FILED
2011 Aug-05 PM 10:50
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

HISPANIC INTEREST COALITION OF ALABAMA; *et al.*,	)	
Plaintiffs,	)	
vs.	)	Case Number: 5:11-cv-02484-SLB
ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; *et al.*,	)	
Defendants.	)	
RT. REV. HENRY N. PARSLEY, JR., in his official capacity as Bishop of the Episcopal Church in the Diocese of Alabama; *et al.*	)	
Plaintiffs,	)	
vs.	)	Case Number: 5:11-cv-02736-SLB
ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama; *et al.*,	)	
Defendants.	)	
UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case Number: 2:11-cv-02746-SLB
STATE OF ALABAMA; GOVERNOR ROBERT J. BENTLEY,	)	
Defendants.	)	

STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT (DOC. 37)

Governor Bentley, Attorney General Strange, Superintendent Morton, Chancellor Hill, and District Attorney Broussard (the State Defendants) respectfully respond to the *Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support*, doc. 37.

I. BACKGROUND

A. ACT NO. 2011-535

On June 9, 2011, Governor Bentley signed Act No. 2011-535 into law. Doc. 1-2 at 73.[1] The Act concerns, but does not regulate, illegal immigration. A total of 34 provisions govern a variety of traditional State interests from employment to education and voting. In addition, a number of new crimes are created.

Section 2 of the Act sets out the Alabama Legislature's findings and declaration as follows:

> The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this [S]tate and that illegal immigration is encouraged when public agencies within this [S]tate 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

[1] Citations to page numbers in the record are to the CM/ECF assigned page numbers.

> 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 [S]tate.
>
> The State of Alabama further finds that certain practices currently allowed in this [S]tate 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 [S]tate 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.

Doc. 1-2 at 6-7 (paragraph breaks added).

Throughout the Act, there is a spirit of cooperation with the federal government. For instance, Section 2 "declare[s] that it is a compelling public interest to discourage illegal immigration by requiring all agencies within this [S]tate to *fully cooperate with federal immigration authorities in the enforcement of federal immigration laws*," doc. 1-2 at 6-7 (emphasis added), and Section 4 requires the Alabama Attorney General to attempt to negotiate a Memorandum of Agreement with the federal government concerning "the enforcement of federal immigration laws, detentions and removals, and related investigations," *id.* at 12.

The Alabama Department of Public Safety already has such a Memorandum of Agreement with the federal government. *See* Exhibit 1 (Declaration of Haran Lowe) at ¶¶ 6-8; Exhibit B to Exhibit 1 (current Memorandum of Agreement).

Additionally, the Act envisions cooperation with, and deference to, the federal government. For instance, Act No. 2011-535 repeatedly calls for State and local officials to seek the cooperation of the federal government in determining an individual's immigration status pursuant to 8 U.S.C. § 1373(c). *See, e.g.,* Section 7, doc. 1-2 at 20; Section 8, doc. 1-2 at 24.[2] It also repeatedly—and explicitly—bows to federal law. *See, e.g.,* Section 5(c), doc. 1-2 at 14 ("Except as provided by federal law . . . ."); Section 7(c), doc. 1-2 at 20 ("Except as otherwise provided in subsection (a) or where exempted by federal law . . . ."); Section 11(j), doc. 1-2 at 33 ("The terms of this section shall be interpreted consistently with 8 U.S.C. § 1324a and any applicable federal rules and regulations.").

Moreover, despite the Plaintiffs' speculative fears to the contrary, Act No. 2011-535 expressly and repeatedly prohibits unlawful discrimination on the basis

---

[2] Section 1373(c) is labeled "Obligation to respond to inquiries" and provides:

> 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).

of race, color, or national origin. *See, e.g.,* Section 7(d), doc. 2-1 at 20 ("An agency of this [S]tate or a county, city, town, or other political subdivision of this [S]tate may not consider race, color, or national origin in the enforcement of this section."); Section 10(c), doc. 2-1 at 30 ("A law enforcement official or agency of this [S]tate or a county, city, or other political subdivision of this [S]tate 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."); Section 11(c), doc. 1-2 at 32 (same). Along these lines, it is notable that there have been no complaints about the manner in which the ICE-certified State troopers have been enforcing federal immigration law since 2003. *See* Exhibit 1 at ¶¶ 10, 15.

By Act No. 2011-535's terms, most, but not all, of the law's provisions take effect on September 1, 2011.[3] Doc. 1-2 at 72. However, for State Constitutional reasons, a number of these provisions will not be effective at the county or

[3] Section 34 of Act No. 2011-535 sets out the effective dates of the various provisions of the Act. Only Sections 22 and 23 took effect immediately. Most of the provisions of Act No. 2011-535 take effect on September 1, 2011, according to the terms of the Act. Section 9 is effective on January 1, 2012 and Section 15 is effective on April 1, 2012.

The presently effective sections do not appear to be subject to any specific challenge in the present litigation. Section 22 authorizes the Alabama Department of Homeland Security to "hire, appoint and maintain APOST [Alabama Peace Officers Standards and Training Commission] certified [S]tate law enforcement officers." Section 23 authorizes the Department "to coordinate with [S]tate and local law enforcement the practice and methods required to enforce this [A]ct in cooperation with federal immigration authorities and consistent with federal immigration laws."

municipal level until the State's new fiscal year begins on October 1, 2011, though they will be enforceable at the State level.[4]

Act No. 2011-535 contains a severability clause. Section 33 provides: "The provisions of this [A]ct are severable. If any part of this [A]ct is declared invalid or unconstitutional, that declaration shall not affect the part which remains." Doc. 1-2 at 72.

