificate showing that he or she was born in the United States are presumed to be unlawfully present for reporting purposes unless and until he or she establishes citizenship or lawful presence. Therefore, for reporting purposes, it is possible that children will be presumed unlawfully-present aliens who are neither aliens nor unlawfully-present.

The United States argues that Section 28, which creates "mandatory data collection, classification, and reporting requirements," is preempted as an "impermissibl[e] . . . registration scheme for children (and derivatively their parents) akin to the one the Supreme Court invalidated in *Hines*." (Doc. 2 at 57-58.) The court disagrees. As the State Defendants argue, "Section 28 bears no resemblance to the Pennsylvania statute examined by the court in *Hines*, which required ***all*** aliens over the age of 18 – whether or not they

[22]Also, Sections 28(a)(1) and (d)(2) require schools to determine and report the number of students participating in English as a Second Language [ESL] Programs. This information is already collected and reported under federal law. *See* 20 U.S.C. § 6968. Plaintiffs do not challenge the collection and reporting of the number of ESL students, which, the court notes, is not synonymous with a student's national origin.

were legally in the United States–to, among other things, register annually and carry an alien registration card." (Doc. 69 at 59 [citing *Hines*, 312 U.S. at 59-60].) They also contend that Section 28 is distinguishable from the state registration scheme in *Hines* because Section 28 does not impose a penalty. (*Id.*)

As noted above, in *Hines*, the Supreme Court considered whether the federal Alien Registration Act, the precursor to the INA, preempted the Alien Registration Act adopted by the Commonwealth of Pennsylvania. *Hines*, 312 U.S. at 56. The subject of both the federal Act and the Pennsylvania Act was the registration of aliens as a distinct group. *Id.* at 61. The Court stated:

> [W]here the federal government, in the exercise of its superior authority in . . . [the] field [of immigration], has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, ***inconsistently with the purpose of Congress***, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

Id. at 66-67 (emphasis added). On that basis, the Court found that its "primary function" was "to determine whether . . . Pennsylvania's law . . . [stood] as on obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the federal Act. *Id.* at 66-67.

Unlike the Pennsylvania Act in *Hines*, Section 28 does not create an independent, state-specific registration scheme, attempt to register anyone, or create registration requirements in addition to those established by Congress in the INA. The standard for registration provided by Congress remains uniform. Section 28 is not preempted by federal

law. Therefore, the United States has not shown a likelihood of success on its claim that Section 28 is preempted by federal law.

Also, the United States argues that Section 28 is preempted by foreign policy goals. However, for the reasons set forth above with regard to Section 10, the court finds the United States has not submitted sufficient evidence that Section 28 conflicts with federally-established foreign policy goals.

Based on the foregoing, the United States's Motion for Preliminary Injunction will be denied as to Section 28.

K. SECTION 30

Section 30 provides:

> (a) For the purposes of this section, "business transaction" includes any transaction between a person and the state or a political subdivision of the state, including, but not limited to, applying for or renewing a motor vehicle license plate, applying for or renewing a driver's license or nondriver identification card, or applying for or renewing a business license. "Business transaction" does not include applying for a marriage license.
>
> (b) An alien not lawfully present in the United States shall not enter into or attempt to enter into a business transaction with the state or a political subdivision of the state and no person shall enter into a business transaction or attempt to enter into a business transaction on behalf of an alien not lawfully present in the United States.
>
> (c) Any person entering into a business transaction or attempting to enter into a business transaction with this state or a political subdivision of this state shall be required to demonstrate his or her United States citizenship, or if he or she is an alien, his or her lawful presence in the United States to the person conducting the business transaction on behalf of this state or a political subdivision of this state. United States citizenship shall be demonstrated by

presentation of one of the documents listed in Section 29(k).[23] An alien's

[23]These documents are:

(1) The applicant's driver's license or nondriver's identification card issued by the division of motor vehicles or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of United States citizenship.

(2) The applicant's birth certificate that verifies United States citizenship to the satisfaction of the county election officer or Secretary of State.

(3) Pertinent pages of the applicant's United States valid or expired passport identifying the applicant and the applicant's passport number, or presentation to the county election officer of the applicant's United States passport.

(4) The applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States Bureau of Citizenship and Immigration Services by the county election officer or the Secretary of State, pursuant to 8 U.S.C. § 1373(c).

(5) Other documents or methods of proof of United States citizenship issued by the federal government pursuant to the Immigration and Nationality Act of 1952, and amendments thereto.

(6) The applicant's Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number.

(7) The applicant's consular report of birth abroad of a citizen of the United States of America.

(8) The applicant's certificate of citizenship issued by the United States Citizenship and Immigration Services.

lawful presence in the United States shall be demonstrated by this state's or a political subdivision of this state's verification of the alien's lawful presence through the Systematic Alien Verification for Entitlements program operated by the Department of Homeland Security, or by other verification with the Department of Homeland Security pursuant to 8 U.S.C. § 1373(c).

(d) A violation of this section is a Class C felony.

(e) An agency of this state or a county, city, town, or other political subdivision of this state may not consider race, color, or national origin in the enforcement of this section except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901.

(f) In the enforcement of this section, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). An official of this state or political subdivision of this state shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.

H.B. 56 § 30 (footnote added).

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(9) The applicant's certification of report of birth issued by the United States Department of State.

(10) The applicant's American Indian card, with KIC classification, issued by the United States Department of Homeland Security.

(11) The applicant's final adoption decree showing the applicant's name and United States birthplace.

(12) The applicant's official United States military record of service showing the applicant's place of birth in the United States.

(13) An extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States.

H.B. 56 § 29(k).

Section 30 prohibits all "business transaction[s]" between an unlawfully-present alien and "the state or a political subdivision of the state." H.B. 56, § 30(b). "'It is well established by the decisions of [the Alabama Supreme Court] that a public corporation is a separate entity from the State and from any local political subdivision thereof, including a city or county.'" *Limestone Cnty. Water and Sewer Auth. v. City of Athens*, 896 So. 2d 531, 534 (Ala. Civ. App. 2004)(quoting *Knight v. W. Ala. Envtl. Improvement Auth.*, 246 So. 2d 903, 905 (Ala. 1971)). "Business transaction" is not defined in Section 30 except to say that applying or renewing vehicle licenses, driver's licenses, identification cards, and business licenses are "business transactions." H.B. 56 § 30(a).

To be sure, use of the word "business" to modify "transactions" implies an intent to limit the "transactions" to those involving a commercial aspect.[24] Indeed, Alabama has defined "business" within the business licensing statute as:

> Any commercial or industrial activity or any enterprise, trade, profession, occupation, or livelihood, including the lease or rental of residential or nonresidential real estate, whether or not carried on for gain or profit, and whether or not engaged in as a principal or as an independent contractor, which is engaged in, or caused to be engaged in, within a municipality.

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[24]Black's Law Dictionary defines "business" as:

> 1. A commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain. 2. Commercial enterprises. 3. Commercial transactions.

BLACK'S LAW DICTIONARY 226 (9th ed. 2009). It defines "business transaction" as "An action that affects the actor's financial or economic interests, including the making of a contract." *Id*. at 227.

ALA. CODE § 11-51-90.1(1)(1975). As commonly understood, Section 30 would prohibit all commercial contracts between unlawfully-present aliens and the state or one of its political subdivisions. However, given that Section 27 declares unlawfully-present aliens do not have the capacity to contract, such interpretation does not reach the scope intended by the Alabama legislature.

Yet, the words of Section 30 obfuscate its meaning. It declares a ban on business transactions and then proceeds to define "business transactions" with examples, none of which fit within the commonly understood definition of a business transaction. The three examples are (1) applying for or renewing a motor vehicle license plate; (2) applying for or renewing a driver's license or a nondriver identification card; and (3) applying for or renewing a business license. H.B. 56 § 30(a).

Although not a "business transaction," the court finds that Section 30 is intended to prohibit the state from issuing a license to an unlawfully-present alien.[25] "'The word 'license,' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize.'" *Fed. Land Bank of Wichita v. Bd. of Cnty. Commrs of Kiowa Cnty.*, 368 U.S. 146, 154 n.23 (1961)

[25]The court finds that the term "business transactions" does not reach registration requirements. Therefore, it finds no need to decide whether prohibiting unlawfully-present aliens from registering births and deaths or complying with state and local government registration laws is prohibited.

(quoting *Gibbons v. Ogden*, 22 U.S. 1, 213 (1824)). Alabama issues licenses to drivers and businesses, but also to professionals, hospitals, day care facilities, and a myriad of other individuals giving them permission to conduct business or "do that thing" the license allows. The United States has not demonstrated that Congress has – expressly or implicitly – preempted the power of the states to refuse to license an unlawfully-present alien. *Cf. John Doe No. 1 v. Ga. Dep't of Pub. Safety*, 147 F. Supp. 2d 1369, 1374, 1376 (N.D. Ga. 2001)(holding Georgia can deny an unlawfully-present alien a driver's license).

Based on the foregoing, the court finds that, to the extent Section 30 reaches commercial contracts and licenses, the United States has not shown that it has a likelihood of success on the merits as its claim that Section 30 is preempted by federal law.

Section 30 prohibits unlawfully-present aliens from contracting with state and local governments, applying for or renewing drivers' licenses and identification cards, and applying for and renewing motor vehicle license plates. This law is not preempted. Therefore, the United States has not shown a likelihood of success of the merits. The United States's Motion for Preliminary Injunction as to Section 30 will be denied.

CONCLUSION

For the foregoing reasons, the court concludes:

1. The United States has shown that it is entitled to an injunction preliminarily enjoining Sections 11(a), 13, 16, and 17 of H.B. 56.

2. The United States has not shown that it is entitled to an injunction preliminarily enjoining Sections 10, 12, 18, 27, 28, and 30 of H.B. 56.

An Order granting in part and denying the United States's Motion for Preliminary Injunction, (doc. 2), and enjoining enforcement of Sections 11(a), 13, 16 and 17, will be entered contemporaneously with this Memorandum Opinion.

DONE, this 28th day of September, 2011.

Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
CHIEF UNITED STATES DISTRICT JUDGE

EXHIBIT 3

FILED
2011 Oct-05 PM 03:21
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

HISPANIC INTEREST COALITION OF ALABAMA, *et al.*	)	
Plaintiffs,	)	
vs.	)	**Case Number 5:11-CV-2484-SLB**
ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; *et al.*,	)	
Defendants.	)	

ORDER

This case is currently before the court on plaintiffs' Emergency Motion to Enjoin Portions of H.B. 56 Pending Appeal. (Doc. 140.)[1] Specifically, plaintiffs move the court to enjoin Sections 10, 12, 27, 28, and 30 of H.B. 56, pending appeal, pursuant to FED. R. CIV. P. 62(c) and FED. R. APP. P. 8(a). For the reasons set forth below, the court is of the opinion that plaintiffs' Emergency Motion is due to be and hereby is **DENIED**. Plaintiffs' alternative request for a temporary injunction so that a motion for an injunction pending appeal can be filed with the Eleventh Circuit Court of Appeals is also **DENIED**.

> In relevant part, Rule 62(c) provides that, "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). An injunction pending an appeal is considered an

[1] Reference to a document number, ["Doc. ___"], refers to the number assigned to each document as it is filed in the court's record.

> "extraordinary remedy," *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000), "for which the moving party bears a 'heavy burden.'" *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1558, 1561 (M.D. Ala. 1996) (Thompson, J.)(citation omitted). In deciding whether to issue an injunction pending an appeal, the Eleventh Circuit requires movants to show "(1) a substantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the [movants] unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest." *Touchston*, 234 F.3d at 1132; *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)(explaining that, while different procedural rules govern the authority of district courts and courts of appeals to stay an order pending appeal, the factors for consideration generally are the same)(citing Fed. R. Civ. P. 62(c) & Fed. R. App. P. 8(a)).

Reed v. Riley, No. 2:07-cv-0190-WKW [wo], 2008 WL 3931612, *1 (M.D. Ala. Aug. 25, 2008)(parallel citations omitted); *see also Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). "[W]here the balance of the equities weighs heavily in favor of granting the [injunction], the movant need only show a substantial case on the merits." *Gonzalez ex rel. Gonzalez v. Reno*, No. 00-11424-D, 2000 WL 381901, *1 (11th Cir. Apr. 19, 2000)(quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A June 1981))(internal quotations and other citations omitted)(unpublished).[2]

For the reasons set forth in the court's Memorandum Opinion, the court finds that plaintiffs have not shown that they are "likely to prevail" nor that they have a "substantial case" on the merits. The court carefully and thoroughly reviewed all issues raised by the

[2]"In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), this Court adopted as binding precedent decisions of the Fifth Circuit, including Unit A panel decisions of that circuit, handed down prior to October 1, 1981." *W.R. Huff Asset Management Co., L.L.C. v. Kohlberg, Kravis, Roberts & Co., L.P.*, 566 F.3d 979, 985 n.6 (11th Cir. 2009)(citing *United States v. Todd*, 108 F.3d 1329, 1333 (11th Cir. 1997)).

parties and its lengthy Memorandum Opinion represents the product of its time and effort. It does not foresee a "substantial" case for reversal.

"It is unnecessary to engage in a protracted analysis of the balancing of the equities in this case because the Court finds that under either standard discussed above, [plaintiffs have] not demonstrated a question for appeal sufficient to warrant the issuance of a stay pending appeal." *United States v. Engelhard Corp.*, No. 6–95–CV–45 (WLS), 1997 WL 834205, *2 (M.D. Ga. Apr. 7, 1997); *see also MacBride v. Askew*, 541 F.2d 465, 467 (5th Cir. 1976). Nevertheless, even if the court was to accept plaintiffs' assertion that they have a substantial case on the merits, the court finds that the balance of the equities does not weigh heavily in favor of plaintiffs.

The court notes that some of plaintiffs' evidence of irreparable injury appear to have been caused by a misinterpretation of the Act. Jane Doe #7 (not a plaintiff) filed a declaration stating that a school teacher questioned her daughter about her immigration status and the immigration status of her parents. (Doc. 143-1 at 2.) Certainly this conduct is not compelled by any Section of H.B. 56. Assuming this questioning occurred, it does not demonstrate irreparable harm and, as noted, such questioning is not based on the enforcement of H.B. 56 § 28 or any other section of H.B. 56. Any injuries caused by intentional or unintentional misapplication of H.B. 56 cannot be said to be the result of the implementation and enforcement of the Act.

The court has found that plaintiffs are not likely to be able to show that Sections 10, 12, 27, 28, and 30 are due to be enjoined. Alabama has an interest in enforcing laws

properly enacted by its Legislature and not likely to be found unconstitutional. Moreover, the public has an interest in having properly enacted valid laws enforced. Plaintiffs' interests in enjoining Sections 10, 12, 27, 28, and 30 of H.B. 56 at this point in the proceedings do not tip the scales heavily in their favor.

Therefore, plaintiffs' Emergency Motion to Enjoin Portions of H.B. 56 Pending Appeal, (doc. 140), is **DENIED**.

As an alternative, plaintiffs ask this court to issue "a temporary injunction of these sections so that a motion for an injunction pending appeal can be filed with the U.S. Court of Appeals for the Eleventh Circuit." (Doc. 140 at 17.) This Motion is also **DENIED**.

DONE, this 5th day of October, 2011.

Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
CHIEF UNITED STATES DISTRICT JUDGE

FILED
2011 Oct-05 PM 03:17
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case Number: 2:11-CV-2746-SLB**
	)	
STATE OF ALABAMA and GOVERNOR ROBERT J. BENTLEY,	)	
	)	
Defendants.	)	
	)	

ORDER

This case is presently pending before the court on the United States's Motion for an Injunction Pending Appeal or, Alternatively, a Temporary Injunction Pending Adjudication of an Emergency Motion to the Court of Appeals for an Injunction Pending Appeal. (Doc. 96.)[1] Specifically, the United States moves the court to enjoin the enforcement of Sections 10, 12(a), 18, 27, 28 and 30 of Act No. 2011-535 (also referred to as H.B. 56). For the reasons set forth below, the court is of the opinion that the United States's Motion for an Injunction Pending Appeal is due to be and hereby is **DENIED**; its Motion for a Temporary Injunction Pending Adjudication of an Emergency Motion to the Court of Appeals for an Injunction Pending Appeal is also **DENIED**.

> In relevant part, Rule 62(c) provides that, "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies

[1] Reference to a document number, ["Doc. ___"], refers to the number assigned to each document as it is filed in the court's record.

> an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). An injunction pending an appeal is considered an "extraordinary remedy," *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000), "for which the moving party bears a 'heavy burden.'" *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1558, 1561 (M.D. Ala. 1996) (Thompson, J.)(citation omitted). In deciding whether to issue an injunction pending an appeal, the Eleventh Circuit requires movants to show "(1) a substantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the [movants] unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest." *Touchston*, 234 F.3d at 1132; *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)(explaining that, while different procedural rules govern the authority of district courts and courts of appeals to stay an order pending appeal, the factors for consideration generally are the same)(citing Fed. R. Civ. P. 62(c) & Fed. R. App. P. 8(a)).

Reed v. Riley, No. 2:07-cv-0190-WKW [wo], 2008 WL 3931612, *1 (M.D. Ala. Aug. 25, 2008)(parallel citations omitted); *see also Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). "[W]here the balance of the equities weighs heavily in favor of granting the [injunction], the movant need only show a substantial case on the merits." *Gonzalez ex rel. Gonzalez v. Reno*, No. 00-11424-D, 2000 WL 381901, *1 (11th Cir. Apr. 19, 2000)(quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A June 1981))(internal quotations and other citations omitted)(unpublished).[2]

For the reasons set forth in the court's Memorandum Opinion, the court finds that the United States has not shown that it is "likely to prevail" nor that it has a "substantial case"

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[2]"In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), this Court adopted as binding precedent decisions of the Fifth Circuit, including Unit A panel decisions of that circuit, handed down prior to October 1, 1981." *W.R. Huff Asset Management Co., L.L.C. v. Kohlberg, Kravis, Roberts & Co., L.P.*, 566 F.3d 979, 985 n.6 (11th Cir. 2009)(citing *United States v. Todd*, 108 F.3d 1329, 1333 (11th Cir. 1997)).

on the merits. The court carefully and thoroughly reviewed all issues raised by the parties and its lengthy Memorandum Opinion represents the product of its time and effort. It does not foresee a "substantial" case for reversal.

"It is unnecessary to engage in a protracted analysis of the balancing of the equities in this case because the Court finds that under either standard discussed above, [the United States] has not demonstrated a question for appeal sufficient to warrant the issuance of a stay pending appeal." *United States v. Engelhard Corp.*, No. 6–95–CV–45 (WLS), 1997 WL 834205, *2 (M.D. Ga. Apr. 7, 1997); *see also MacBride v. Askew*, 541 F.2d 465, 467 (5th Cir. 1976). Nevertheless, even if the court accepted the assertion that the United States has a substantial case on the merits, the court finds that the balance of the equities does not weigh heavily in favor of the United States. The State Defendants argue that the United States will not suffer irreparable harm if an injunction is not issued. The court agrees. As pointed out in the Defendants' Opposition to the instant Motion, the previous findings of the court in its Memorandum Opinion on the Motion for Preliminary Injunction reflect the court's view that the United States will not be irreparably harmed if Sections 10, 12(a), 18, 27, 28, and 30 are enforced pending an appeal. In addition, the United States has not established that there will be "substantial harm" to other interested persons or to the public interest absent an injunction. Alabama has an interest in enforcing laws properly enacted by its Legislature and not likely to be found unconstitutional. Moreover, the public has an interest in having properly enacted valid laws enforced. The United States has not shown

that the equities "weigh heavily" in favor of an injunction pending appeal. Therefore, the United States's Motion for an Injunction Pending Appeal, (doc. 96), is **DENIED**.

As an alternative, the United States asks this court to "issue a temporary injunction that would permit the Eleventh Circuit to consider the government's motion for an injunction pending appeal." (Doc. 96 at 7.) This Motion is also **DENIED**.

DONE, this 5th day of October, 2011.

Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
CHIEF UNITED STATES DISTRICT JUDGE

EXHIBIT 4

AMERICAN FactFinder

QT-P10 | Hispanic or Latino by Type: 2010

2010 Census Summary File 1

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see http://www.census.gov/prod/cen2010/doc/sf1.pdf.

Geography: Albertville city, Alabama

Subject	Number	Percent
HISPANIC OR LATINO		
Total population	21,160	100.0
Hispanic or Latino (of any race)	5,899	27.9
Not Hispanic or Latino	15,261	72.1
HISPANIC OR LATINO BY TYPE		
Hispanic or Latino (of any race)	5,899	27.9
Mexican	3,457	16.3
Puerto Rican	79	0.4
Cuban	29	0.1
Dominican (Dominican Republic)	6	0.0
Central American (excludes Mexican)	1,856	8.8
Costa Rican	0	0.0
Guatemalan	1,740	8.2
Honduran	43	0.2
Nicaraguan	7	0.0
Panamanian	10	0.0
Salvadoran	50	0.2
Other Central American	6	0.0
South American	18	0.1
Argentinean	1	0.0
Bolivian	0	0.0
Chilean	2	0.0
Colombian	6	0.0
Ecuadorian	4	0.0
Paraguayan	0	0.0
Peruvian	1	0.0
Uruguayan	0	0.0
Venezuelan	4	0.0
Other South American	0	0.0
Other Hispanic or Latino	454	2.1
Spaniard	9	0.0
Spanish	67	0.3
Spanish American	2	0.0
All other Hispanic or Latino	376	1.8

X Not applicable.
Source: U.S. Census Bureau, 2010 Census.
Summary File 1, Table PCT 11.

AMERICAN FactFinder

QT-P10 | Hispanic or Latino by Type: 2010

2010 Census Summary File 1

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see http://www.census.gov/prod/cen2010/doc/sf1.pdf.

Geography: Alabama

Subject	Number	Percent
HISPANIC OR LATINO		
Total population	4,779,736	100.0
Hispanic or Latino (of any race)	185,602	3.9
Not Hispanic or Latino	4,594,134	96.1
HISPANIC OR LATINO BY TYPE		
Hispanic or Latino (of any race)	185,602	3.9
Mexican	122,911	2.6
Puerto Rican	12,225	0.3
Cuban	4,064	0.1
Dominican (Dominican Republic)	852	0.0
Central American (excludes Mexican)	22,800	0.5
Costa Rican	504	0.0
Guatemalan	14,282	0.3
Honduran	3,280	0.1
Nicaraguan	739	0.0
Panamanian	1,450	0.0
Salvadoran	2,419	0.1
Other Central American	126	0.0
South American	5,938	0.1
Argentinean	496	0.0
Bolivian	292	0.0
Chilean	451	0.0
Colombian	2,052	0.0
Ecuadorian	466	0.0
Paraguayan	121	0.0
Peruvian	1,116	0.0
Uruguayan	129	0.0
Venezuelan	757	0.0
Other South American	58	0.0
Other Hispanic or Latino	16,812	0.4
Spaniard	2,079	0.0
Spanish	1,803	0.0
Spanish American	90	0.0
All other Hispanic or Latino	12,840	0.3

X Not applicable.
Source: U.S. Census Bureau, 2010 Census.
Summary File 1, Table PCT 11.

EXHIBIT 5

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

Hispanic Interest Coalition of Alabama, et al.,

Plaintiffs,

v.

Governor Robert Bentley, et al.,

Defendants.

Case No. 5:11-cv-02484-SLB

Exhibit in Support of Notice Of Supplemental Evidence Regarding Emergency Motion to Enjoin Portions of HB 56 Pending Appeal

Exhibit 1

Declaration of Jane Doe #7

Declaration of [redacted]

I, [redacted], make the following declaration:

1. I reside in Montgomery, Alabama and am married. Neither I nor my husband have current immigration status.

2. I have a daughter, who was born in the United States and is a U.S. Citizen. My daughter is in the fourth grade, and attends a public school in Montgomery, Alabama.

3. On Friday, September 30, 2011, my daughter went to school. She told me that while at school, she was asked twice about her immigration status by teachers at the school.

4. My daughter tells me that the first question came while she was in the classroom doing her homework. Her teacher approached her and asked her what her immigration status was. My daughter responded she was a U.S. citizen.

5. My daughter tells me that later in the day, her teacher approached her again, and asked her what my and my husband's immigration status was. She tells me she told the teacher that she did not know.

6. My daughter tells me that several of her Latina and Latino friends were also asked about their immigration status by the same teacher. I know one of these children and her parents. I called the other parent, and the parent told me the same thing—that her child had been asked about her immigration status. The parent also told me that her child would not be returning to school on Monday, October 3, because their family was afraid of what would happen to them and their children.

7. I intend to have my child return to school this week. Her education is too important for her to miss school, and I trust that she will not tell the school about her parent's

immigration status. However, I am very afraid that they might find out, and that they will treat her and us differently because of this new law.

I declare under penalty of perjury the foregoing is true and correct.

Executed this 2d day in October, 2011, in Montgomery, Alabama.

s/ [redacted]

EXHIBIT 6

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

Hispanic Interest Coalition of Alabama, et al.,

Plaintiffs,

v.

Governor Robert Bentley, et al.,

Defendants.

Case No. 5:11-cv-02484-SLB

Exhibit in Support of Notice Of Supplemental Evidence Regarding Emergency Motion to Enjoin Portions of HB 56 Pending Appeal

Exhibit 4

Dominique D. Nong Declaration

Declaration of Dominique D. Nong

I, Dominique D. Nong, hereby declare as follows:

1. I am above the age of majority and make the following statement based on my personal knowledge.

2. On September 30, 2011, I visited the town offices in Allgood, Alabama. On the door of the office was a sign which states, "ATTENTION **ALL** WATER CUSTOMERS: TO BE COMPLIANT WITH NEW LAWS CONCERNING IMMIGRATION YOU MUST HAVE AN ALABAMA DRIVER'S LICENSE OR AN ALABAMA PICTURE ID CARD ON FILE AT THIS OFFICE BEFORE SEPTEMBER 29, 2011 OR YOU MAY LOSE WATER SERVICE. THANK YOU."

3. I obtained a photograph of the sign as it appeared on September 30, 2011. An accurate copy of that photograph is attached as Exhibit A.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2 day of October, 2011.

Dominique D. Nong


ATTENTION ALL WATER CUSTOMERS:
TO BE COMPLIANT WITH NEW LAWS CONCERNING IMMIGRATION YOU MUST HAVE AN ALABAMA DRIVER'S LICENSE OR AN ALABAMA PICTURE ID CARD ON FILE AT THIS OFFICE BEFORE SEPTEMBER 30, 2011 OR YOU MAY LOSE WATER SERVICE. THANK YOU.

EXHIBIT 7

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

Hispanic Interest Coalition of Alabama, et al.,

Plaintiffs,

v.

Governor Robert Bentley, et al.,

Defendants.

Case No. 5:11-cv-02484-SLB

Exhibit in Support of Notice Of Supplemental Evidence Regarding Emergency Motion to Enjoin Portions of HB 56 Pending Appeal

Exhibit 6

Evangeline Limón Declaration

DECLARATION OF EVANGELINE LIMÓN

I, Evangeline Limón, declare the following under penalty of perjury:

1. I am a United States citizen. I was born in Texas and identify as Mexican-American. I am over the age of eighteen. I have been a resident and a business owner in the Hoover area for approximately 12 years.

2. I speak both English and Spanish fluently. Since moving to Hoover, I have served as an advocate and interpreter for my Latino and Latina friends.

3. Since HB 56 passed in June, I have received many phone calls from Latino community members who are afraid and do not understand the law or their rights. In fact, I have received at least 20 calls since September 28, 2011 after the court allowed some of the law to go into effect. Many of these community members have questions about their property rights, custody rights and other basic questions about how the law will impact them and their families.

4. Some of the community members who I have assisted live in the Carrousel Apartments in Hoover, Alabama.

5. After HB 56 passed in June 2011, several of my friends told me that the rental company at Carrousel Apartments notified them and other apartment residents that they would have to provide proof of lawful residence when their leases expired in order to renew their lease agreements. The residents received this letter before the September 28, 2011 ruling. On Thursday, September 29, 2011, after part of the law was permitted to go into effect by the courts, one of my friends who had received the letter asked the rental company to renew his lease, and was told that they could not unless he provided proof of lawful residence because of the contracting provision in the law.

6. Another family contacted me and informed me that the electricity to their rental home was discontinued by Alabama Power. When they attempted to have their power re-connected on Thursday, September 29, 2011, Alabama Power informed them that they would have to provide proof of lawful residence, specifically a social security number, in order to get it turned back on. I spoke to this family after the services were disconnected—they told me that they were leaving the state because they couldn't live without this basic necessity. After this incident, I received a phone call from them confirming that they left the state of Alabama on Friday, September 30th.

7. I have also been personally impacted by the implementation of HB 56. By 7:30am Thursday, September 29th, I received two phone calls from companies that I subcontract with calling to verify whether the contracts that they had with my business would be negatively impacted by HB 56. I asked one of the companies why they were inquiring. The company representative who I spoke with asked me whether I was going to be personally impacted by HB 56. I understood from his question that he was inquiring into my immigration status. I believe that these companies questioned me about my status and were concerned about our business contracts because they assumed that I am undocumented because I am Latina.

I declare under penalty of perjury on this 1st day of October of 2011 that the foregoing is true and correct.

Executed in Hoover, Alabama.

Evangeline Limón

Evangeline Limón

EXHIBIT 8

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

Hispanic Interest Coalition of Alabama, et al.,

Plaintiffs,

v.

Governor Robert Bentley, et al.,

Defendants.

Case No. 5:11-cv-02484-SLB

Exhibits in Support of Plaintiffs' Reply In Support of Motion For Preliminary Injunction

Exhibit 4

Supplemental Declaration of Scott Douglas
On behalf of Greater Birmingham Ministries

SUPPLEMENTAL DECLARATION OF SCOTT DOUGLAS

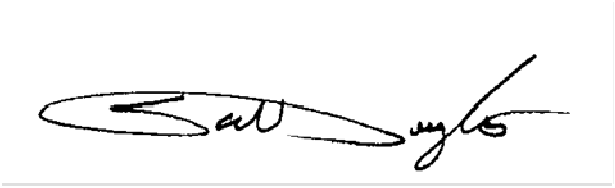
I, Scott Douglas, hereby make this declaration based on my personal knowledge and if called to testify I could and would do so competently as follows.

1. My name is Scott Douglas. I am the Executive Director of the Greater Birmingham Ministries ("GBM"), based in Birmingham, Alabama. I am providing this supplemental declaration to give further information on the harm HB56's education provision will cause to both future and present school age children.
2. Section 28 directly interferes with GBM's mission, particularly with regard to economic justice. As I explained in Paragraph 11 of my first declaration, undocumented individuals are afraid to enroll their children in school because of HB 56. Our mission to provide economic justice and improve the lives of all is undermined by Section 28 because we can have no economic justice if children are uneducated and deterred from going to school. In addition, we have had to divert resources from our regular duties to educate parents about Section 28, and will now have to divert more resources to Section 28 because the state keeps changing what it means to "enroll" in Alabama schools. This will only create more confusion as the school year is about to begin.

3. GBM and its member organizations have undocumented families with children of all ages coming to their faith communities from out of state. Undocumented people move to Birmingham from other parts of the country for many reasons - jobs, education and relocation from larger cities, among other things. No matter what time of year these families arrive, if they have not lived in Alabama before, they enroll their children in Alabama schools for the first time.
4. As I stated in Paragraph 11 of my first declaration, GBM is affected by HB 56's education provision because our member congregations serve a large number of school-age children. This includes families that have young children who haven't entered school yet, but will begin school (kindergarten) for the first time next year.
5. If allowed to go forward, HB56's education provisions will harm both current and future students in Alabama.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 15th day of August, 2011 in Birmingham, Alabama.



Scott Douglas

EXHIBIT 9

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

Hispanic Interest Coalition of Alabama, et al.,

Plaintiffs,

v.

Governor Robert Bentley, et al.,

Defendants.

Case No. 5:11-cv-02484-SLB

Exhibits in Support of Plaintiffs' Motion For Preliminary Injunction And Memorandum In Support

Exhibit 6

Declaration of John Pickens
On behalf of Alabama Appleseed Center for Law & Justice, Inc.

Declaration of John A. Pickens

I, John A. Pickens, make this declaration based on my personal knowledge and if called to testify I could and would do so competently as follows:

1. My name is John A. Pickens, and I am the Executive Director of Alabama Appleseed Center for Law & Justice, Inc. ("Alabama Appleseed"). I was born and raised in Tuscaloosa, Alabama and after spending some time away, I returned to Alabama in October 2002 when I was hired as Alabama Appleseed's first Executive Director. I currently live in Montgomery, Alabama.

2. Alabama Appleseed was founded in 1999. We are a 501(c)(3) statewide organization with supporters, constituents and board members located around the state. Alabama Appleseed's office is located in Montgomery.