B. PROCEDURAL HISTORY

On July 8, 2011, Plaintiffs filed the present litigation. Doc. 1. Twelve Plaintiffs are organizations,[5] and twelve are individuals.[6] Another dozen

---

[4] *See* Ala. Const. Art. IV, § 111.03 (Barring certain exceptions, "No law, whether general, special or local, whose purpose or effect is to provide for a new or increased expenditure of county funds held or disbursed by the county governing body shall become effective as to any county of this [S]tate until the first day of the fiscal year next following the passage of such law."); Ala. Const. Art. IV, § 111.04 (same, except as applied to municipalities rather than counties).

[5] The organizational Plaintiffs are: Hispanic Interest Coalition of Alabama (HICA); AIDS Action Coalition (AAC); Huntsville International Help Center (HIHC); Interpreters and Translators Association of Alabama (ITAA); Alabama Appleseed Center for Law & Justice, Inc. (Appleseed); Service Employees International Union (SEIU); Southern Regional Joint Board of Workers United ("Joint Board"); United Food and Commercial Workers International Union (UFCW International); United Food and Commercial Workers Union Local 1657 (UFCW Local 1657); DreamActivist.org (DreamActivist); Greater Birmingham Ministries (GBM); and, Boat People SOS (BPSOS). Doc. 1 at ¶¶ 10-61.

[6] The twelve individual Plaintiffs are: Matt Webster, a U.S. citizen who plans to adopt two children who are citizens of Mexico, Doc. 1 at ¶¶ 62-63; Maria D. Ceja Zamora, a long-time Alabama resident who "is presently waiting for a visa to become available to her for permanent residence", *id.* at ¶ 68; Pamela Long, a U.S. citizen and lay minister, *id.* at ¶ 72; Juan Pablo Black Romero, a citizen of Ecuador who has been in the United States since 2003 *via* an F-1 student visa, *id.* at ¶ 78; Pastor Christopher Barton Thau, a U.S. citizen who is married to a lawful permanent resident (LPR) with undocumented persons in her extended family, *id.* at ¶ 80; Ellin Jimmerson, a U.S. citizen and minister, *id.* at ¶¶ 88-89; Robert Barber, a Birmingham

individuals are seeking leave to proceed using pseudonyms. *See* doc. 2. The State Defendants have filed a response to this motion, doc. 46[7], and it remains pending. For purposes of this response, the State Defendants assume that the putative Does are plaintiffs, though they may not all choose to proceed in the event that their motion is denied. Additionally, the Plaintiffs hope to have a class certified. *See* doc. 1 at ¶¶ 318-22.

The State Defendants are Governor Robert Bentley, Attorney General Luther Strange, State School Superintendent Joe Morton[8], Department of Postsecondary Education Chancellor Freida Hill, and Madison County District

---

lawyer with a large Latino clientele, *id.* at ¶ 91; Daniel Upton, a Madison County lawyer who practices immigration law at Justice for Our Neighbors, *id.* at ¶ 97; Jeffrey Allen Beck, a landlord who rents housing to a substantial number of immigrants, some of whom are undocumented, *id.* at ¶¶ 101-02; Michelle Cummings, who rents housing to undocumented immigrants, *id.* at ¶¶ 106-07; and, Esayas Haile and Fiesha Tesfamariam, citizens of Eritrea who came to the United States last year as refugees, *id.* at ¶¶ 109-10.

[7] Generally, to the extent that the Doe Plaintiffs seek leave to remain anonymous from the State Defendants, the motion is opposed. It is both critical and a matter of fundamental fairness that the State Defendants know the identities of the Doe Plaintiffs so that we may test matters such as standing, conduct any appropriate discovery, cross-examine their evidence, etc. To the extent Plaintiffs seek to shield their identity from the public, the State Defendants urged the court to exercise caution—and, perhaps, creativity—in "[b]alancing the general principle that parties must disclose their identities to sue in federal court against the countervailing factors presented by this suit . . . ." *Doe v. Steagall*, 653 F.2d 180, 181 (5th Cir. August 1981).

[8] Superintendent Morton is retiring effective August 31, 2011. Larry Craven will be taking over the position on a temporary basis effective September 1, 2011, and will be automatically substituted as the party. Fed. R. Civ. P. 25(d) ("An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.").

Attorney Robert L. Broussard. *Id.* at ¶¶ 166-69, 172. Six county or local school superintendents are also defendants. *Id.* at ¶¶ 170-71. Each of the defendants is sued in his/her official capacity only. *Id.* at 166-72.

The Complaint is a classic shotgun pleading.[9] *Cf. Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 981 (11th Cir. 2008) ("The unacceptable consequences of shotgun pleading are many."). Accordingly, determining precisely what claims are being asserted presents a challenge. Nonetheless, it does appear that the Plaintiffs seek to have Act No. 2011-535 declared unconstitutional and enjoined in its entirety, doc. 1 at ¶ 2, even though only some of the Act's provisions are discussed in the Complaint. For instance, the Complaint contains no reference to the E-Verify requirements in Sections 9 and 15 of the Act, perhaps because the United States Supreme Court recently upheld Arizona's statute that includes nearly-identical E-Verify requirements. *Chamber of Commerce of the United States of America v. Whiting*, 563 U.S. _____, 131 S.Ct. 1968 (2011). Similarly, the Complaint contains no reference to the voter registration provisions of Section 29 of the Act.