3. Alabama Appleseed is a non-profit public interest advocacy organization. Our mission is to identify root causes of injustice and inequality in Alabama and to develop and advocate for solutions that will improve the lives of all Alabamians. To fulfill our mission we undertake network/coalition organizing and development, research, education, advocacy and policy development. Our staff and network of pro bono lawyers work in partnership with community and statewide non-profit advocacy organizations, the legal and judicial communities, state and local elected officials, academia and the business community. Our projects principally serve low-wealth and underrepresented citizens throughout Alabama who often have little voice or power to affect change. Representative constituencies on whose behalf Appleseed has advocated for include: immigrants; residential tenants; heir property owners; elderly and disabled Hurricane Katrina survivors and victims of the BP oil spill; payday loan borrowers; public school students; indigent criminal defendants (adults and juveniles); and the uninsured.

4. Alabama Appleseed began working directly with the Hispanic immigrant population of Alabama in 2005 through our national Appleseed collaborative network to increase access to traditional lending institutions. This work involved working with lending institutions in Alabama to develop and market products and services to the Hispanic immigrant population, as well as educating the Hispanic immigrant population on available banking services and manner of enrollment.

5. Our current Immigration Policy Project was started in 2007. It grew out of our exposure to the Hispanic immigrant community. This project is dedicated to promoting policies that advance fundamental fairness, due process, and respect for human rights for immigrants, while opposing any proposed anti-immigrant policies and laws that work against these values. Our work with the immigrant population in Alabama has focused mostly on the Hispanic population – both documented and undocumented. However, our work has expanded to include advocacy for all immigrants, not just Hispanic immigrants. We have created for and circulated among Alabama's immigrant community, and the groups that serve it, numerous educational resources including pamphlets addressing financial and credit opportunities, "Know Your Rights" materials, Deportation Manuals, and various additional resources in English, Spanish, and Korean.

6. Alabama Appleseed founded the Alabama Coalition for Immigrant Justice ("ACIJ") in March 2007 to respond to the increased anti-immigrant public rhetoric and sentiments making Alabama a hostile place for immigrant residents and to build a unified voice in Alabama for immigrants. Alabama Appleseed receives private funding through a grant to facilitate its work with ACIJ, as well as its other immigrant policy and welcoming work. ACIJ is now comprised of more than 60 organizations and individuals, including both English and non-

English speaking members of various communities, direct service organizations, students and advocates throughout Alabama. The mission of ACIJ is to provide a united voice to ensure the social, legal and civic rights of immigrants; promote equal participation and involvement; and facilitate the building of grassroots power and leadership in the immigrant community. In conjunction with the Hispanic Interest Coalition of Alabama ("¡HICA!"), Alabama Appleseed continues to coordinate ACIJ's activities, including quarterly meetings, and Alabama Appleseed maintains both ACIJ's website (www.acij.net) and Facebook page.

7. A member of Alabama Appleseed's staff serves on the Southeast Immigrant Rights Network ("SEIRN") steering committee and is affiliated with several national immigration reform campaigns, including Reform Immigration for America and America's Voice.

8. Since September 2007, Alabama Appleseed has assigned two staff members to conduct the great majority of our immigrant policy and Welcoming Alabama project work. As Executive Director of Alabama Appleseed, I have general supervisory responsibilities over the work of these two staff members and I have met with them on a regular basis to discuss and review this work. In this Declaration, when I use the word "we" to describe the immigrant policy and Welcoming Alabama projects, I am usually referring to the work of these two staff members: Shay M. Farley and Zayne B. Smith.

9. Alabama Appleseed has been a vocal opponent to local and state laws targeting Alabama's immigrant population while encouraging the civic participation and community acceptance of immigrants. We have offered frequent testimony at the Alabama Statehouse and a couple of city halls around the state against legislation aimed at limiting the immigrant population's due process rights and access to education, housing, business licenses and other

issues affecting the basic civil rights of immigrants. Additionally, we have participated in radio and television programs and had several opinion pieces published in daily newspapers around the state. Further, reporters and media outlets frequently call Alabama Appleseed as a source for information on immigration issues.

10. Since 2007, Alabama Appleseed has opposed at the Alabama legislature numerous bills similar to HB56. In 2011, we have been very involved in opposing HB56. During all phases of the legislative debate, we conducted public policy analysis of the bill and its impact on all Alabama's residents – immigrant or non-immigrant – and organized opposition, including a protest outside of the statehouse on March 10, 2011. In organizing the March 10 event, we arranged for charter buses from Mobile, Tuscaloosa, and Birmingham to allow other opponents of HB56 from across the state to join us at the statehouse to voice opposition to HB56. Our outreach regarding HB56 included providing regular updates to ACIJ members through ACIJ's listserv and Facebook page. In response to the passage of HB56, we have increased our Know Your Rights events and developed a "Frequently Asked Questions" pamphlet regarding the law's various provisions. As we are seen as a community resource, our "fans" on ACIJ's Facebook page have grown from less than 100 (prior to passage) to over 600 presently. From our work with the immigrant population in Alabama, we believe that HB56 will encourage racial profiling, will create a more hostile living environment for legally present immigrants, and will discourage civic participation of all immigrants living in Alabama. Partnering with the various members of ACIJ, we collected and delivered to Governor Bentley, on June 2, 2011, a petition with approximately 1,500 signatures signed by immigrant and non-immigrant residents of Alabama and numerous other states opposing the passage of HB56. We are presently engaged

with Greater Birmingham Ministries and various faith groups from around the state to gather signatures on a petition calling for the repeal of HB56.

11. Although Alabama Appleseed has been active in opposing HB56, we have continued working on the core priority areas of our immigrant policy and Welcoming Alabama projects throughout this time. However, the passage of HB56 has substantially diverted the attention and time of our immigrant policy staff away from the requisite, funded activities of our outreach projects to Alabama's immigrant population. For example:

a. We are continually asked questions about HB56. We have scheduled meetings and outreach trips on our immigration-related projects (unrelated to HB56), only to have them cancelled or redirected into a Know Your Rights presentation on HB56. Our staff is also being inundated with phone calls about the impact of the law, from medical care providers, teachers, everyday Alabama residents, and immigrants. For example, beginning several weeks prior to it being signed into law, we have received approximately 3 calls per day on HB56. Responding to these calls diverts the time of our immigration policy staff from their core work on our immigration-related projects.

b. Alabama Appleseed recently initiated a project to investigate the working conditions in Alabama's poultry processing plants, which employs many immigrants. Our paramount concern is worker safety, particularly for the minority and immigrant workers who lack knowledge of workplace safety standards and thus do not pursue available remedies, with the goal being to publicize the plight of these workers, to develop Know Your Rights materials, and to promote state legislation establishing a Bill of Rights for workers in the poultry industry. The initial phase of this work involves interviewing hundreds of present or recent workers, without respect to immigration status. The majority of those interviewed to date are Latino

immigrants. Each interview takes approximately forty-five minutes to complete. However, as HB56 has progressed, our work investigating the poultry processing plants has been severely impacted. Usually, we have had to begin each interview with a detailed discussion about the bill and its likely impact on the interviewee. This is necessary because interviewees are unwilling to talk to us about anything else, specifically working in the poultry industry, until these questions are answered. Because of this, we often have to spend on average an additional twenty to thirty minutes talking about the bill before we can complete our real objective: the survey about working conditions. We often find people to do the surveys by going door-to-door and introducing ourselves, but HB56 has made this difficult to do as people are more suspicious of us, and when we identify themselves, they immediately start asking about the immigration bill and prevent us from focusing on the survey. We have had to scale back the number of surveys we are conducting because the impact of HB56 has made our original goal of 500 interviews infeasible. This interview process will only worsen if the law goes into effect.

c. Alabama Appleseed also receives funding to coordinate Welcoming Alabama, a state affiliate of Welcoming America. Welcoming America is a national, grassroots-driven collaborative that works to promote mutual respect and cooperation between foreign-born and U.S.-born Americans. The ultimate goal of Welcoming America is to create a welcoming atmosphere – community by community – in which immigrants are more likely to integrate into the social fabric of their adopted hometowns. We facilitate meetings between immigrant and non-immigrant communities, and in these we steer away from policy discussions and instead encourage dialogue and understanding among the two groups. Our Welcoming Alabama work has been greatly complicated by the passage of HB56. When we identify local community leaders who might facilitate these meetings, they immediately (and understandably) ask myriad

questions about the impact of HB56 on them and their neighbors. My staff is forced to deal with these questions before they are able to move on to the Welcoming America agenda, and even if the questions raised are addressed, the dialogue and understanding we are working to create is undermined because the issue is then framed in an "us-or-them" dichotomy. We have had to postpone this welcoming work in a number of communities because of all the extra work and difficulty HB56 has infused into this process. If HB56 goes into effect, this problem will certainly grow.

12. I and my staff are also deeply concerned that our immigrant policy project and immigrant welcoming work could be considered violative of Section 13(b) and (c) and Section 25 of HB56. We routinely provide educational outreach and assistance to persons who are immigrants to help them understand their legal rights and to live a more full and complete life in Alabama. For example, my staff often engages in Know Your Rights presentations on state law and the federal immigration court system, provides transportation of immigrants to rallies, coordinates the work of ACIJ in support of the immigrant population in Alabama, answers questions related to immigration laws, hosts welcoming and integration dialogue meetings, and recently, informs people of their rights under HB56. Our poultry plant investigation was initiated in order to improve the working conditions of poultry plant workers, which is largely comprised of immigrant labor. Although we do not ask persons with whom we work about their immigration status, they often volunteer their status without us asking. All of these activities could be interpreted to be violative of Section 13(b) and (c) and Section 25 as encouraging or inducing an "alien" to reside in the state, transporting an alien in furtherance of their residency in the state, or soliciting such activities. If HB56 were to go into effect, we would have to

substantially curtail or stop our immigrant policy, Welcoming Alabama, and poultry plant investigation work.

13. As exemplified by the concerns stated above in Paragraphs 11 and 12, HB56 is already impacting Alabama Appleseed's ability to satisfy grant obligations under funding for our Immigrant Policy Project, Welcoming Alabama Campaign and Poultry Plant Worker Safety Investigation. Additionally, persons from around the state are looking to Alabama Appleseed for guidance on the impact of the law on their day-to-day lives, and we have been forced to respond to these needs instead of placing our complete time and energy on the specific activities for which grants were awarded.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 11th day of July, 2011 in Montgomery, Alabama.

John A. Pickens
Executive Director, Alabama Appleseed

EXHIBIT 10

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

Hispanic Interest Coalition of Alabama, et al.,

Plaintiffs,

v.

Governor Robert Bentley, et al.,

Defendants.

Case No. 5:11-cv-02484-SLB

Exhibits in Support of Plaintiffs' Reply In Support of Motion For Preliminary Injunction

Exhibit 2

Supplemental Declaration of John Pickens *On behalf of* Alabama Appleseed Center for Law & Justice, Inc.

SUPPLEMENTAL DECLARATION OF JOHN A. PICKENS

I, John A. Pickens, make this declaration based on my personal knowledge and if called to testify I could and would do so competently as follows:

1. My name is John A. Pickens and I am the Executive Director of Alabama Appleseed Center for Law & Justice, Inc. ("Appleseed"). I submit this supplemental declaration to provide further information about the strain that HB 56 has imposed on Appleseed's resources and staff. This declaration is based on information that I have ascertained in my capacity as Executive Director of Appleseed through conversations with two Appleseed staff members, Shay M. Farley and Zayne B. Smith. Shay M. Farley and Zayne B. Smith directly handle the Appleseed's immigration policy and immigrant community welcoming work.

2. Prior to and since the passage of HB 56, immigrant community members and their advocates have contacted our organization to raise many concerns related to the law. In particular, many of the inquiries that we have received specifically relate to the education provision contained within the law. As a result, Appleseed's immigrant policy staff has had to divert a significant amount of time and resources to address the concerns and the many questions that have arisen.

3. Among these inquiries, groups and individuals have contacted us to specifically request that we host public meetings to educate immigrant and non-immigrant community members about the law and their rights.

4. Consequently, to plan and host these community meetings, we have had to expend our financial resources dedicated to immigration policy work on such things as travel, copies, translation services and other materials, all of which had not been previously budgeted. In addition, we have been forced to divert our immigration policy staff's time from other planned activities to allow us to provide this service.

5. In order to meet the demand, we have planned and conducted presentations on HB 56 throughout the state of Alabama. The purpose of these presentations has been to educate community members about the law and their rights. These meetings have also provided community members with the opportunity to ask important questions related to the law and how it will impact their families.

6. We have conducted at least 15 of these presentations since March, 2011. They have been held in Tuscaloosa, Foley, Birmingham, Theodore, Bayou La Batre, Montgomery and Huntsville. Some of these presentations have drawn hundreds of concerned immigrant community members and advocates who sought general information about the law, educational

materials in Spanish and English and other information to help prepare them for the law's implementation. In fact, Ms. Smith has informed me that an estimated 1500 people have attended these in-person community meetings the last few months alone.

7. My staff members have also reported to me that at virtually every single presentation, parents and other service providers in attendance have asked questions related to their children's education. Across the board, parents of both documented and undocumented children have asked us for information about how to enroll their children in school; whether to enroll their children in school; what will happen to the registration information that is collected by the school when they enroll their children; whether the registration information will be shared with immigration authorities or other law enforcement officials; whether parents will be subject to immigration enforcement because of the registration requirements; and how their children will be impacted by the enrollment, registration and information collection procedures that have been created, among others.

8. These in-person meetings have required immigration policy staff time to coordinate, publicize and attend. These staff members have also had to dedicate time to develop educational materials, event fliers, and other information in Spanish and English for use at these meetings.

9. Since the passage of HB 56, we have also experienced an increase in the number of phone calls to our office specifically related to HB 56. A large number of the inquiries that we have received by phone have also been directly related to the education provision of the law.

10. As a result, our immigration policy staff members have been required to spend their time providing the responsive information to these callers about the HB 56, including the enrollment and registration provisions of the law. Most of the phone calls that we have received have been from social service providers, community advocates and from employers of immigrants who are calling on behalf of their employees. Service providers who have contacted us for information and assistance related to HB 56 have included church staff, healthcare providers and other direct service providers.

11. The majority of the callers have presented many of the same questions that my staff has heard in the in-person meetings that have been held. Most of these questions have been about the new school registration requirements and have related to the overall adverse consequences that children and families will suffer because of the law, such as being reported to immigration or other law enforcement agencies as a result of the registration provisions of the law.

12. Aside from contacting us to ask general questions about the law, we have received calls from community members, advocates and one school principal who work directly with these parents who have told us that parents are not enrolling their children in school or are afraid to do so because of HB 56.

13. The passage of HB 56 has resulted in a diversion of resources from Appleseed's immigration policy work and immigrant welcoming services. It has had a negative financial impact on our immigration policy financial resources because we have had to use these funds in order to deal with the myriad of ramifications caused by HB56, including parents' concerns about their children's education, not to mention the overall impact of this law on their families.

14. I believe that Appleseed's immigration policy and immigrant welcoming work will continue to be detrimentally impacted by HB 56 because additional staff time and financial resources will be required if the law is permitted to take effect. As stated in my prior declaration, if HB 56 were to go into effect, we would have to substantially curtail or stop our immigrant policy, Welcoming Alabama, and poultry plant investigation work, despite the fact that community members have expressed grave concerns and wide-ranging needs because of this law.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 13th day of August, 2011 in Montgomery, Alabama.

John A. Pickens

EXHIBIT 11

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

Hispanic Interest Coalition of Alabama, et al.,

Plaintiffs,

v.

Governor Robert Bentley, et al.,

Defendants.

Case No. 5:11-cv-02484-SLB

Exhibits in Support of Plaintiffs' Motion For Preliminary Injunction And Memorandum In Support

Exhibit 2

Declaration of Isabel Rubio
On behalf of Hispanic Interest Coalition of Alabama

Declaration of Isabel Rubio

I, Isabel Rubio, hereby make this declaration based on my personal knowledge and if called to testify I could and would do so competently as follows.

1. I am the Executive Director of the Hispanic Interest Coalition of Alabama ("¡HICA!"), based in Birmingham, Alabama. I was a co-founder of ¡HICA! at its inception in 1999 and I became the Executive Director in 2001.

2. ¡HICA! is a non-profit membership organization formed to facilitate the social, civic and economic integration of Hispanics into Alabama as well as to help Alabamians understand the diverse Hispanic culture. Initially, ¡HICA! provided information, referral and interpreter services, including bringing the first interpreter training course to Alabama. ¡HICA! has grown tremendously since 1999 and now offers a broad variety of services to our Latino community and to our members. Now, ¡HICA!'s services include: court advocacy for immigrant victims of domestic violence, a 24/7 Spanish language hotline for immigrant victims of crime, legal immigration services, financial literacy, workforce development, volunteer income tax assistance, English and civics classes, advocacy, community education, leadership development and training to the host community.

3. ¡HICA! has more than fifty members in its formal membership. Many of ¡HICA!'s members were born abroad. While ¡HICA! does not monitor the immigration status of its members, I am aware that some have lacked immigration status at times. Our members also include some parents of children born abroad. ¡HICA!'s membership is largely comprised of current residents of the state of Alabama.

4. ¡HICA! provides services to more than 15,000 constituents in any given year. ¡HICA!'s constituents are new Alabamians confronting linguistic and cultural barriers in accessing services in their adopted home.

5. ¡HICA! operates a civics-based English as a Second Language ("ESL") program. We generally operate four sections of our ESL classes, and these sections meet twice a week for 3 hours at a time. We currently have about fifty students enrolled, which is a fairly typical size for our classes. Students are charged a nominal fee for the classes, currently $200. They pay an initial deposit of $100 and pay the balance within the first half of the "semester," which lasts approximately fifteen weeks. Most of our students are low-income and cannot pay for their classes in a lump sum. We do take some students on a pro bono basis. When we enroll students in the ESL program, we inquire whether the student possesses an alien registration or "green card" because we receive funding from U.S. Citizenship and Immigration Services for our civics-based ESL classes. The classes supported by the USCIS grant are provided to green card holders who are preparing for the naturalization exam. For this reason, we do have some information that may indicate the immigration status of our ESL students. We do not exclude students who may appear to be undocumented immigrants from our ESL classes. If we are deemed to be harboring or inducing these students to remain in Alabama under Section 13 of HB56 we may have to cease offering ESL classes. These classes constitute more than 15 percent of ¡HICA!'s operations.

6. ¡HICA! provides income tax assistance to its constituents and members. In 2010 we initiated a Volunteer Income Tax Assistance ("VITA") program, which is a program accredited through the federal Internal Revenue Service ("IRS") through which we help individuals to complete tax returns. We helped over one hundred twenty (120) people file their

taxes this spring. We are also accredited by the IRS as certified acceptance agency, which means that we help individuals who do not have social security numbers to apply for an Income Tax Identification Number ("ITIN") so they may file a tax return. We have helped 40 individuals apply for an ITIN in the past year. In providing this service we learn whether the tax payers we assist have or lack a social security number. For this reason, we do have some information that may indicate the immigration status of the taxpayers we serve. We do not exclude constituents who may appear to be undocumented immigrants from our tax services. If we are deemed to be harboring or inducing these taxpayers to remain in Alabama under Section 13 of HB56 we may have to cease offering tax services. These tax services constitute 5 percent of ¡HICA!'s operations.

7. ¡HICA! also helps its members and the community to find appropriate jobs by maintaining a jobs bank for employers. We help willing workers to review those job postings and we help employees to prepare resumes so they can apply for a job. For example, several organizations in the banking industry have worked with us to recruit bilingual employees, and some businesses in the construction industry have advertised for workers as well. In 2010, over 200 job referrals were made through our job bank. ¡HICA! does not employ the constituents accessing the jobs bank, it merely assists them in applying for work. ¡HICA! does not take any steps to inquire into the work authorization of job applicants, as that would be handled by the employer's I-9 process under federal law. If HB56 goes into effect, we may be required to cease offering these job bank services, which constitute 5 percent of ¡HICA!'s operations.

8. ¡HICA! operates an immigration legal services program as well. That program is designed to remove barriers for low-income immigrants seeking to apply for citizenship or to adjust their immigration status. These services are accessed in part by individuals who currently

lack immigration status. When providing immigration services, our staff necessarily comes to know the immigration status of the constituents they serve. Our attorney provides a wide variety of immigration-related services, including family-based petitions for adjustment of status; applications for naturalization; applications for work authorization cards; petitions for U visas for those who are victims of qualifying crimes; petitions for T visas for those who are victims of human trafficking, and VAWA self-petitions for those clients who are victims of domestic violence. We also offer referrals to other attorneys throughout the state. Our legal services program is funded through multiple sources, including some grant money from United States Citizenship and Immigration Services for our work related to naturalization, and some fees charged to clients, depending on the type of service we are offering. We routinely execute retainer agreements with clients. Our retainer agreements with some clients paying a reduced fee for services specify that payment obligation. All of the legal services we provide for a fee take over twenty-four hours to complete. In cases involving paying clients, payment generally occurs over the course of several weeks or months. We are concerned that HB 56 would make all of these contracts with our clients unenforceable in court. If ¡HICA! is deemed to be harboring the individuals it assists with immigration services under HB56, we may have to cease offering these vital immigration services, which constitute 15 percent of ¡HICA!'s operations.

9. Many of the immigration petitions ¡HICA! assists members and clients with relate to the petitioner's status as a victim of crime and require that client to cooperate with law enforcement's investigation of those crimes. This is true of the T and U visa categories and Violence Against Women Act ("VAWA") petitions as well. These federal visa categories are generally designed to facilitate the participation of undocumented immigrants in the prosecution of particularly destructive crimes. ¡HICA!'s provision of these federal immigration services will

be greatly compromised by the implementation of HB 56, which I understand to require law enforcement to arrest any undocumented person present in the state of Alabama. Since the passage of HB 56, we have already seen a decreased willingness among our clients to approach and interact with law enforcement officers. ¡HICA! receives federal funding from the Office of Violence Against Women ("OVW") related to these applications, but these efforts will be frustrated completely if the HB 56 state immigration law goes into effect because our clients will be unwilling to engage with law enforcement officers in the prosecution of crimes—a requirement for some of these federal visas.

10. ¡HICA! provides a variety of services designed to minimize the incidence of domestic and family violence in the immigrant community

11. We administer a Court Advocacy Program for victims of family violence. ¡HICA!'s court advocate assists victims to develop safety plans, file police reports and protection orders, understand the legal process, and communicate with the courts. ¡HICA! also coordinates women's groups designed to prevent domestic violence through education on topics ranging from protective services to financial and safety planning. Finally, ¡HICA! operates a Spanish language victim's hotline 24 hours a day, seven day a week. It is only the fourth of its kind in the country. This hotline gives immigrant victims of crime easy access to information and services at any time. The hotline primarily serves victims of family violence, sexual assault and rape. While the hotline provides critical immediate counseling, we also hope that it will increase reporting of these crimes. Our domestic violence prevention work depends in large part on our clients' willingness to utilize police protection when necessary. These services depend on a close working relationship between ¡HICA! and law enforcement to ensure that victims can make police reports. Often law enforcement officials will come to one of ¡HICA!'s offices to

make the police report with the victim to ensure that she feels at ease. ¡HICA! receives federal funding from the OVW to do this work, but these efforts will be frustrated completely should the HB 56 mandate that law enforcement arrest undocumented immigrants reporting crimes go into effect. This program will also be frustrated if the state courts are required to report immigration violations because our clients will be very hesitant to apply for protection if they or their family could be punished by this process.

12. The ESL, tax preparation, immigration advocacy and violence prevention services ¡HICA! provides are provided in centralized locations that require our immigrant client base to travel to access our services. Our delivery of all the services ¡HICA! provides will be made significantly more difficult due to the immigrant community's inability and unwillingness to travel on the roadways for fear of a traffic stop that could lead to mandatory arrest and deportation. ¡HICA!'s ability to serve the community will be compromised by the implementation of HB 56's provisions requiring police to verify the immigration status of individuals they come into contact with.

13. ¡HICA!'s Community Engagement and Education program does mobile outreach to the immigrant community where they congregate and reside. In this program, ¡HICA! provides educational presentations explaining how these new communities can effectively access health care, law enforcement, financial and education resources. We also provide information about civic rights and responsibilities, explaining for example tax obligations, the Census and how these communities may participate in government. These community education events have already suffered greatly from the passage of HB 56. Concerns about interacting with the police have suppressed turnout at community meetings. HB 56 has also complicated community education as constituents direct all community meetings to the new immigration law and how it

will affect them. We have been unable to conduct effective workshops on other matters without first addressing HB 56 concerns. This has diverted resources away from the goals of our Community Engagement and Education program, which constitutes 20 percent of ¡HICA!'s operations, and generally covers other matters such as health care, financial literacy and educational opportunities.

14. Approximately ten times annually, ¡HICA! provides transportation to constituents to facilitate their participation in public hearings, leadership development opportunities, or other forums of interest to immigrants. We do not deny constituents we have reason to believe may be undocumented access to this transportation. If this transportation were made criminal by HB56, ¡HICA! may have to discontinue this aspect of the Community Engagement and Education Program.

15. ¡HICA! provides many services on a drop-in basis, constituents visiting our offices to access peer support, information and referral and family advocacy. We projected we would serve 20,000 constituents in calendar year 2011. Since the passage of HB 56, we have been overwhelmed with drop-in visits, however, and are presently on track to see more than 28,500 constituents this year. This over-subscription of ¡HICA!'s services is due almost entirely to HB 56, as a tremendous number of constituents have come to ¡HICA!, seeking assistance with legal documents that would prepare their family for separation and disruption in the event of arrest or deportation if the law is implemented. For example, these constituents seek to obtain birth certificates and passports for their children; they seek power of attorney documents that allow trusted people to take custody of their children or property in the event of their arrest. Many of the drop-in visitors seek information about the new law's provisions regarding K-12 education. Our constituents and members are fearful of enrolling their children in school and we

must address these concerns constantly. HB 56 has given rise to this type of request, which has overwhelmed ¡HICA! and diverted our resources away from planned programmatic work over the past six months.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 6 day of July, 2011 in Birmingham, Alabama.

Isabel Rubio

EXHIBIT 12

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

Hispanic Interest Coalition of Alabama, et al.,

Plaintiffs,

v.

Governor Robert Bentley, et al.,

Defendants.

Case No. 5:11-cv-02484-SLB

Exhibits in Support of Plaintiffs' Reply In Support of Motion For Preliminary Injunction

Exhibit 3

Supplemental Declaration of Isabel Rubio *On behalf of* Hispanic Interest Coalition of Alabama

SUPPLEMENTAL DECLARATION OF ISABEL RUBIO

I, Isabel Rubio, hereby make this declaration based on my personal knowledge and if called to testify I could and would do so competently as follows.

1. I am the executive director of the Hispanic Interest Coalition of Alabama (¡HICA!), based in Birmingham, Alabama. I am providing this supplemental declaration to give further information on the harm HB 56 will cause to ¡HICA! and its members.

2. Since HB 56 was proposed in Alabama, ¡HICA! has responded to the requests of its membership and the broader community to present information about HB 56 and its impact on Alabamians. Our response has been in the form of answering questions in the office, by phone and email, by adding information during programs on other topics, and by preparing for and giving HB 56 Know Your Rights presentations in several churches and other community settings.

3. ¡HICA! staff persons have given approximately eighteen presentations in June, July, and August 2011 in Alabama to immigrant families, allies, educators, and other community members. About thirteen of those presentations were planned in order to give information on HB 56 and its impact on Alabamians, including specifically information on enrollment

of students in Alabama public schools. The other approximately five presentations had been planned to cover other topics that ¡HICA! addresses, such as humanitarian visas, basic immigration law information, and Latino Culture in Alabama, but due to audience demand, information on HB 56 was added to the agenda. Approximately 1,527 people attended the above-mentioned presentations, including about 800 at a single event.

4. As mentioned in my previous declaration, visits by community members to the ¡HICA! office have increased dramatically. The majority of the new visits are by community members asking questions about how their families will be impacted by HB 56. Parents of children in kindergarten through 12th grade, including those who are preparing to enroll for the first time and those whose children are already attending public schools, are asking what will happen to their children and themselves if they are asked to reveal their immigration status in order to register their children for school, or if school officials otherwise suspect them of being undocumented.

5. ¡HICA! staff members have had to postpone other important work in order to meet this important and urgent community need for information related to HB 56 and its impact. The delayed work has included the preparation of U and T Visa applications for crime victims, and other important legal representation work. Staff members who teach classes or

lead groups of community members have had to extend session times to be able to give updates on HB 56 on top of the regular class content or group discussion topic. Most ¡HICA! staff persons have seen their work expand to include giving information on the impact of HB 56 and listening to and responding to community members' fears about the new law.

6. ¡HICA! staff persons and members also participated in a community listening session held by U.S. Department of Justice on August 4, 2011, in Birmingham, Alabama. Approximately 60 participants recounted their fears of the impact of HB 56, especially on their children who are enrolled or enrolling this year in Alabama public schools. Parents reported fears of discrimination against their children born outside of the United States, and fears of arrest for undocumented parents of children registering in school. This event required significant preparation by ¡HICA!.

7. HB 56 has already impacted ¡HICA! in a negative way, by causing the postponement of a substantial amount of our mission-required work and forcing us to divert scarce resources to inform the community about this new law.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of August, 2011, in Birmingham, Alabama.

Isabel Rubio

EXHIBIT 13

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

Hispanic Interest Coalition of Alabama, et al.,

Plaintiffs,

v.

Governor Robert Bentley, et al.,

Defendants.

Case No. 5:11-cv-02484-SLB

Exhibits in Support of Plaintiffs' Motion For Preliminary Injunction And Memorandum In Support

Exhibit 11

Declaration of Scott Douglas
On behalf of Greater Birmingham Ministries

DECLARATION OF SCOTT DOUGLAS

I, Scott Douglas, hereby make this declaration based on my personal knowledge and if called to testify I could and would do so competently as follows.

1. My name is Scott Douglas. I am the Executive Director of the Greater Birmingham Ministries ("GBM"), based in Birmingham, Alabama.

2. GBM is a 501(c)(3) organization and is a multi-faith, multi-racial, multi-member organization. GBM provides emergency assistance to low-income families in need while working on public policies that can better the quality of life for all. GBM counts Christian, Muslim, and Jewish faith communities among its members, including the Roman Catholic Diocese and the Conference of the United Methodist Church, and individual temples, churches, and mosques. GBM's members also have congregations that comprise Latino, African, Middle Eastern and other immigrant families, including undocumented individuals and school-age children. GBM has three main program areas: Economic Justice, Direct Services, and Faith In Community. Its direct services project provides services in the form of food and financial assistance to immigrant and other communities based on their level of need.

3. There are eight full-time staff, three part-time staff and several hundred volunteers that work with me to operate GBM. Every year, we have 400

volunteers to assist with GBM's programs. Most of these volunteers come from GBM's member congregations.

4. Our membership consists of twenty different faith communities. To become a member of GBM, potential members must agree with GBM's mission, agree to provide volunteer services, and provide financial assistance. Members must support GBM through contributions of at least $500 per year, and members can provide support upwards of $20,000 per year.

5. The constituencies that we serve are low-income families from the Birmingham Metropolitan region, which consists of five counties. Our services reach approximately 4,000 families every year. Those families are composed of over 7,000 individuals including men, women, and children, including undocumented individuals.

6. GBM's Direct Services program provides a variety of services to low-income families. In the course of a week, GBM provides approximately fifty families, or about 150 people, nonperishable foods, fresh fruits and vegetables and other needed grocery items. GBM also provides families with assistance in the form of paying their rent and utility bills, and paying for their medicine prescriptions. Additionally, twice a week, GBM distributes free clothes to families.

7. In the course of its work, GBM members often provide transportation to immigrant members, including individuals who we believe to be undocumented. Many times these individuals will share with GBM volunteers where they are from, which are often foreign countries. We even have had to recruit a volunteer interpreter who speaks a native Guatemalan language to accommodate the need to communicate with some of these clients.

8. The population that GBM serves is diverse. Our constituency includes African American, White, and immigrant families. Our immigrant constituents are primarily Latino, African, and Middle Eastern, and our population of Latino Spanish-speaking constituents is increasing. In order to address this growing need we have recruited a student intern who is bilingual because of the increasing number of Spanish-speaking-only clients.

9. HB 56 would greatly burden GBM. The greatest harm would be to require our members to provide us with proof of citizenship for the constituents we assist. As of now, we only ask our members to provide us with proof of income and proof of residence. As an organization, we simply do not have the capacity or desire to document more than what we already require for our services.

10. If HB 56 is implemented, GBM fears that, because of its services to people it believes to be undocumented, its members and volunteers may be prosecuted for encouraging undocumented immigrants to stay in Alabama. GBM

also fears that it will be prosecuted under HB 56's harboring and transportation provision because our members and volunteers often do provide transportation to our constituents to Hispanic worship services, to vacation bible school for children, to medical and dental appointments, and some do even provide a regular route to medical clinics. Often, volunteers provide rides to families who come to GBM to pick up groceries. Further, along with the rides, many of our members provide bus tickets, and pay for rent and utilities for many of our clients whom they know or believe to be undocumented. These bus passes are intended for people to get to and from work.