---

[9] Additionally, the Complaint is full of "redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The State Defendants have moved for a more definite statement and to have the inappropriate matter stricken (or not repeated in an amended complaint). Doc. 36. The Court has ordered the Plaintiffs to respond to the motion by August 12, 2011, and has set a hearing on that motion simultaneously with the preliminary injunction motion. Doc. 52. Accordingly, the State Defendants are forced to respond to the present motion for a preliminary injunction against the background of an improper Complaint

On July 21, 2011, the Plaintiffs filed a motion for preliminary injunction. Doc. 37. By Order dated the same day, this Court set a deadline for responses of August 5, 2011, an opportunity for reply by August 15, 2011, and a hearing for August 24, 2011. Doc. 41. The Court has also ordered than any *amicus* briefs be filed by August 5, 2011, doc. 44. The motion for preliminary injunction advances a number of different theories as to why Act No. 2011-535 should be enjoined.

Additionally, while this response was being drafted, the United States and a group of religious leaders each separately filed actions challenging Act No. 2011-535. The three cases have now been consolidated with the present one. Doc. 59.

II. PRELIMINARY INJUNCTION STANDARD

"It goes without saying that an injunction is an equitable remedy. It is not a remedy which issues as of course . . . ." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (internal quotation marks and citation omitted).

"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.'" *United States v. Lambert*, 695 F.2d 536, 539 (11th Cir. 1983) (*quoting University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). *See also Canal Authority of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974) ("[T]he court must remember that a preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion. The primary

justification for applying this remedy is to preserve the court's ability to render a meaningful decision on the merits.").[10]

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

As to the second factor—irreparable harm to the plaintiffs—"[i]ssuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with our [*i.e.,* the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (emphasis added). "[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.*

Similarly, the Supreme Court would likely reject the articulation of the fourth element advanced by the Plaintiffs in this case and found in Eleventh Circuit case law. The Plaintiffs contend that they need merely prove that "the injunction *would not be adverse* to the public interest." Doc. 37 at 19 (emphasis added; *citing*

[10] *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*) ("We hold that the decisions of the United States Court of Appeals for the Fifth Circuit . . . , as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.").

McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998)); *see also Citizens for Police Accountability Political Committee v. Browning*, 572 F.3d 1213, 1217 (11th Cir. 2009). As quoted above, the Supreme Court articulates the test as whether "an injunction is in the public interest." *Winter*, 555 U.S. at 20. The Court's articulation puts a slightly higher, affirmative burden on the Plaintiffs, consistent with the Court's "characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22.

In the context of a stay, the third and fourth "factors merge when the Government is the opposing party," *Nken v. Holder*, 556 U.S. ___, 129 S.Ct. 1749, 1762 (2009),[11] and this response will treat them together. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger*, 456 U.S. at 312.

> [T]he Court has noted that [t]he award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff, and that where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the

[11] "There is substantial overlap between these [factors governing whether a stay should be granted] and the factors governing preliminary injunctions; not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken*,129 S.Ct. at 1761 (internal citation omitted).

> parties, though the postponement may be burdensome to the plaintiff. The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.

Weinberger, 456 U.S. at 312-13 (internal quotation marks and citations omitted; second alteration by the Court); *see also id.* at 320 ("The exercise of equitable discretion, which must include the ability to deny as well as grant injunctive relief, can fully protect the range of public interests at issue at this stage in the proceedings.").

"The preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant 'clearly carries the burden of persuasion' as to the four prerequisites. 'The burden of persuasion in all of the four requirements is at all times upon the plaintiff.'" *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983) (internal citations to *Canal Authority* omitted). And, "[b]ecause a preliminary injunction is 'an extraordinary and drastic remedy,' its grant is the exception rather than the rule . . . ." *Lambert*, 695 F.2d at 539 (quoting *Texas v. Seatrain International, S.A.*, 518 F.2d 175, 179 (5th Cir.1975)); *Winter*, 555 U.S. at 24 ("A preliminary injunction is an extraordinary remedy never awarded as of right.").

III. OVERARCHING PRINCIPLES

Before launching into the substantive analysis pertinent to the questions pending before the Court, it is helpful to look at a few Overarching Principles that should guide the Court's analysis through all of the questions presented.

A. FACIAL CHALLENGES

This litigation presents a facial challenge, as not one of the contested portions of Act No. 2011-535 is yet in effect. *Cf. Bowen v. Kendrick*, 487 U.S. 589, 600 (1988) ("Indeed, in that case it was clear that only a facial challenge could have been considered, as the Act had not been implemented."). The Eleventh Circuit has noted an additional attribute of facial challenges—that "a party who asserts a facial challenge to a statute is seeking not only to vindicate his own rights, but also those of others who may be adversely impacted by the statute." *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1262 (11th Cir. 2007). This is also true in the instant case. Plaintiffs' asserted injuries are ones that they speculate will occur in the future when the statute is implemented—injuries that will be suffered by themselves and by others: they seek to "prevent serious harm that Plaintiffs and countless fellow Alabamians will suffer if the law goes into effect." Doc. 1 at 2 (emphasis added); *see also* doc. 37 at 10 ("The requested injunction is urgently needed to prevent this unconstitutional law from causing irreparable injury to Plaintiffs *and countless other individuals*.").

The Supreme Court has established an extremely high bar for facial challenges—in order to prevail, a plaintiff must show that a challenged statute is unconstitutional under every conceivable set of circumstances. "A facial challenge to a legislative Act is, of course, 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) (emphasis supplied).

In *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), the Supreme Court reiterated the principle that, to prevail in a facial challenge, a plaintiff must establish "that the law is unconstitutional in *all* of its applications." *Id*. at 449 (emphasis supplied). The Court cautioned against conjuring up hypothetical scenarios where the law might be unconstitutional: "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id*. at 449-50 (*quoting United States v. Raines*, 362 U.S. 17, 22 (1960)).