11. GBM is also affected by HB 56's education provision because our member congregations serve a large number of school-age children and provide these children with brand new school clothes. Undocumented individuals from GBM congregations have expressed that because of HB 56 they are afraid to enroll their children in school. These members fear that their immigration status will be sent to the federal government and lead them to being detained and possibly deported under HB 56.

12. HB 56 is causing our member congregations to lose families and individuals as they leave the state out of fear that they will be detained. One of these members shared with us that they "don't want to be in a state where they hate us." Due to this sentiment, GBM will soon have to reallocate organizational and

financial resources, since GBM draws from its members for its volunteer base. If congregations have fewer members because of HB 56, GBM will have to decrease its services due to the decreasing volunteer base.

13. Under HB 56, GBM will have to redirect efforts towards documenting clients' immigration status in addition to what GBM already documents in terms of need. This would involve spending more staff time and money to guarantee that the assistance GBM provides to each of its clients comes within the purview of the law. This will substantially slow down GBM's work, and cause GBM to reprioritize all of its projects. Additionally, since under HB 56, GBM would have to withhold assistance to people who could not verify their immigration status, GBM would have to develop new procedures on how to handle this new group of people that GBM would no longer provide services to, which would also involve a reallocation of our limited resources.

14. GBM has decided to continue implementing the mission of the organization regardless of the implementation of HB 56, even if that stance affects us negatively. This includes to continue providing services to our clients regardless of immigration status, including transporting them as needed, providing food and clothing to them, and all other services that we currently provide.

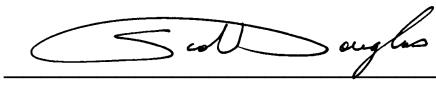
15. GBM receives approximately 20% of its income from congregations or religious bodies, and in the past, taking a controversial stance has led some

congregations to limit or cease their financial support of GBM. Since we are publicly opposed to HB 56, it is likely that member congregations that do not agree with GBM will limit or cease their support of GBM, which would cause a diversion and a significant loss of organizational and financial resources, including laying off staff and reducing programming.

16. HB 56 conflicts with GBM's mission, and GBM is not going to change its mission. Very simply put, HB 56 stands in stark contradiction to GBM's mission and everything we stand for. GBM will continue our work with respect to our mission, which is to serve people based on need alone. Our mission requires that GBM serve people, build community, and pursue justice. HB 56 is a disservice to people, breaks community, and is unjust.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 15 day of July, 2011 in Birmingham, Alabama.



Scott Douglas

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 11-14535

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

v.

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

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

ADDENDUM ATTACHMENT TO: TIME-SENSITIVE MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL AND FOR EXPEDITED APPEAL

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*Motion for Admission Forthcoming

EXHIBIT 14

ACT No. 2011 - 535

HB56

132433-8

By Representatives Hammon, Collins, Patterson, Rich, Nordgren, Merrill, Treadaway, Johnson (R), Roberts, Henry, Bridges, Gaston, Johnson (K), Chesteen, Sanderford, Williams (D), McClendon, Wren, Williams (J), Hubbard (M), Williams (P), Baughn, Moore (B), Long and Canfield

RFD: Public Safety and Homeland Security

First Read: 01-MAR-11

PFD: 02/25/2011

HB56

ENROLLED, An Act,

Relating to illegal immigration; to define terms; to require the Attorney General to attempt to negotiate a Memorandum of Agreement under certain conditions; to require a person to present proof of citizenship and residency before voting; to preclude any state or local government or official from refusing to assist the federal government in the enforcement of federal immigration laws; to prohibit an alien unlawfully present in the United States from receiving any state or local public benefits; to prohibit a person not lawfully present from being eligible on the basis of residence for education benefits; to require business entities or employers seeking economic incentives to verify the employment eligibility of their employees and to provide penalties; to require an illegal alien to possess certain documents already required by federal law and to provide penalties; to prohibit an unauthorized alien from seeking employment in this state and to provide penalties; to require the verification of the legal status of persons by law enforcement officers under certain circumstances; to criminalize certain behavior relating to concealing, harboring, shielding, or attempting to conceal, harbor, or shield unauthorized aliens and to provide penalties; to create the crime of dealing in false identification documents and the crime of vital records

identity fraud and to provide penalties; to prohibit a business entity, employer, or public employer from knowingly employing an unauthorized alien and to provide penalties; to prohibit certain deductible business expenses; to make it a discriminatory practice for a business entity or employer to fail to hire a legally present job applicant or discharge an employee while retaining an employee who is an unauthorized alien under certain conditions; to require the verification of legal status of every alien charged with a crime for which bail is required; to amend Section 32-6-9 of the Code of Alabama 1975, relating to driver's licenses; to require law enforcement to detain any alien whose lawful immigration status cannot be verified under certain conditions; to require notification of the United States Bureau of Immigration and Customs Enforcement and the Alabama Department of Homeland Security when an unlawfully present alien is convicted of state law; to provide for a stay of the provisions of this act when an alien unlawfully present is a victim or critical witness of a crime under certain conditions; to authorize the Alabama Department of Homeland Security to hire state police officers and give the department enforcement power under certain conditions; to provide penalties for solicitation, attempt, or conspiracy to violate this act; to require the Alabama Department of Homeland Security to file a quarterly report with the Legislature under certain conditions; to

require the Alabama Department of Homeland Security to establish and maintain an E-Verify employer agent service under certain conditions; to prohibit the enforcement of certain contracts under certain conditions; to require public schools to determine the citizenship and immigration status of students enrolling; to require school districts to compile certain data and submit reports to the State Board of Education; to require the State Board of Education to submit an annual report to the Legislature; to further provide for eligibility and requirements for voter registration; to establish a state election board; to provide duties of the board; to provide that a person may obtain a certified copy of a birth certificate from the Department of Public Health free of charge under certain conditions; to prohibit an alien not lawfully present from entering into a business transaction under certain conditions and provide penalties; to prohibit a landlord from knowingly entering into a rental agreement to harbor an illegal alien and provide penalties; and in connection therewith would have as its purpose or effect the requirement of a new or increased expenditure of local funds within the meaning of Amendment 621 of the Constitution of Alabama of 1901, now appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. This act shall be known and may be cited as the Beason-Hammon Alabama Taxpayer and Citizen Protection Act.

Section 2. The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this state and that illegal immigration is encouraged when public agencies within this state provide public benefits without verifying immigration status. Because the costs incurred by school districts for the public elementary and secondary education of children who are aliens not lawfully present in the United States can adversely affect the availability of public education resources to students who are United States citizens or are aliens lawfully present in the United States, the State of Alabama determines that there is a compelling need for the State Board of Education to 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 any impact that the presence such population may have on publicly funded education in this state. The State of Alabama further finds that certain practices currently allowed in this state impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Alabama. Therefore, the people of the State of Alabama declare that it

is a compelling public interest to discourage illegal immigration by requiring all agencies within this state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws. The State of Alabama also finds that other measures are necessary to ensure the integrity of various governmental programs and services.

Section 3. For the purposes of this act, the following words shall have the following meanings:

(1) ALIEN. Any person who is not a citizen or national of the United States, as described in 8 U.S.C. § 1101, et seq., and any amendments thereto.

(2) BUSINESS ENTITY. Any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit. "Business entity" shall include, but not be limited to the following:

a. Self-employed individuals, business entities filing articles of incorporation, partnerships, limited partnerships, limited liability companies, foreign corporations, foreign limited partnerships, foreign limited liability companies authorized to transact business in this state, business trusts, and any business entity that registers with the Secretary of State.

b. Any business entity that possesses a business license, permit, certificate, approval, registration, charter,

or similar form of authorization issued by the state, any business entity that is exempt by law from obtaining such a business license, and any business entity that is operating unlawfully without a business license.

(3) CONTRACTOR. A person, employer, or business entity that enters into an agreement to perform any service or work or to provide a certain product in exchange for valuable consideration. This definition shall include, but not be limited to, a general contractor, subcontractor, independent contractor, contract employee, project manager, or a recruiting or staffing entity.

(4) EMPLOYEE. Any person directed, allowed, or permitted to perform labor or service of any kind by an employer. The employees of an independent contractor working for a business entity shall not be regarded as the employees of the business entity, for the purposes of this act.

(5) EMPLOYER. Any person, firm, corporation, partnership, joint stock association, agent, manager, representative, foreman, or other person having control or custody of any employment, place of employment, or of any employee, including any person or entity employing any person for hire within the State of Alabama, including a public employer. This term shall not include the occupant of a household contracting with another person to perform casual domestic labor within the household.

(6) EMPLOYMENT. The act of employing or state of being employed, engaged, or hired to perform work or service of any kind or character within the State of Alabama, including any job, task, work, labor, personal services, or any other activity for which compensation is provided, expected, or due, including, but not limited to, all activities conducted by a business entity or employer. This term shall not include casual domestic labor performed in a household on behalf of the occupant of the household or the relationship between a contractor and the employees of a subcontractor performing work for the contractor.

(7) E-VERIFY. The electronic verification of federal employment authorization program of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, Division C, Section 403(a); 8 U.S.C. §1324(a), and operated by the United States Department of Homeland Security, or its successor program.

(8) FEDERAL WORK AUTHORIZATION PROGRAM. Any of the electronic verification of work authorization programs operated by the United States Department of Homeland Security or an equivalent federal work authorization program operated by the United States Department of Homeland Security to verify information of newly hired employees, under the Immigration Reform and Control Act of 1986 (IRCA), P.L. 99-603 or the Illegal Immigration Reform and Immigrant Responsibility Act of

1996, P.L. 104-208, Division C, Section 403(a); 8 U.S.C. §1324(a).

(9) KNOWS or KNOWINGLY. A person acts knowingly or with knowledge with respect to either of the following:

a. The person's conduct or to attendant circumstances when the person is aware of the nature of the person's conduct or that those circumstances exist.

b. A result of the person's conduct when the person is reasonably aware that the person's conduct is likely to cause that result.

(10) LAWFUL PRESENCE or LAWFULLY PRESENT. A person shall be regarded as an alien unlawfully present in the United States only if the person's unlawful immigration status has been verified by the federal government pursuant to 8 U.S.C. § 1373(c). No officer of this state or any political subdivision of this state shall attempt to independently make a final determination of an alien's immigration status. An alien possessing self-identification in any of the following forms is entitled to the presumption that he or she is an alien lawfully present in the United States:

a. A valid, unexpired Alabama driver's license.

b. A valid, unexpired Alabama nondriver identification card.

c. A valid tribal enrollment card or other form of tribal identification bearing a photograph or other biometric identifier.

d. Any valid United States federal or state government issued identification document bearing a photograph or other biometric identifier, if issued by an entity that requires proof of lawful presence in the United States before issuance.

e. A foreign passport with an unexpired United States Visa and a corresponding stamp or notation by the United States Department of Homeland Security indicating the bearer's admission to the United States.

f. A foreign passport issued by a visa waiver country with the corresponding entry stamp and unexpired duration of stay annotation or an I-94W form by the United States Department of Homeland Security indicating the bearer's admission to the United States.

(11) POLICY OR PRACTICE. A guiding principle or rule that may be written or adopted through repeated actions or customs, which must be sanctioned by an agency or the head of an agency.

(12) PROTECTIVE SERVICES PROVIDER. A child protective services worker; adult protective services worker; protective services provider; or provider of services to victims of domestic violence, stalking, sexual assault, or

human trafficking that receives federal grants under the Victim of Crimes Act, the Violence Against Women Act, or the Family Violence Prevention and Services Act.

(13) PUBLIC EMPLOYER. Every department, agency, or instrumentality of the state or a political subdivision of the state including counties and municipalities.

(14) STATE-FUNDED ENTITY. Any governmental entity of the state or a political subdivision thereof or any other entity that receives any state monies.

(15) SUBCONTRACTOR. A subcontractor, contract employee, staffing agency, or any contractor, regardless of its tier.

(16) UNAUTHORIZED ALIEN. An alien who is not authorized to work in the United States as defined in 8 U.S.C. § 1324a(h)(3).

Section 4. (a) The Attorney General shall attempt to negotiate the terms of a Memorandum of Agreement between the State of Alabama and the United States Department of Homeland Security, as provided in 8 U.S.C. Section 1357(g), concerning the enforcement of federal immigration laws, detentions and removals, and related investigations in the State of Alabama by certain state law enforcement officers designated by the Attorney General.

(b) The Memorandum of Agreement negotiated pursuant to subsection (a) shall be signed on behalf of this state by

the Attorney General and the Governor or as otherwise required by the appropriate federal agency.

(c) A report of the results of the attempt of the Attorney General to enter into a Memorandum of Agreement shall be submitted to the Legislature within six months of the effective date of this act.

Section 5. (a) No official or agency of this state or any political subdivision thereof, including, but not limited to, an officer of a court of this state, may adopt a policy or practice that limits or restricts the enforcement of federal immigration laws by limiting communication between its officers and federal immigration officials in violation of 8 U.S.C. § 1373 or 8 U.S.C. § 1644, or that restricts its officers in the enforcement of this act. If, in the judgment of the Attorney General of Alabama, an official or agency of this state or any political subdivision thereof, including, but not limited to, an officer of a court in this state, is in violation of this subsection, the Attorney General shall report any violation of this subsection to the Governor and the state Comptroller and that agency or political subdivision shall not be eligible to receive any funds, grants, or appropriations from the State of Alabama until such violation has ceased and the Attorney General has so certified. Any appeal of the determination of the Attorney General as considered in this section shall be first appealed to the

circuit court of the respective jurisdiction in which the alleged offending agency resides.

(b) All state officials, agencies, and personnel, including, but not limited to, an officer of a court of this state, shall 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.

(c) Except as provided by federal law, officials or agencies of this state or any political subdivision thereof, including, but not limited to, an officer of a court of this state, may not be prohibited or in any way be restricted from sending, receiving, or maintaining information relating to the immigration status, lawful or unlawful, of any individual or exchanging that information with any other federal, state, or local governmental entity for any of the following official purposes:

(1) Determining the eligibility for any public benefit, service, or license provided by any state, local, or other political subdivision of this state.

(2) Verifying any claim of residence or domicile if determination of residence or domicile is required under the laws of this state or a judicial order issued pursuant to a civil or criminal proceeding of this state.

(3) Pursuant to 8 U.S.C. § 1373 and 8 U.S.C. § 1644.

(d) A person who is a United States citizen or an alien who is lawfully present in the United States and is a resident of this state may bring an action in circuit court to challenge any official or head of an agency of this state or political subdivision thereof, including, but not limited to, an officer of a court in this state, that adopts or implements a policy or practice that is in violation of 8 U.S.C. § 1373 or 8 U.S.C. § 1644. If there is a judicial finding that an official or head of an agency, including, but not limited to, an officer of a court in this state, has violated this section, the court shall order that the officer, official, or head of an agency pay a civil penalty of not less than one thousand dollars ($1,000) and not more than five thousand dollars ($5,000) for each day that the policy or practice has remained in effect after the filing of an action pursuant to this section.

(e) A court shall collect the civil penalty prescribed in subsection (d) and remit one half of the civil penalty to the Alabama Department of Homeland Security and the second half shall be remitted to the Department of Public Safety.

(f) Every person working for the State of Alabama or a political subdivision thereof, including, but not limited to, a law enforcement agency in the State of Alabama or a

political subdivision thereof, shall have a duty to report violations of this act. Any person who willfully fails to report any violation of this act when the person knows that this act is being violated shall be guilty of obstructing governmental operations as defined in Section 13A-10-2 of the Code of Alabama 1975.

(g) For the purposes of this section, the term "official or head of an agency of this state" shall not include a law enforcement officer or other personnel employed in a jail who is acting within the line and scope of his or her duty.

(h) For the purposes of this act, any proceedings against an official shall be only in his or her official capacity. Each side on any litigation considered within this act shall bear their own costs and fees associated with the litigation unless otherwise ordered by the court. For the purposes of this act, the relevant statute of repose for assessing penalties shall be no more than 30 days prior to the initial allegation of the violations of this act.

Section 6. (a) No official or agency of this state or any political subdivision thereof, including, but not limited to, an officer of a court of this state, may adopt a policy or practice that limits or restricts the enforcement of this act to less than the full extent permitted by this act or that in any way limits communication between its officers or

officials in furtherance of the enforcement of this act. If, in the judgment of the Attorney General of Alabama, an official or agency of this state or any political subdivision thereof, including, but not limited to, an officer of a court of this state, is in violation of this subsection, the Attorney General shall report any violation of this subsection to the Governor and the state Comptroller and that agency or political subdivision shall not be eligible to receive any funds, grants, or appropriations from the State of Alabama until such violation has ceased and the Attorney General has so certified.

(b) All state officials, agencies, and personnel, including, but not limited to, an officer of a court of this state, shall fully comply with and, to the full extent permitted by law, support the enforcement of this act.

(c) Except as provided by this act, officials or agencies of this state or any political subdivision thereof, including, but not limited to, an officer of a court of this state, may not be prohibited or in any way be restricted from sending, receiving, or maintaining information relating to the immigration status, lawful or unlawful, of any individual or exchanging that information with any other federal, state, or local governmental entity for any of the following official purposes:

(1) Determining the eligibility for any public benefit, service, or license provided by any state, local, or other political subdivision of this state.

(2) Verifying any claim of residence or domicile if determination of residence or domicile is required under the laws of this state or a judicial order issued pursuant to a civil or criminal proceeding of this state.

(3) Pursuant to 8 U.S.C. § 1373 and 8 U.S.C. § 1644.

(d) A person who is a United States citizen or an alien who is lawfully present in the United States and is a resident of this state may bring an action in circuit court to challenge any official or head of an agency of this state or political subdivision thereof, including, but not limited to, an officer of a court in this state, that adopts or implements a policy or practice that limits or restricts the enforcement of this act to less than the full extent permitted by this act. Such person shall have actual knowledge that any official or head of an agency of this state or political subdivision thereof, including, but not limited to, an officer of a court in this state, has adopted or implemented a policy or practice that limits or restricts the enforcement of this act to less than the full extent permitted by this act. If there is a judicial finding that an official or head of an agency, including, but not limited to, an officer of a court in this state, has violated this section, the court shall order that

the officer, official, or head of an agency pay a civil penalty of not less than one thousand dollars ($1,000) and not more than five thousand dollars ($5,000) for each day that the policy or practice has remained in effect after the filing of an action pursuant to this section.

(e) A court shall collect the civil penalty prescribed in subsection (d) and remit one half of the civil penalty to the Alabama Department of Homeland Security and the second half shall be remitted to the Department of Public Safety.

(f) Every person working for the State of Alabama or a political subdivision thereof, including, but not limited to, a law enforcement agency in the State of Alabama or a political subdivision thereof, shall have a duty to report violations of this act. Failure to report any violation of this act when there is reasonable cause to believe that this act is being violated is guilty of obstructing governmental operations as defined in Section 13A-10-2, Code of Alabama 1975, and shall be punishable pursuant to state law.

(g) For the purposes of this section, the term "official or head of an agency of this state" shall not include a law enforcement officer or other personnel employed in a jail who is acting within the line and scope of his or her duty.

Section 7. (a) As used in this section, the following terms have the following meanings:

(1) EMERGENCY MEDICAL CONDITION. The same meaning as provided in 42 U.S.C. § 1396b(v)(3).

(2) FEDERAL PUBLIC BENEFITS. The same meaning as provided in 8 U.S.C. § 1611.

(3) STATE OR LOCAL PUBLIC BENEFITS. The same meaning as provided in 8 U.S.C. § 1621.

(b) An alien who is not lawfully present in the United States and who is not defined as an alien eligible for public benefits under 8 U.S.C. § 1621(a) or 8 U.S.C. § 1641 shall not receive any state or local public benefits.

(c) Except as otherwise provided in subsection (e) or where exempted by federal law, commencing on the effective date of this act, each agency or political subdivision of the state shall verify with the federal government the lawful presence in the United States of each alien who applies for state or local public benefits, pursuant to 8 U.S.C. §§ 1373(c), 1621, and 1625.

(d) An agency of this state or a county, city, town, or other political subdivision of this state may not consider race, color, or national origin in the enforcement of this section.

(e) Verification of lawful presence in the United States shall not be required for any of the following:

(1) For primary or secondary school education, and state or local public benefits that are listed in 8 U.S.C. § 1621(b).

(2) For obtaining health care items and services that are necessary for the treatment of an emergency medical condition of the person involved and are not related to an organ transplant procedure.

(3) For short term, noncash, in kind emergency disaster relief.

(4) For public health assistance for immunizations with respect to immunizable diseases, for the Special Supplemental Nutrition Program for Women, Infants, and Children, and for testing and treatment of symptoms of communicable diseases, whether or not such symptoms are caused by a communicable disease.

(5) For programs, services, or assistance, such as soup kitchens, crisis counseling and intervention, and short-term shelter specified by federal law or regulation that satisfy all of the following:

a. Deliver in-kind services at the community level, including services through public or private nonprofit agencies.

b. Do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance

provided on the income or resources of the individual recipient.

c. Are necessary for the protection of life or safety.

(6) For prenatal care.

(7) For child protective services and adult protective services and domestic violence services workers.

(f) No official of this state or political subdivision of this state shall attempt to independently make a final determination of whether an alien is lawfully present in the United States. An alien's lawful presence in the United States shall be verified by the federal government pursuant to 8 U.S.C. § 1373(c).

(g) Any United States citizen applying for state or local public benefits, except those benefits described in subsection (e), shall sign a declaration that he or she is a United States citizen.

(h) Any person who knowingly makes a false, fictitious, or fraudulent statement or representation in a declaration executed pursuant to subsection (g) shall be guilty of perjury in the second degree pursuant to Section 13A-10-102, Code of Alabama 1975. Each time that a person receives a public benefit based upon such a statement or representation shall constitute a separate violation of Section 13A-10-102, Code of Alabama 1975.

(i) The verification that an alien seeking state or local public benefits is an alien lawfully present in the United States shall be made through the Systematic Alien Verification for Entitlements (SAVE) program, operated by the United States Department of Homeland Security. If for any reason the verification of an alien's lawful presence through the SAVE program is delayed or inconclusive, the alien shall be eligible for state or local public benefits in the interim period if the alien signs a declaration that he or she is an alien lawfully present in the United States. The penalties under subsection (h) shall apply to any false, fictitious, or fraudulent statement or representation made in a declaration.

(j) Each state agency or department that administers a program that provides state or local public benefits shall provide an annual report with respect to its compliance with this section to the Government Affairs Committee of the Senate and the Government Operations Committee of the House of Representatives, or any successor committees.

(k) Errors and significant delays resulting from use of the SAVE program shall be reported to the United States Department of Homeland Security and to the Alabama Department of Homeland Security to assist the federal government in ensuring that the application of the SAVE program is not wrongfully denying benefits to aliens lawfully present in the United States.

(l) For the purposes of administering the Alabama Child Health Insurance Program, verification and documentation of lawful presence through any alternative means expressly authorized by federal law shall satisfy the requirements of this section.

Section 8. An alien who is not lawfully present in the United States shall not be permitted to enroll in or attend any public postsecondary education institution in this state. An alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq. For the purposes of this section, a public postsecondary education institution officer may seek federal verification of an alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A public postsecondary education institution officer or official shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States. Except as otherwise provided by law, an alien who is not lawfully present in the United States shall not be eligible for any postsecondary education benefit, including, but not limited to, scholarships, grants, or financial aid.

Section 9. (a) As a condition for the award of any contract, grant, or incentive by the state, any political subdivision thereof, or any state-funded entity to a business

entity or employer that employs one or more employees, the business entity or employer shall not knowingly employ, hire for employment, or continue to employ an unauthorized alien and shall attest to such, by sworn affidavit signed before a notary.

(b) As a condition for the award of any contract, grant, or incentive by the state, any political subdivision thereof, or any state-funded entity to a business entity or employer that employs one or more employees, the business entity or employer shall provide documentation establishing that the business entity or employer is enrolled in the E-Verify program. During the performance of the contract, the business entity or employer shall participate in the E-Verify program and shall verify every employee that is required to be verified according to the applicable federal rules and regulations.

(c) No subcontractor on a project paid for by contract, grant, or incentive by the state, any political subdivision thereof, or any state-funded entity shall knowingly employ, hire for employment, or continue to employ an unauthorized alien and shall attest to such by sworn affidavit signed before a notary. The subcontractor shall also enroll in the E-Verify program prior to performing any work on the project and shall attach to the sworn affidavit

documentation establishing that the subcontractor is enrolled in the E-Verify program.

(d) A contractor of any tier shall not be liable under this section when such contractor contracts with its direct subcontractor who violates subsection (c), if the contractor receives a sworn affidavit from the subcontractor signed before a notary attesting to the fact that the direct subcontractor, in good faith, has complied with subsection (c) with respect to verifying each of its employee's eligibility for employment, unless the contractor knows the direct subcontractor is violating subsection (c).

(e)(1) Upon the first violation of subsection (a) by any business entity or employer awarded a contract by the state, any political subdivision thereof, or any state-funded entity the business entity or employer shall be deemed in breach of contract and the state, political subdivision thereof, or state-funded entity may terminate the contract after providing notice and an opportunity to be heard. Upon application by the state entity, political subdivision thereof, or state-funded entity, the Attorney General may bring an action to suspend the business licenses and permits of the business entity or employer for a period not to exceed 60 days, according to the procedures described in Section 15. The court shall order the business entity or employer to file a signed, sworn affidavit with the local district attorney

within three days after the order is issued by the court stating that the business entity or employer has terminated the employment of every unauthorized alien and the business entity or employer will not knowingly or intentionally employ an unauthorized alien in this state. Before a business license or permit that has been suspended under this subsection is reinstated, a legal representative of the business entity or employer shall submit to the court a signed, sworn affidavit stating that the business entity or employer is in compliance with the provisions of this act and a copy of the Memorandum of Understanding issued to the business entity or employer at the time of enrollment in E-Verify.

(2) Upon a second or subsequent violation of subsection (a) by any business entity or employer awarded a contract by the state, any political subdivision thereof, or any state-funded entity the business entity or employer shall be deemed in breach of contract and the state, any political subdivision thereof, or any state-funded entity shall terminate the contract after providing notice and an opportunity to be heard. Upon application by the state entity, political subdivision thereof, or state-funded entity, the Attorney General may bring an action to permanently revoke the business licenses and permits of the business entity or employer according to the procedures described in Section 15.

(f)(1) Upon the first violation of subsection (c) by a subcontractor, the state or political subdivision thereof may bar the subcontractor from doing business with the state, any political subdivision thereof, any state-funded entity, or with any contractor who contracts with the state, any political subdivision thereof, or any state-funded entity after providing notice and an opportunity to be heard. Upon application by the state entity or political subdivision thereof, or state-funded entity, the Attorney General may bring an action to suspend the business licenses and permits of the subcontractor for a period not to exceed 60 days, according to the procedures described in Section 15. The court shall order the subcontractor to file a signed, sworn affidavit with the local district attorney within three days after the order is issued by the court stating that the subcontractor has terminated the employment of every unauthorized alien and the subcontractor will not knowingly or intentionally employ an unauthorized alien in this state. Before a business license or permit that has been suspended under this subsection is reinstated, a legal representative of the subcontractor shall submit to the court a signed, sworn affidavit stating that the subcontractor is in compliance with the provisions of this act and a copy of the Memorandum of Understanding issued to the subcontractor at the time of enrollment in E-Verify.

(2) Upon a second or subsequent violation of subsection (c) by a subcontractor and upon application by the state entity or political subdivision thereof, or state-funded entity, the Attorney General may bring an action to permanently suspend the business licenses of the business entity or employer according to the procedures described in Section 15. The determination of a violation shall be according to the procedures described in Section 15.

(g) A business entity or employer that complies with subsection (b) shall not be found to be in violation of subsection (a). A subcontractor that is enrolled in the E-Verify program during the full period of performance of the subcontract shall not be found to be in violation of subsection (c).

(h) The Secretary of State shall adopt rules to administer this section and shall report any rules adopted to the Legislature.

(i) Compliance with this section may be verified by the state authorities or law enforcement at any time to ensure a contractual agreement as provided for in this section is being met.

(j) The suspension of a business license or permit under subsection (e)(1) and (f)(1) shall terminate one business day after a legal representative of the business entity, employer, or subcontractor submits a signed, sworn

affidavit stating that the business entity, employer, or subcontractor is in compliance with the provisions of this act to the court.

Section 10. (a) In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), and the person is an alien unlawfully present in the United States.

(b) In the enforcement of this section, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A law enforcement officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.

(c) A law enforcement official or agency of this state or a county, city, or other political subdivision of this state may not consider race, color, or national origin in the enforcement of this section except to the extent permitted by the United States Constitution and the Constitution of Alabama of 1901.

(d) This section does not apply to a person who maintains authorization from the federal government to be present in the United States.

(e) Any record that relates to the immigration status of a person is admissible in any court of this state

without further foundation or testimony from a custodian of records if the record is certified as authentic by the federal government agency that is responsible for maintaining the record. A verification of an alien's immigration status received from the federal government pursuant to 8 U.S.C. § 1373(c) shall constitute proof of that alien's status. A court of this state shall consider only the federal government's verification in determining whether an alien is lawfully present in the United States.

(f) An alien unlawfully present in the United States who is in violation of this section shall be guilty of a Class C misdemeanor and subject to a fine of not more than one hundred dollars ($100) and not more than 30 days in jail.

(g) A court shall collect the assessments prescribed in subsection (f) and remit 50 percent of the assessments to the general fund of the local government where the person was apprehended to be earmarked for law enforcement purposes, 25 percent of the assessments to the Alabama Department of Homeland Security, and 25 percent of the assessments to the Department of Public Safety.

Section 11. (a) It is unlawful for a person who is an unauthorized alien to knowingly apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state.

(b) In the enforcement of this section, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A law enforcement officer shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.

(c) A law enforcement official or agency of this state or a county, city, or other political subdivision of this state may not consider race, color, or national origin in the enforcement of this section except to the extent permitted by the United States Constitution and the Constitution of Alabama of 1901.

(d) This section does not apply to a person who maintains authorization from the federal government to be employed in the United States.

(e) Any record that relates to the employment authorization of a person is admissible in any court of this state without further foundation or testimony from a custodian of records if the record is certified as authentic by the federal government agency that is responsible for maintaining the record. A verification of an alien's immigration status received from the federal government pursuant to 8 U.S.C. § 1373(c) shall constitute proof of that alien's status. A court of this state shall consider only the federal government's

verification in determining whether a person is an unauthorized alien.

(f) It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway, or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

(g) It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

(h) A person who is in violation of this section shall be guilty of a Class C misdemeanor and subject to a fine of not more than five hundred dollars ($500).

(i) A court shall collect the assessments prescribed in subsection (h) and remit 50 percent of the assessments to the general fund of the local government where the person was apprehended to be earmarked for law enforcement purposes, 25 percent of the assessments to the Alabama Department of Homeland Security, and 25 percent of the assessments to the Department of Public Safety.

(j) The terms of this section shall be interpreted consistently with 8 U.S.C. § 1324a and any applicable federal rules and regulations.

Section 12. (a) Upon any lawful stop, detention, or arrest made by a state, county, or municipal law enforcement officer of this state in the enforcement of any state law or ordinance of any political subdivision thereof, where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the citizenship and immigration status of the person, except if the determination may hinder or obstruct an investigation. Such determination shall be made by contacting the federal government pursuant to 8 U.S.C. § 1373(c) and relying upon any verification provided by the federal government.

(b) Any alien who is arrested and booked into custody shall have his or her immigration status determined pursuant to 8 U.S.C. § 1373(c). The alien's immigration status shall be verified by contacting the federal government pursuant to 8 U.S.C. § 1373(c) within 24 hours of the time of the alien's arrest. If for any reason federal verification pursuant to 8 U.S.C. § 1373(c) is delayed beyond the time that the alien would otherwise be released from custody, the alien shall be released from custody.

(c) A law enforcement officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States. A law enforcement officer may not consider race, color, or national origin in

implementing the requirements of this section except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901.

(d) A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer any of the following:

(1) A valid, unexpired Alabama driver's license.

(2) A valid, unexpired Alabama nondriver identification card.

(3) A valid tribal enrollment card or other form of tribal identification bearing a photograph or other biometric identifier.

(4) Any valid United States federal or state government issued identification document bearing a photograph or other biometric identifier, if issued by an entity that requires proof of lawful presence in the United States before issuance.

(5) A foreign passport with an unexpired United States Visa and a corresponding stamp or notation by the United States Department of Homeland Security indicating the bearer's admission to the United States.