A primary reason that "[f]acial challenges are disfavored," *Washington State Grange*, 552 U.S. at 450, is the problem that infects the facial challenge in this case: "Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Id.* (internal quotation marks and citation omitted).

Here, the paper file is already extensive, but much of what Plaintiffs have filed is speculation, hearsay, speculation about hearsay, or otherwise of questionable value. Missing from the Court's files is anything that suggests how Act No. 2011-535 is actually being implemented. One need not read a single exhibit—nor even a single word—filed by the Plaintiffs to know that such facts are missing; it is necessarily the case because, with the exception of two unchallenged provisions concerning the Alabama Department of Homeland Security, Act No. 2011-535 is, by its own terms, not yet effective, and, accordingly, not yet being enforced. Doc. 1-2 at 72; *see also* n.3, *supra*.

Facial challenges are also disfavored because they "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it, nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange*, 552 U.S. at 450 (internal quotation marks and citations omitted). The Supreme Court, and by implication any federal court, "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, *except as it is called upon to adjudge the legal rights of litigants in actual controversies*." *Liverpool, N.Y. & P.S.S. Co. v. Emigration Com'rs*, 113 U.S. 33, 39 (1885) (emphasis added); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973)

("[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments . . . are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court . . . .") (internal citation omitted). For this reason, the fundamental principles of judicial restraint echoed in *Washington State Grange* "are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Liverpool, N.Y. & P.S.S. Co.*, 113 U.S. at 39.

Thirdly, the Supreme Court has noted that facial challenges are disfavored because they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange*, 552 U.S. at 451. Such lawful implementation is, of course, possible through the interpretation of Alabama's Executive Branch officials in enforcing the law as well as through an authoritative interpretation by the Alabama Supreme Court. *See id.* at 450 ("The State has had no opportunity to implement I-872, and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions."); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 494 n.5 (1982) ("In 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."); *see also Riley v. Kennedy*, 553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably 'the ultimate exposito[r] of state law.'") (alteration by the Court; *quoting Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975)); *Gooding v. Wilson*, 405 U.S. 518, 520 (1972) ("Only the Georgia courts can supply the requisite construction, since of course we lack jurisdiction authoritatively to construe state legislation.") (internal quotation marks and citation omitted); *McMahan v. Toto*, 311 F.3d 1077, 1079 (11th Cir. 2002) ("[W]hen we write to a [S]tate law issue, we write in faint and disappearing ink.") (internal quotation marks and citation omitted).

Given the disfavor with which courts view facial challenges, it is no surprise that the hurdles a plaintiff must clear to succeed are high. "Under *United States v. Salerno*, 481 U.S. 739 (1987), a plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.,* that the law is unconstitutional in all of its applications. While some Members of the [Supreme] Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a plainly legitimate sweep."

Washington State Grange, 552 U.S. at 449 (some internal quotation marks and citations omitted; first alteration by the Court).[12]

"In determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange*, 552 U.S. at 449-50. This "[e]xercis[e] [of] judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *Id.* at 450 (internal quotation marks and citations omitted). This case is a particularly speculative facial challenge to a statute—one that is therefore unlike to prevail.

B. A SCALPEL, NOT AN AXE

Plaintiffs argue that Act No. 2011-535 "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 [S]tate law attempting to regulate immigration." Doc. 37 at 19. They make this argument even though there are portions of the Act which are not individually challenged. For example, the State Defendants can identify no challenge to the E-Verify provisions in Sections 9 and 15, perhaps because of the United States Supreme Court's recent decision upholding Arizona's E-Verify

[12] A different standard applies in the First Amendment context, *Washington State Grange*, 552 U.S. at 449 n.6, and is discussed in that section of this response.

requirements in *Whiting*, 131 S.Ct. 1968. Similarly, the Complaint contains no reference to the voter registration provisions of Section 29 of the Act. Additionally, Act No. 2011-535 contains a severability clause in Section 33. Doc. 1-2 at 72. And, of course, "[i]t is axiomatic that a statute may be invalid as applied to one state of facts and yet valid as applied to another." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006).

Ayotte concerned a facial, pre-enforcement challenge to a New Hampshire law concerning abortions. *Ayotte*, 546 U.S. at 324, 325. Upon finding the law unconstitutional, "the courts below chose the most blunt remedy—permanently enjoining the enforcement of New Hampshire's parental notification law and thereby invalidating it entirely." *Id.* at 330. The Supreme Court concluded that "a modest remedy," in the form of "relief more finely drawn," was instead appropriate. *Id.* at 331; *see also id.* ("carefully crafted injunctive relief"). This was so because, "[g]enerally speaking, when confronting a constitutional flaw in a statute, *we try to limit the solution to the problem*. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." *Id.* at 328-39 (emphasis added; internal citations omitted).

The Court explained that "[t]hree interrelated principles inform[ed] [its] approach." *Ayotte*, 546 U.S. at 329. The first principle is "not to nullify more of a

legislature's work than is necessary" because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Id.* (internal quotation marks and citation omitted; alteration by the Court). "Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may be . . . declared invalid to the extent that it reaches too far, but otherwise left intact." *Id.* (internal quotation marks and citation omitted; alteration by the Court).

The second principle espoused by the Court is to "restrain ourselves from rewrit[ing] [S]tate law to conform it to constitutional requirements even as we try to salvage it." *Ayotte*, 546 U.S. at 329 (internal quotation marks and citation omitted; first alteration by the Court). The Court exercises this restraint "mindful that our constitutional mandate and institutional competence are limited." *Id.* The Court's "ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly [the Court has] already articulated the background constitutional rules at issue and how easily [the Court] can articulate the remedy." *Id.* Sometimes a "narrow remedy" is possible. *Id.* Other times, "making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a far more serious invasion of the legislative domain than [the Court] ought to undertake." *Id.* at 330 (internal quotation marks and citation omitted).

The final principle, "the touchstone for any decision about remedy[,] is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte*, 546 U.S. at 330 (internal quotation marks and citation omitted). For this reason, the Court will inquire into whether the Legislature would prefer severance or that the entire Act be stricken. *Id.* In this case, the Alabama Legislature has been clear that severance is preferred. Doc. 1-2 at 72 ("The provisions of this [A]ct are severable. If any part of this [A]ct is declared invalid or unconstitutional, that declaration shall not affect the part which remains.").

As Defendants demonstrate below, Plaintiffs cannot prevail on any of their various challenges to Act No. 2011-535. However, if this Court disagrees on any discrete challenge, and given the diverse topics collected in Act No. 2011-535, severance for the purpose of preliminary injunctive relief is clearly preferable to the blunt remedy of enjoining the Act in its entirely.

C. STANDING

Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies, and the doctrine of standing helps to ensure that courts are so constrained. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of

standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

The Supreme Court has “established that the irreducible constitutional minimum of standing contains three elements.” *Lujan*, 504 U.S. at 560. The first of these is that “the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Id.* (internal quotation marks, citations, and footnote omitted). “Particularized[] . . . mean[s] that the injury must affect the plaintiff in a personal and individual way.” *Id.* at 560 n.6.

Next, “there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted; alterations by the Court). Finally, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision” of the Court. *Id.* at 561 (internal quotation marks and citations omitted).

Plaintiffs bear the burden of establishing standing. *Lujan*, 504 U.S. at 561. And, they must do so as to each claim; “[s]tanding 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 citations and quotation marks omitted).

Additionally, with respect to the organizational Plaintiffs, it is imperative to keep in mind that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Unless these three prongs are all met, the organization lacks standing to bring suit on behalf of its members.

Here, the Complaint lists a number of Plaintiffs, a number of concerns about Act No. 2011-535, and a number of claims, without ever effectively tying them together. While the State Defendants have moved for a more definite statement to correct this deficiency, doc. 36, a hearing on that motion will be held at the same time as a hearing on the preliminary injunction motion, doc. 52. Accordingly, it will not be easy to determine whether any Plaintiff has standing to bring any particular claim; the particular concern revolves around whether any Plaintiff has an injury that "is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Nonetheless, this is something which should be considered throughout the preliminary injunction

analysis, both as a jurisdictional matter and with respect to the question of whether Plaintiffs have established that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

Finally, it appears that some of the anonymous Plaintiffs are unlawfully present in the United States.[13] The Northern District of Oklahoma, when considering a challenge to an Oklahoma law that is very similar to Act No. 2011-535, held that such Plaintiffs lacked prudential standing to challenge the State law. *National Coalition of Latino Clergy, et al. v. Henry, et al.*, 2007 WL 4390650, 2007 U.S. Dist. LEXIS 91487 (2007). In articulating its holding, the Court stated:

> An illegal alien, in willful violation of federal immigration law, is without standing to challenge the constitutionality of a state law, when compliance with federal law would absolve the illegal alien's constitutional dilemma—particularly when the challenged state law was enacted to discourage violation of the federal immigration law.

2007 WL 4390650 at *9, 2007 U.S. Dist. LEXIS 91487 at *28. This Court should likewise prudentially decline to take jurisdiction with respect to the illegal alien Doe Plaintiffs. Doing so may also result in the dismissal of some of the issues raised in this litigation, though that will be easier to assess once a more definite statement is provided.

---

[13] Based on the bare descriptions provided in the Complaint, it appears that Jane Doe #2, doc. 1 at ¶¶ 116-21, Jane Doe #4, *id.* at ¶¶ 126-30, Jane Doe #5, *id.* at ¶¶ 131-36, Jane Doe #6, *id.* at ¶¶ 137-42, John Doe #2, *id.* at ¶¶ 147-50, John Doe #3, *id.* at ¶¶ 151-54, John Doe #4, *id.* at ¶¶ 155-59, John Doe #5, *id.* at ¶¶ 160-62, and John Doe #6, *id.* at ¶¶ 163-65, are all aliens who are not lawfully present in the United States.

D. CERTIFICATION TO THE ALABAMA SUPREME COURT

Act No. 2011-535 is entirely new, and the Alabama "courts have had no occasion to construe the law in the context of actual disputes . . . , or to accord the law a limiting construction to avoid constitutional questions." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008).[14] Of course, only the Alabama Supreme Court can authoritatively construe Act No. 2011-535. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972) ("Only the Georgia courts can supply the requisite construction, since of course we lack jurisdiction authoritatively to construe state legislation.") (internal quotation marks and citation omitted). And, to the extent necessary, if any, it is the Alabama Supreme Court that can offer "a limiting construction" of Act No. 2011-535. *Washington State Grange*, 552 U.S. at 450; *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964) ("[T]his Court ordinarily accepts the construction given a state statute in the local courts and also presumes that the statute will be construed in such a way as to avoid the constitutional question presented . . . .").