(6) A foreign passport issued by a visa waiver country with the corresponding entry stamp and unexpired duration of stay annotation or an I-94W form by the United

States Department of Homeland Security indicating the bearer's admission to the United States.

(e) If an alien is determined by the federal government to be an alien who is unlawfully present in the United States pursuant to 8 U.S.C. § 1373(c), the law enforcement agency shall cooperate in the transfer of the alien to the custody of the federal government, if the federal government so requests.

Section 13. (a) It shall be unlawful for a person to do any of the following:

(1) Conceal, harbor, or shield or attempt to conceal, harbor, or shield or conspire to conceal, harbor, or shield an alien from detection in any place in this state, including any building or any means of transportation, if the person knows or recklessly disregards the fact that the alien has come to, has entered, or remains in the United States in violation of federal law.

(2) Encourage or induce an alien to come to or reside in this state if the person knows or recklessly disregards the fact that such coming to, entering, or residing in the United States is or will be in violation of federal law.

(3) Transport, or attempt to transport, or conspire to transport in this state an alien in furtherance of the unlawful presence of the alien in the United States,

knowingly, or in reckless disregard of the fact, that the alien has come to, entered, or remained in the United States in violation of federal law. Conspiracy to be so transported shall be a violation of this subdivision.

(4) Harbor an alien unlawfully present in the United States by entering into a rental agreement, as defined by Section 35-9A-141 of the Code of Alabama 1975, with an alien to provide accommodations, if the person knows or recklessly disregards the fact that the alien is unlawfully present in the United States.

(b) Any person violating the provisions of this section is guilty of a Class A misdemeanor for each unlawfully present alien, the illegal presence of which in the United States and the State of Alabama, he or she is facilitating or is attempting to facilitate.

(c) A person violating the provisions of this section is guilty of a Class C felony when the violation involves 10 or more aliens, the illegal presence of which in the United States and the State of Alabama, he or she is facilitating or is attempting to facilitate.

(d) Notwithstanding any other law, a law enforcement agency may securely transport an alien whom the agency has received verification from the federal government pursuant to 8 U.S.C. § 1373(c) is unlawfully present in the United States and who is in the agency's custody to a state approved

facility, to a federal facility in this state, or to any other point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency. A law enforcement agency shall obtain judicial or executive authorization from the Governor before securely transporting an alien who is unlawfully present in the United States to a point of transfer that is outside this state.

(e) Notwithstanding any other law, any person acting in his or her official capacity as a first responder or protective services provider may harbor, shelter, move, or transport an alien unlawfully present in the United States pursuant to state law.

(f) Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of this section, and the gross proceeds of such a violation, shall be subject to civil forfeiture under the procedures of Section 20-2-93 of the Code of Alabama 1975.

(g) In the enforcement of this section, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). A law enforcement officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.

(h) Any record that relates to the immigration status of a person is admissible in any court of this state

without further foundation or testimony from a custodian of records if the record is certified as authentic by the federal government agency that is responsible for maintaining the record. A verification of an alien's immigration status received from the federal government pursuant to 8 U.S.C. § 1373(c) shall constitute proof of that alien's status. A court of this state shall consider only the federal government's verification in determining whether an alien is lawfully present in the United States.

Section 14. (a) A person commits the crime of dealing in false identification documents if he or she knowingly reproduces, manufactures, sells, or offers for sale any identification document which does both of the following:

(1) Simulates, purports to be, or is designed so as to cause others reasonably to believe it to be an identification document.

(2) Bears a fictitious name or other false information.

(b) A person commits the crime of vital records identity fraud related to birth, death, marriage, and divorce certificates if he or she does any of the following:

(1) Supplies false information intending that the information be used to obtain a certified copy of a vital record.

(2) Makes, counterfeits, alters, amends, or mutilates any certified copy of a vital record without lawful authority and with the intent to deceive.

(3) Obtains, possesses, uses, sells, or furnishes, or attempts to obtain, possess, or furnish to another a certified copy of a vital record, with the intent to deceive.

(c)(1) Dealing in false identification documents is a Class C felony.

(2) Vital records identity fraud is a Class C felony.

(d) The provisions of this section shall not apply to any of the following:

(1) A person less than 21 years of age who uses the identification document of another person to acquire an alcoholic beverage.

(2) A person less than 19 years of age who uses the identification documents of another person to acquire any of the following:

a. Cigarettes or tobacco products.

b. A periodical, videotape, or other communication medium that contains or depicts nudity.

c. Admittance to a performance, live or film, that prohibits the attendance of the person based on age.

d. An item that is prohibited by law for use or consumption by such person.

(e) As used in this section, "identification document" means any card, certificate, or document or banking instrument, including, but not limited to, a credit or debit card, which identifies or purports to identify the bearer of such document, whether or not intended for use as identification, and includes, but is not limited to, documents purporting to be drivers' licenses, nondriver identification cards, certified copies of birth, death, marriage, and divorce certificates, Social Security cards, and employee identification cards.

(f) Any person convicted of dealing in false identification documents as defined in this section shall be fined up to one thousand dollars ($1,000) for every card or document he or she creates or possesses and be subject to any and all other state laws that may apply. A court shall collect the fines prescribed by this subsection and shall remit 50 percent of the fines to the general fund of the local government that apprehended the person to be earmarked for law enforcement purposes, 25 percent of the fines to the Alabama Department of Homeland Security, and 25 percent of the fines to the Department of Public Safety.

Section 15. (a) No business entity, employer, or public employer shall knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Alabama. Knowingly employ, hire for

employment, or continue to employ an unauthorized alien means the actions described in 8 U.S.C. § 1324a.

(b) Effective April 1, 2012, every business entity or employer in this state shall enroll in E-Verify and thereafter, according to the federal statutes and regulations governing E-Verify, shall verify the employment eligibility of the employee through E-Verify. A business entity or employer that uses E-Verify to verify the work authorization of an employee shall not be deemed to have violated this section with respect to the employment of that employee.

(c) On a finding of a first violation by a court of competent jurisdiction that a business entity or employer knowingly violated subsection (a), the court shall do all of the following:

(1) Order the business entity or employer to terminate the employment of every unauthorized alien.

(2) Subject the business entity or employer to a three-year probationary period throughout the state. During the probationary period, the business entity or employer shall file quarterly reports with the local district attorney of each new employee who is hired by the business entity or employer in the state.

(3) Order the business entity or employer to file a signed, sworn affidavit with the local district attorney within three days after the order is issued by the court

stating that the business entity or employer has terminated the employment of every unauthorized alien and the business entity or employer will not knowingly or intentionally employ an unauthorized alien in this state.

(4) Direct the applicable state, county, or municipal governing bodies to suspend the business licenses and permits, if such exist, of the business entity or employer for a period not to exceed 10 business days specific to the business location where the unauthorized alien performed work.

(d)(1) Before a business license or permit that has been suspended under subsection (c) is reinstated, a legal representative of the business entity or employer shall submit to the court a signed, sworn affidavit stating that the business entity or employer is in compliance with the provisions of this act and a copy of the Memorandum of Understanding issued to the business entity or employer at the time of enrollment in E-Verify.

(2) The suspension of a business license or permit under subsection (c) shall terminate one business day after a legal representative of the business entity or employer submits a signed, sworn affidavit stating that the business entity or employer is in compliance with the provisions of this act to the court.

(e) For a second violation of subsection (a) by a business entity or employer, the court shall direct the

applicable state, county, or municipal governing body to permanently revoke all business licenses and permits, if such exist, held by the business entity or employer specific to the business location where the unauthorized alien performed work. On receipt of the order, and notwithstanding any other law, the appropriate agencies shall immediately revoke the licenses and permits held by the business entity or employer.

(f) For a subsequent violation of subsection (a), the court shall direct the applicable governing bodies to forever suspend the business licenses and permits, if such exist, of the business entity or employer throughout the state.

(g) This section shall not be construed to deny any procedural mechanisms or legal defenses included in the E-Verify program or any other federal work authorization program. A person or entity that establishes that it has complied in good faith with the requirements of 8 U.S.C. § 1324a(b) establishes an affirmative defense that the business entity or employer did not knowingly hire or employ an unauthorized alien.

(h) In proceedings of the court, the determination of whether an employee is an unauthorized alien shall be made by the federal government, pursuant to 8 U.S.C. § 1373(c). The court shall consider only the federal government's determination when deciding whether an employee is an

unauthorized alien. The court may take judicial notice of any verification of an individual's immigration status previously provided by the federal government and may request the federal government to provide further automated or testimonial verification.

(i) Any business entity or employer that terminates an employee to comply with this section shall not be liable for any claims made against the business entity or employer by the terminated employee, provided that such termination is made without regard to the race, ethnicity, or national origin of the employee and that such termination is consistent with the anti-discrimination laws of this state and of the United States.

(j) If any agency of the state or any political subdivision thereof fails to suspend the business licenses or permits, if such exist, as a result of a violation of this section, the agency shall be deemed to have violated subsection (a) of Section 5 and shall be subject to the penalties thereunder.

(k) In addition to the district attorneys of this state, the Attorney General shall also have authority to bring a civil complaint in any court of competent jurisdiction to enforce the requirements of this section.

(l) Any resident of this state may petition the Attorney General to bring an enforcement action against a

specific business entity or employer by means of a written, signed petition. A valid petition shall include an allegation that describes the alleged violator or violators, as well as the action constituting the violation, and the date and location where the action occurred.

(2) A petition that alleges a violation on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be acted upon.

(3) The Attorney General shall respond to any petition under this subdivision within 60 days of receiving the petition, either by filing a civil complaint in a court of competent jurisdiction or by informing the petitioner in writing that the Attorney General has determined that filing a civil complaint is not warranted.

(l) This section does not apply to the relationship between a party and the employees of an independent contractor performing work for the party and does not apply to casual domestic labor performed within a household.

(m) It is an affirmative defense to a violation of subsection (a) of this section that a business entity or employer was entrapped.

(1) To claim entrapment, the business entity or employer must admit by testimony or other evidence the substantial elements of the violation.

(2) A business entity or employer who asserts an entrapment defense has the burden of proving by clear and convincing evidence the following:

a. The idea of committing the violation started with law enforcement officers or their agents rather than with the business entity or employer.

b. The law enforcement officers or their agents urged and induced the business entity or employer to commit the violation.

c. The business entity or employer was not already predisposed to commit the violation before the law enforcement officers or their agents urged and induced the employer to commit the violation.

(n) In addition to actions taken by the state or political subdivisions thereof, the Attorney General or the district attorney of the relevant county may bring an action to enforce the requirements of this section in any county district court of this state wherein the business entity or employer does business.

(o) The terms of this section shall be interpreted consistently with 8 U.S.C. § 1324a and any applicable federal rules and regulations.

Section 16. (a) No wage, compensation, whether in money or in kind or in services, or remuneration of any kind for the performance of services paid to an unauthorized alien

shall be allowed as a deductible business expense for any state income or business tax purposes in this state. This subsection shall apply whether or not an Internal Revenue Service Form 1099 is issued in conjunction with the wages or remuneration.

(b) Any business entity or employer who knowingly fails to comply with the requirements of this section shall be liable for a penalty equal to 10 times the business expense deduction claimed in violation of subsection (a). The penalty provided in this subsection shall be payable to the Alabama Department of Revenue.

Section 17. (a) It shall be a discriminatory practice for a business entity or employer to fail to hire a job applicant who is a United States citizen or an alien who is authorized to work in the United States as defined in 8 U.S.C. § 1324a(h)(3) or discharge an employee working in Alabama who is a United States citizen or an alien who is authorized to work in the United States as defined in 8 U.S.C. § 1324a(h)(3) while retaining or hiring an employee who the business entity or employer knows, or reasonably should have known, is an unauthorized alien.

(b) A violation of subsection (a) may be the basis of a civil action in the state courts of this state. Any recovery under this subsection shall be limited to

compensatory relief and shall not include any civil or criminal sanctions against the employer.

(c) The losing party in any civil action shall pay the court costs and reasonable attorneys fees for the prevailing party; however, the losing party shall only pay the attorneys fees of the prevailing party up to the amount paid by the losing party for his or her own attorneys fees.

(d) The amount of the attorneys fees spent by each party shall be reported to the court before the verdict is rendered.

(e) In proceedings of the court, the determination of whether an employee is an unauthorized alien shall be made by the federal government, pursuant to 8 U.S.C. § 1373(c). The court shall consider only the federal government's determination when deciding whether an employee is an unauthorized alien. The court may take judicial notice of any verification of an individual's immigration status previously provided by the federal government and may request the federal government to provide further automated or testimonial verification.

Section 18. Section 32-6-9, Code of Alabama 1975, is amended to read as follows:

"§32-6-9.

"(a) Every licensee shall have his or her license in his or her immediate possession at all times when driving a

motor vehicle and shall display the same, upon demand of a judge of any court, a peace officer or a state trooper. However, no person charged with violating this section shall be convicted if he or she produces in court or the office of the arresting officer a driver's license theretofore issued to him or her and valid at the time of his or her arrest.

"(b) Notwithstanding the provisions of Section 32-1-4, if a law officer arrests a person for a violation of this section and the officer is unable to determine by any other means that the person has a valid driver's license, the officer shall transport the person to the nearest or most accessible magistrate.

"(c) A reasonable effort shall be made to determine the citizenship of the person and if an alien, whether the alien is lawfully present in the United States by verification with the federal government pursuant to 8 U.S.C. § 1373(c). An officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.

(d) A verification inquiry, pursuant to 8 U.S.C. § 1373(c), shall be made within 48 hours to the Law Enforcement Support Center of the United States Department of Homeland Security or other office or agency designated for that purpose by the federal government. 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 19. (a) When a person is charged with a crime for which bail is required, or is confined for any period in a state, county, or municipal jail, a reasonable effort shall be made to determine if the person is an alien unlawfully present in the United States by verification with the federal government pursuant to 8 U.S.C. § 1373(c).

(b) A verification inquiry, pursuant to 8 U.S.C. § 1373(c), shall be made within 48 hours to the Law Enforcement Support Center of the United States Department of Homeland Security or other office or agency designated for that purpose by the federal government. 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 20. If an alien who is unlawfully present in the United States is convicted of a violation of state or local law and is within 30 days of release or has paid any fine as required by operation of law, the agency responsible for his or her incarceration shall notify the United States Bureau of Immigration and Customs Enforcement and the Alabama Department of Homeland Security, pursuant to 8 U.S.C. § 1373.

The Alabama Department of Homeland Security shall assist in the coordination of the transfer of the prisoner to the appropriate federal immigration authorities; however, the Alabama Department of Corrections shall maintain custody during any transfer of the individual.

Section 21. If a person is an alien who is unlawfully present in the United States and is a victim of a criminal act, is the child of a victim of a criminal act, is a critical witness in any prosecution, or is the child of a critical witness in any prosecution of a state or federal crime, all provisions of this act shall be stayed until all of the related legal proceedings are concluded. However, the relevant state, county, or local law enforcement agency shall comply with any request by federal immigration officers to take custody of the person.

Section 22. (a) Notwithstanding the provisions of Section 31-9A-9 of the Code of Alabama 1975, the Alabama Department of Homeland Security may hire, appoint, and maintain APOST certified state law enforcement officers. Such officers shall receive the same rights and benefits as those prescribed to officers of the Alabama Department of Public Safety, except for the purposes of retirement. The officers shall have the same retirement benefits as a law enforcement officer as defined under Section 36-27-59 of the Code of Alabama 1975.

(b) Unless a violation of state law occurs in their presence, officers authorized under this section shall not engage in routine law enforcement activity, except for those investigative and analytical duties necessary to carry out the enforcement of this act and to fulfill the mission of the Alabama Department of Homeland Security or those duties necessary to provide assistance to other law enforcement agencies.

(c) The Director of the Alabama Department of Homeland Security shall have the authority to promulgate rules for the enforcement of this act.

Section 23. The Alabama Department of Homeland Security shall have the authority to coordinate with state and local law enforcement the practice and methods required to enforce this act in cooperation with federal immigration authorities and consistent with federal immigration laws.

Section 24. The Alabama Department of Homeland Security shall file a quarterly report to the Legislature on the progress being made regarding the enforcement of this act and the status of the progress being made in the effort to reduce the number of illegal aliens in the State of Alabama. The report shall include, but is not limited to, the statistics and results from the enforcement of the sections of this act, and suggestions on what can be done including additional legislation to further assist the federal

government in its efforts to apprehend illegal aliens in the State of Alabama. At the start of the 2013 fiscal year, the report shall be filed twice a year. At the start of the 2015 fiscal year, the report is required annually. This report shall also be made available to the public and shall be announced through a press release from the Attorney General's office.