In 1997, writing for a unanimous Court, Justice Ginsburg summarized the "cardinal principle" that federal courts must follow when called upon to consider a

[14] A challenge to Act No. 2011-535 was just filed in the Montgomery County Circuit Court on July 22, 2011. *See Doe v. Bentley*, Case No. CV-2011-882 (Montgomery County Circuit Court, Hardwick, J.). The *Doe* litigation originally raised State constitutional claims, and an amended complaint raising federal claims has now been filed.

constitutional challenge to a State statute that has not been reviewed by the State's courts:

> Federal courts, when confronting a challenge to the constitutionality of a federal statute, follow a "cardinal principle": They "will first ascertain whether a construction ... is fairly possible" that will contain the statute within constitutional bounds. *See Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *Ellis v. Railway, Airline & Steamship Clerks*, 466 U.S. 435, 444 (1984); *Califano v. Yamasaki*, 442 U.S. 682, 692-693, (1979); *Rescue Army* [*v. Municipal Court of City of Los Angeles*], 331 U.S. [549,] 568-569 [(1947)]. State courts, when interpreting [S]tate statutes, are similarly equipped to apply that cardinal principle. *See Knoell v. Cerkvenik-Anderson Travel, Inc.*, 185 Ariz. 546, 548, 917 P.2d 689, 691 (1996) (*citing Ashwander*).

Arizonans for Official English v. Arizona, 520 U.S. 43, 78-79 (1997) (first alteration by the Court).

As the Eleventh Circuit has noted, "[w]hen substantial doubt exists about the answer to a material [S]tate law question upon which the case turns, a federal court should certify that question to the [S]tate supreme court in order to avoid making unnecessary [S]tate law guesses and to offer the [S]tate court the opportunity to explicate [S]tate law…. Only through certification can federal courts get definitive answers to unsettled [S]tate law questions. Only a [S]tate supreme court can provide what we can be assured are 'correct' answers to [S]tate law questions, because a [S]tate's highest court is the one true and final arbiter of [S]tate law." *Forgione v. Dennis Pirtle Agency, Inc.*, 93 F.3d 758, 761 (11th Cir.1996) (*per curiam*) (internal quotation marks and citation omitted); *see also Riley v. Kennedy*,

553 U.S. 406, 425 (2008) ("A State's highest court is unquestionably 'the ultimate exposito[r] of state law.'") (alteration by the Court; *quoting Mullaney v. Wilbur,* 421 U.S. 684, 691 (1975)); *McMahan v. Toto*, 311 F.3d 1077, 1079 (11th Cir. 2002) ("[W]hen we write to a state law issue, we write in faint and disappearing ink.") (internal quotation marks and citation omitted).

Alabama's Rules of Appellate Procedure allow this Court to certify questions to the Alabama Supreme Court to give it the opportunity to interpret the Act once and for all. Rule 18(a) provides:

> When it shall appear to a court of the United States that there are involved in any proceeding before it questions or propositions of law of this State which are determinative of said cause and that there are no clear controlling precedents in the decisions of the Supreme Court of this State, such federal court may certify such questions or propositions of law of this State to the Supreme Court of Alabama for instructions concerning such questions or propositions of [S]tate law, which certified question the Supreme Court of this State, by written opinion, may answer.

Ala. R. App. P. 18(a). If this Court certified questions to the Alabama Supreme Court, the parties to this litigation would have the opportunity, and responsibility, to brief the issues to the State court. Ala. R. App. P. 18(g).

Certification of novel questions of State law to the State's highest court promotes judicial economy. "Certification procedure ... allows a federal court faced with a novel [S]tate-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of

gaining an authoritative response." *Arizonans for Official English v. Arizona*, 520 U.S. at 76.

In addition to clarifying ambiguities and limiting any problematic areas, review by the Alabama Supreme Court additionally offers the possibility of a resolution based on controlling State law. This Court lacks jurisdiction to direct State officials to comply with State law.[15] The Alabama Supreme Court, however, could read Act No. 2011-535 in compliance with the Alabama Constitution and that reading would be authoritative. *Riley*, 553 U.S. at 425; *Mullaney,* 421 U.S. at 691.[16]

The Plaintiffs' Complaint is chock-full of speculation about how Act No. 2011-535 will be implemented and the parade of horrors that they believe will inevitably result. The State Defendants do not read the Act the same way that the Plaintiffs do, but the law is not beyond rebuke and an authoritative construction offers a good many benefits. The many issues raised by the Plaintiffs in this

---

[15] U.S. Const. Amend. XI; *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 106 (1984) ("A federal court's grant of relief against [S]tate officials on the basis of [S]tate law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on [S]tate sovereignty than when a federal court instructs [S]tate officials on how to conform their conduct to [S]tate law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.").

[16] While this Court would not certify a question about compliance with the Alabama Constitution, the Alabama Supreme Court would need to read Act No. 2011-535 in such as way as to promote compliance with the Alabama Constitution and the State Defendants would be able to argue for such a construction.

litigation are serious matters, but so are concerns of federalism and comity. Certifying the question of statutory construction to the Alabama Supreme Court will satisfy the latter and enable the Court to best consider the former.

E. SPECULATION, HEARSAY, ETC.

The State Defendants offer a word of caution about the declarations Plaintiffs submit in support of their motion. There is little in the way of hard facts based on personal knowledge. Instead, they present hearsay[17], legal opinion[18], speculation[19], and even speculation about other people's speculation[20].

The State Defendants do not contend that Plaintiffs must be held to the same evidentiary standards that would apply at trial or on a motion for summary

---

[17] *See, e.g.,* Doc. 37-3 at ¶ 11 ("Since the passage of HB 56 [*sic*], numerous Hispanic clients have expressed a fear to travel to AAC's clinics . . . . "); Doc. 37-5 at ¶ 11 ("Some members have stated that they are nervous . . . ."); *id.* at ¶ 12 ("But some members have questioned if they can continue to provide interpretation and translation services if HB 56 [*sic*] goes into effect.").

[18] *See, e.g.,* Doc. 37-4 at ¶ 9 ("HB 56 would criminalize many of HIHC's activities and the activities of the other volunteers and organizations that we work with.").

[19] *See, e.g.,* Doc. 37-2 at ¶ 12 ("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."); Doc. 37-3 at ¶ 11 ("We also expect that the Hispanic community will be much more reluctant to interact with AAC staff conducting HIV testing in their communities, if HB 56 [*sic*] is implemented."); Doc. 37-7 at ¶ 13 ("SEIU will be harmed if HB 56 [*sic*] is implemented because employers in the [S]tate of Alabama will refrain from hiring members and potential members of SEIU that they believe look or sound 'foreign' based on a fear that they will be subject to increased liability under HB 56 [*sic*]."); Doc. 37-10 at ¶ 7 ("a law enforcement officer may be confused . . ."); Doc. 37-12 at ¶ 10 ("Confusion over HB 56 is also likely to make people afraid to drive or to seek government services.").

[20] *See e.g.,* Doc. 37-4 at ¶ 11("I believe that churches with mostly American congregations do not want to host events for a Latino organization because of the assumption that undocumented individuals will attend.").

judgment. Hearsay and speculation are not necessarily forbidden at the preliminary injunction stage. *See Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) ("At the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding.") (internal quotation marks and citation omitted).

That does not, however, mean "anything goes." As Judge Godbold explained for the former Fifth Circuit: "While we do not rule out the possibility that hearsay may form the basis for, or contribute to, the issuance of a preliminary injunction, the district courts have shown *appropriate reluctance* to issue such orders where the moving party substantiates his side of a factual dispute on information and belief." *Marshall Durbin Farms, Inc. v. National Farmers Org., Inc.*, 446 F.2d 353, 357 (5th Cir. 1971) (citation omitted; emphasis added); *see also id.* at 358 ("[T]he courts are more cautious about invoking the extraordinary remedy of the preliminary injunction where critical facts are in dispute."); *Palmer v. Braun*, 155 F.Supp.2d 1327, 1331 (M.D. Fla. 2001) ("Moreover, vague or conclusory affidavits are insufficient to satisfy the plaintiff's burden. Furthermore, affidavits based on personal knowledge are accorded more weight than affidavits based upon mere belief or hearsay. *See* 13 Moore's Federal Practice § 65.23[2]

(3d ed.2000).") (some citations omitted); *Clark v. Merrill Lynch*, 1995 WL 17909500 *4 (M.D. Fla. June 15, 1995) ("While affidavits containing hearsay are often submitted in preliminary injunction proceedings, issuance of preliminary injunctive relief is frowned upon 'where the moving party substantiates his side of a factual dispute with information and belief.'") (*quoting Marshall Durbin Farms*, 446 F.2d at 357).

The treatises are in accord. 13 *Moore's Federal Practice* § 65.23[2] (3d ed. 2000) ("Affidavits based on belief or hearsay statements may be considered by the trial court in evaluating a request for preliminary injunctive relief. Not surprisingly, however, affidavits based on personal knowledge will be more persuasive than affidavits based on belief or hearsay.") (footnotes omitted); Wright, Miller, & Kane, *Federal Practice & Procedure* § 2949(9)(B) ("Once received, however, the question of how much weight an affidavit will be given is left to the trial court's discretion. The quality of the affidavit will have a significant effect on this determination. Not surprisingly, therefore, when the primary evidence introduced is an affidavit made on information and belief rather than on personal knowledge, it generally is considered insufficient to support a motion for a preliminary injunction."). Certainly, hearsay and speculation should be given much less weight than proper evidence.

Moreover, a primary reason for admitting affidavits based on hearsay and speculation at this stage is that "[s]peed is often extremely important in proceedings for restraining orders and temporary injunctions, and both the movant and the opposing party are often unable to obtain and marshal their evidence in a manner that would be proper for a summary judgment hearing or for an actual trial." Wright, Miller, & Kane, *Federal Practice & Procedure* § 2949(9)(B) (internal block quote formatting and citation omitted). When Plaintiffs are represented by 35 attorneys, at latest count, and were able to submit 41 affidavits of their own (and 4 from other cases), they can hardly claim an inability to submit more reliable evidence. A fundamental basis for relaxing evidentiary standards does not apply here.

The State Defendants therefore urge the Court to consider the extent to which Plaintiffs' evidence is based on personal knowledge and to give little, if any, weight to those declarations which are simply speculative.

F. SECTIONS 5(f) AND 6(f)

One concern raised about Act No. 2011-535 has been the way in which Sections 5(f) and 6(f) might be read to influence enforcement of the remainder of the Act. This concern is unfounded.

Section 5(f) of the Act provides:

> 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.

Doc. 1-2 at 15-16 (emphasis added).

Section 6(f) of the Act provides:

> 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.

Doc. 1-2 at 19 (emphasis added).

On their face, these subsections are inconsistent if the word "Act"—where emphasized above—is not read as "Section." They are inconsistent because each purports to apply Act-wide, yet applies a different standard. *Compare* Section 5(f), doc. 1-2 at 16 ("*willfully fails* to report any violation of this act when the person *knows* that this act is being violated") (emphasis added) *with* Section 6(f), doc 1-2 at 19 ("*Failure* to report . . .*reasonable cause* to believe that this act is being violated . . . ."). The Code Commissioner agrees, and intends to codify Section

5(f) and Section 6(f) to replace "Section" where "Act" is found. *See* Exhibit 2 (Declaration of Jerry Bassett).