Section 25. (a) A solicitation to violate any criminal provision of this act, an attempt to violate any criminal provision of this act, or a conspiracy to violate any criminal provision of this act shall have the same penalty as a violation of this act.

(b) For the purposes of this section, solicitation shall have the same principles of liability and defenses as criminal solicitation under subsections (b) through (e) of Section 13A-4-1, Code of Alabama 1975, and Section 13A-4-5, Code of Alabama 1975.

(c) For the purposes of this section, attempt shall have the same principles of liability and defenses as attempt under subsections (b) and (c) of Section 13A-4-2, Code of Alabama 1975, and Section 13A-4-5, Code of Alabama 1975.

(d) For the purposes of this section, conspiracy shall have the same principles of liability and defenses as criminal conspiracy under subsections (b) through (f) of

Section 13A-4-3, Code of Alabama 1975, and Sections 13A-4-4 and 13A-4-5, Code of Alabama 1975.

Section 26. (a)(1) The Alabama Department of Homeland Security shall establish and maintain an E-Verify employer agent service for any business entity or employer in this state with 25 or fewer employees to use the E-Verify program to verify an employee's employment eligibility on behalf of the business entity or employer. The Alabama Department of Homeland Security shall establish an E-Verify employer agent account with the United States Department of Homeland Security, shall enroll a participating business entity or employer in the E-Verify program on its behalf, and shall conform to all federal statutes and regulations governing E-Verify employer agents. The Alabama Department of Homeland Security shall not charge a fee to a participating business entity or employer for this service.

(2) The Alabama Department of Homeland Security E-Verify employer agent service shall be in place within 90 days after the effective date of this act. The service shall accommodate a business entity or employer who wishes to communicate with the Alabama Department of Homeland Security by internet, by electronic mail, by facsimile machine, by telephone, or in person, provided that such communication is consistent with federal statutes and regulations governing E-Verify employer agents.

(b) On or after January 1, 2012, before receiving any contract, grant, or incentive by the state, any political subdivision thereof, or any state-funded entity, a business entity or employer shall provide proof to the state, political subdivision thereof, or state-funded entity that the business entity or employer is enrolled and is participating in the E-Verify program, either independently or through the Alabama Department of Homeland Security E-Verify employer agent service.

(c) Every three months, the Alabama Department of Homeland Security shall request from the United States Department of Homeland Security a list of every business entity or employer in this state that is enrolled in the E-Verify program. On receipt of the list, the Alabama Department of Homeland Security shall make the list available on its website.

(d) A business entity or employer that is enrolled in the E-Verify program and that verifies the employment eligibility of an employee in good faith pursuant to this section, and acts in conformity with all applicable federal statutes and regulations is immune from liability under Alabama law for any action by an employee for wrongful discharge or retaliation based on a notification from the E-Verify program that the employee is an unauthorized alien.

Section 27. (a) No court of this state shall enforce the terms of, or otherwise regard as valid, any contract between a 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, and the performance of the contract required the alien to remain unlawfully present in the United States for more than 24 hours after the time the contract was entered into or performance could not reasonably be expected to occur without such remaining.

(b) This section shall not apply to a contract for lodging for one night, a contract for the purchase of food to be consumed by the alien, a contract for medical services, or a contract for transportation of the alien that is intended to facilitate the alien's return to his or her country of origin.

(c) This section shall not apply to a contract authorized by federal law.

(d) In proceedings of the court, the determination of whether an alien is unlawfully present in the United States shall be made by the federal government, pursuant to 8 U.S.C. § 1373(c). The court shall consider only the federal government's determination when deciding whether an alien is unlawfully present in the United States. The court may take judicial notice of any verification of an individual's immigration status previously provided by the federal

government and may request the federal government to provide further automated or testimonial verification.

Section 28. (a)(1) Every public elementary and secondary school in this state, at the time of enrollment in kindergarten or any grade in such school, shall determine whether the student enrolling in public school was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States and qualifies for assignment to an English as Second Language class or other remedial program.

(2) The public school, when making the determination required by subdivision (1), shall rely upon presentation of the student's original birth certificate, or a certified copy thereof.

(3) 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 parent, guardian, or legal custodian of the student shall notify the school within 30 days of the date of the student's enrollment of the actual citizenship or immigration status of the student under federal law.

(4) Notification shall consist of both of the following:

a. The presentation for inspection, to a school official designated for such purpose by the school district in which the child is enrolled, of official documentation establishing the citizenship and, in the case of an alien, the immigration status of the student, or alternatively by submission of a notarized copy of such documentation to such official.

b. Attestation by the parent, guardian, or legal custodian, under penalty of perjury, that the document states the true identity of the child. If the student or his or her parent, guardian, or legal representative possesses no such documentation but nevertheless maintains that the student is either a United States citizen or an alien lawfully present in the United States, the parent, guardian, or legal representative of the student may sign a declaration so stating, under penalty of perjury.

(5) 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.

(b) Each school district in this state shall collect and compile data as required by this section.

(c) Each school district shall submit to the State Board of Education an annual report listing all data obtained pursuant to this section.

(d)(1) The State Board of Education shall compile and submit an annual public report to the Legislature.

(2) The report shall provide data, aggregated by public school, regarding the numbers of United States citizens, of lawfully present aliens by immigration classification, and of aliens believed to be unlawfully present in the United States enrolled at all primary and secondary public schools in this state. The report shall also provide the number of students in each category participating in English as a Second Language Programs enrolled at such schools.

(3) The report shall analyze and identify the effects upon the standard or quality of education provided to students who are citizens of the United States residing in Alabama that may have occurred, or are expected to occur in the future, as a consequence of the enrollment of students who are aliens not lawfully present in the United States.

(4) The report shall analyze and itemize the fiscal costs to the state and political subdivisions thereof of providing educational instruction, computers, textbooks and other supplies, free or discounted school meals, and extracurricular activities to students who are aliens not lawfully present in the United States.

(5) The State Board of Education shall prepare and issue objective baseline criteria for identifying and

assessing the other educational impacts on the quality of education provided to students who are citizens of the United States, due to the enrollment of aliens who are not lawfully present in the United states, in addition to the statistical data on citizenship and immigration status and English as a Second Language enrollment required by this act. The State Board of Education may contract with reputable scholars and research institutions to identify and validate such criteria. The State Board of Education shall assess such educational impacts and include such assessments in its reports to the Legislature.

(e) Public disclosure by any person of information obtained pursuant to this section which personally identifies any student shall be unlawful, except for purposes permitted pursuant to 8 U.S.C. §§ 1373 and 1644. Any person intending to make a public disclosure of information that is classified as confidential under this section, on the ground that such disclosure constitutes a use permitted by federal law, shall first apply to the Attorney General and receive a waiver of confidentiality from the requirements of this subsection.

(f) A student whose personal identity has been negligently or intentionally disclosed in violation of this section shall be deemed to have suffered an invasion of the student's right to privacy. The student shall have a civil

remedy for such violation against the agency or person that has made the unauthorized disclosure.

(g) The State Board of Education shall construe all provisions of this section in conformity with federal law.

(h) This section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

Section 29. (a) Applications for voter registration shall give voter eligibility requirements and such information as is necessary to prevent duplicative voter registrations and enable the relevant election officer to assess the eligibility of the applicant and to administer voter registration, identify the applicant and to determine the qualifications of the applicant as an elector and the facts authorizing such person to be registered. Applications shall contain a statement that the applicant shall be required to provide qualifying identification when voting.

(b) The Secretary of State shall create a process for the county election officer to check to indicate whether an applicant has provided with the application the information necessary to assess the eligibility of the applicant, including the applicant's United States citizenship. This section shall be interpreted and applied in accordance with federal law. No eligible applicant whose qualifications have been assessed shall be denied registration.

(c) The county election officer or Secretary of State's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship. Satisfactory evidence of United States citizenship shall be provided in person at the time of filing the application for registration or by including, with a mailed registration application, a photocopy of one of the documents listed as evidence of United States citizenship in subsection (k). After a person has submitted satisfactory evidence of citizenship, the county election officer shall indicate this information in the person's permanent voter file.

(d) Any person who is registered in this state on the effective date of this act is deemed to have provided satisfactory evidence of United States citizenship and shall not be required to submit evidence of citizenship.

(e) For purposes of this section, proof of voter registration from another state is not satisfactory evidence of United States citizenship.

(f) A registered voter who moves from one residence to another within the state or who modifies his or her voter registration records for any other reason shall not be required to submit evidence of United States citizenship.

(g) If evidence of United States citizenship is deemed to be unsatisfactory due to an inconsistency between the document submitted as evidence and the name or sex provided on the application for registration, such applicant may sign an affidavit containing both of the following:

(1) Stating the inconsistency or inconsistencies related to the name or sex, and the reason therefor.

(2) Swearing under oath that, despite the inconsistency, the applicant is the individual reflected in the document provided as evidence of citizenship.

(h) There shall be no inconsistency between the date of birth on the document provided as evidence of citizenship and the date of birth provided on the application for registration. If such an affidavit is submitted by the applicant, the county election officer or Secretary of State shall assess the eligibility of the applicant without regard to any inconsistency stated in the affidavit.

(i) All documents submitted as evidence of United States citizenship shall be kept confidential by the county election officer or the Secretary of State and maintained as provided by record retention laws.

(j) Nothing in this section shall prohibit an applicant from providing, or the Secretary of State or county election officer from obtaining, satisfactory evidence of United States citizenship, as described in this section, at a

different time or in a different manner than an application for registration is provided, as long as the applicant's eligibility can be adequately assessed by the Secretary of State or county election officer as required by this section.

(k) Evidence of United States citizenship shall be demonstrated by one of the following documents, or a legible photocopy of one of the following documents:

(1) The applicant's driver's license or nondriver's identification card issued by the division of motor vehicles or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver's license or nondriver's identification card that the person has provided satisfactory proof of United States citizenship.

(2) The applicant's birth certificate that verifies United States citizenship to the satisfaction of the county election officer or Secretary of State.

(3) Pertinent pages of the applicant's United States valid or expired passport identifying the applicant and the applicant's passport number, or presentation to the county election officer of the applicant's United States passport.

(4) The applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the

registration rolls until the number of the certificate of naturalization is verified with the United States Bureau of Citizenship and Immigration Services by the county election officer or the Secretary of State, pursuant to 8 U.S.C. § 1373(c).

(5) Other documents or methods of proof of United States citizenship issued by the federal government pursuant to the Immigration and Nationality Act of 1952, and amendments thereto.

(6) The applicant's Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number.

(7) The applicant's consular report of birth abroad of a citizen of the United States of America.

(8) The applicant's certificate of citizenship issued by the United States Citizenship and Immigration Services.

(9) The applicant's certification of report of birth issued by the United States Department of State.

(10) The applicant's American Indian card, with KIC classification, issued by the United States Department of Homeland Security.

(11) The applicant's final adoption decree showing the applicant's name and United States birthplace.

(12) The applicant's official United States military record of service showing the applicant's place of birth in the United States.

(13) An extract from a United States hospital record of birth created at the time of the applicant's birth indicating the applicant's place of birth in the United States.

(l) There is hereby established the State Election Board, consisting of the Secretary of State, the Attorney General, and the Lieutenant Governor. The State Election Board shall meet on the call of the Secretary of State. The State Election Board shall do both of the following:

(1) Assess information provided by any applicant for voter registration as evidence of citizenship pursuant to subsection (m).

(2) Adopt rules to implement subsection (m).

(m)(1) If an applicant is a United States citizen but does not have any of the documentation listed in this section as satisfactory evidence of United States citizenship, the applicant may submit any evidence that the applicant believes demonstrates the applicant's United States citizenship.

(2) Any applicant seeking an assessment of evidence under this section may directly contact the office of the Secretary of State by submitting a voter registration

application or the national voter registration form and any supporting evidence of United States citizenship. Upon receipt of this information, the Secretary of State shall notify the State Election Board that such application is pending.

(3) The State Election Board shall give the applicant an opportunity for a hearing, upon the applicant's request in writing, and an opportunity to present any additional evidence to the State Election Board. Notice of such hearing shall be given to the applicant at least five days prior to the hearing date. An applicant shall have the opportunity to be represented by counsel at such hearing.

(4) The State Election Board shall assess the evidence provided by the applicant to determine whether the applicant has provided satisfactory evidence of United States citizenship. A decision of the State Election Board shall be determined by a majority vote of the board.

(5) If an applicant submits an application and any supporting evidence prior to the close of registration for an election cycle, a determination by the State Election Board shall be issued at least five days before such election date.

(6) If the State Election Board finds that the evidence presented by the applicant constitutes satisfactory evidence of United States citizenship, the applicant shall meet the requirements under this section to provide satisfactory evidence of United States citizenship.

(7) If the State Election Board finds that the evidence presented by an applicant does not constitute satisfactory evidence of United States citizenship, the applicant shall have the right to appeal such determination by the State Election Board by instituting an action under 8 U.S.C. § 1503. Any negative assessment of an applicant's eligibility by the State Election Board shall be reversed if the applicant obtains a declaratory judgment pursuant to 8 U.S.C. § 1503, demonstrating that the applicant is a national of the United States.

(n)(1) The Department of Public Health shall not charge or accept any fee for a certified copy of a birth certificate if the certificate is requested by any person who is 17 years of age or older for purposes of meeting the voter registration requirements of this act. The person requesting a certified copy of a birth certificate shall swear under oath to both of the following:

a. That the person plans to register to vote in this state.

b. That the person does not possess any of the documents that constitute evidence of United States citizenship as defined in this act.

(2) The affidavit shall specifically list the documents that constitute evidence of United States citizenship as defined in this act.

Section 30. (a) For the purposes of this section, "business transaction" includes any transaction between a person and the state or a political subdivision of the state, including, but not limited to, applying for or renewing a motor vehicle license plate, applying for or renewing a driver's license or nondriver identification card, or applying for or renewing a business license. "Business transaction" does not include applying for a marriage license.

(b) An alien not lawfully present in the United States shall not enter into or attempt to enter into a business transaction with the state or a political subdivision of the state and no person shall enter into a business transaction or attempt to enter into a business transaction on behalf of an alien not lawfully present in the United States.

(c) Any person entering into a business transaction or attempting to enter into a business transaction with this state or a political subdivision of this state shall be required to demonstrate his or her United States citizenship, or if he or she is an alien, his or her lawful presence in the United States to the person conducting the business transaction on behalf of this state or a political subdivision of this state. United States citizenship shall be demonstrated by presentation of one of the documents listed in Section 29(k). An alien's lawful presence in the United States shall be demonstrated by this state's or a political subdivision of

this state's verification of the alien's lawful presence through the Systematic Alien Verification for Entitlements program operated by the Department of Homeland Security, or by other verification with the Department of Homeland Security pursuant to 8 U.S.C. § 1373(c).

(d) A violation of this section is a Class C felony.

(e) An agency of this state or a county, city, town, or other political subdivision of this state may not consider race, color, or national origin in the enforcement of this section except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901.

(f) In the enforcement of this section, an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c). An official of this state or political subdivision of this state shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.

Section 31. Nothing in this act is in any way meant to implement, authorize, or establish the Real ID Act of 2005 (P.L. 109-13, Division D; 119 Stat. 302).

Section 32. Although this bill would have as its purpose or effect the requirement of a new or increased expenditure of local funds, the bill is excluded from further requirements and application under Amendment 621, now

appearing as Section 111.05 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, because the bill defines a new crime or amends the definition of an existing crime.

Section 33. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains.

Section 34. Sections 22 and 23 of this act shall become effective immediately following the passage and approval of this act by the Governor, or its otherwise becoming law. Section 9 shall become effective on January 1, 2012, following the passage and approval of this act by the Governor, or its otherwise becoming law. Section 15 shall become effective on April 1, 2012, following the passage and approval of this act by the Governor, or its otherwise becoming law. The remainder of this act shall become effective on the first day of the third month following the passage and approval of this act by the Governor, or its otherwise becoming law.

Speaker of the House of Representatives

Kay Ivey

President and Presiding Officer of the Senate

House of Representatives

I hereby certify that the within Act originated in and was passed by the House 05-APR-11, as amended.

Greg Pappas
Clerk

Senate	05-MAY-11	Amended and Passed
House	02-JUN-11	Passed, as amended by Conference Committee Report
Senate	02-JUN-11	Passed, as amended by Conference Committee Report

APPROVED June 9, 2011
TIME 8:30 am
Robert Bentley
GOVERNOR

Alabama Secretary Of State

Act Num....: 2011-535
Bill Num...: H-56

Recv'd 06/09/11 01:14pmJJB