This is the only logical interpretation of the Legislature's intent. Any other reading would turn all employees of the State of Alabama and its subdivisions into roving law enforcement officers despite a complete lack of training or authority. It might also raise issues about overtime pay for hourly employees, and, of course, any other interpretation makes little sense when one considers that the crime associated with Section 5(f) and Section 6(f) concerns governmental operations.[21] Reading these subsections as creating an enforcement mechanism only for Section 5 and Section 6 ensures that public employees, with their special knowledge of the operations of their departments and agencies, are required as a part of their regular

---

[21] Ala. Code § 13A-10-2 provides:

> (a) A person commits the crime of obstructing governmental operations if, by means of intimidation, physical force or interference or by any other independently unlawful act, he:
>
> (1) Intentionally obstructs, impairs or hinders the administration of law or other governmental function; or
>
> (2) Intentionally prevents a public servant from performing a governmental function.
>
> (b) This section does not apply to the obstruction, impairment or hindrance of the making of an arrest.
>
> (c) Obstructing governmental operations is a Class A misdemeanor.

Ala. Code § 13A-10-2.

employment to report a failure of their departments and agencies to comply with the specific requirements of Section 5 and Section 6.

In short, then, the State Defendants do not read Section 5 and Section 6 to compel, for example, school officials reviewing birth certificates pursuant to Section 28 of the Act to take any further action beyond the data collection required by Section 28 itself. *See* Exhibit 3 (Letter from Superintendent Morton) at 4 (flow chart).

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).[22]

IV. PREEMPTION

There are two general categories of preemption: express preemption and implied preemption. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion). Express preemption occurs when a federal

[22] To the extent that the Court is unpersuaded by the unified action of the Alabama Attorney General and the Code Commissioner, certification to the Alabama Supreme Court remains an appropriate avenue for conclusive resolution of the issue.

statute expressly bars a State or local government from passing a particular law. The Plaintiffs in this case do not assert express preemption by any Act of Congress. Rather, they make a series of implied preemption claims, the first of which falls into the category of "regulation of immigration" preemption, Doc. 37 at 19-26, and the rest of which fall into the category of conflict preemption.

Plaintiffs offer seven conflict preemption claims in total. First, they claim that Act No. 2011-535 is preempted because it uses the term "alien unlawfully present in the United States." Doc. 37 at 28-31. Second, they claim that the arrest provisions requiring state law enforcement officers to verify aliens' immigration statuses with the federal government conflict with federal law. *Id*. at 31-35. Third, they claim that Alabama has developed its own alien registration scheme by imposing penalties for failure to carry federally-issued documents that federal law already requires aliens to carry. *Id*. at 35-37. Fourth, they claim that Act No. 2011-535 conflicts with federal law by making it a State crime for unauthorized aliens to work. *Id*. at 37-39. Fifth, they claim that Section 13 of Act No. 2011-535 conflicts with the federal harboring statute. *Id*. at 39-42. Sixth, the Plaintiffs claim that Section 27 of Act No. 2011-535 interferes with a federally-protected right to contract. *Id*. at 42-44. Finally, the Plaintiffs assert that Act No. 2011-535 places excessive burdens on the federal government. Doc. 37 at 44-49. Before turning to each of these arguments specifically, it is necessary to lay out a few fundamental

principles of preemption—principles that Plaintiffs attempt to defy.

A. THE PRESUMPTION AGAINST PREEMPTION

Plaintiffs pointedly fail to mention the starting point of *every* preemption case—the presumption against preemption. "'[I]n *all* pre-emption cases, …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*, 555 U.S. ___, 129 S. Ct. 1187, 1194-95 (2009) (emphasis supplied) (*quoting Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)). Although the presumption against preemption is stronger in some cases and weaker in others, it "applies with particular force" in cases like this one, in which the challenged law is in "a field traditionally occupied by the states." *See Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008). Here, Act No. 2011-535 operates in a variety of fields traditionally occupied by the States: the regulation of business licenses, the regulation of rental housing, the distribution of public benefits, the determination of arrest protocols by local law enforcement officers, the administration of elementary and secondary schools, and the allocation of postsecondary educational benefits. The fact that these regulations have a common purpose—discouraging illegal immigration—does not alter the fields on which they operate. And those fields are undeniably fields traditionally occupied by the States.

To overcome the presumption against preemption, a plaintiff must demonstrate *unmistakable* Congressional intent to preempt state regulation. In the controlling immigration preemption analysis of *De Canas v. Bica*, 424 U.S. 351 (1976),[23] the Supreme Court explained this high standard:

> "[F]ederal regulation … should not be deemed preemptive of state regulatory power in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has *unmistakably* so ordained."

424 U.S. at 356 (*quoting Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)) (emphasis supplied). The Supreme Court has repeatedly reconfirmed this principle. "[T]he historic police powers of the States [are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *Altria Group*, 555 U.S. at 77. "[W]e will not infer pre-emption of the States' historic police powers absent a clear statement of intent by Congress." *Gade*, 505 U.S. at 111-12 (Kennedy, J., concurring) (*citing Rice v. Santa Fe Elevator Corp*., 331 U.S. at 230; *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977); and *English v. General Electric Co*., 496 U.S. 72, 79 (1990)).

Plaintiffs do not come close to clearing this hurdle. They fail to identify a single federal statute that is in conflict with Act No. 2011-535. Instead, they offer theories of unwritten constitutional intent, supposing that Act No. 2011-535 might

---

[23] *De Canas* was abrogated by statute, but its reasoning and analysis are regularly cited by courts interpreting immigration law. *Whiting*, 131 S.Ct. at 1974, 1981. *Georgia Latino Alliance for Human Rights v. Deal*, ___ F.Supp.2d ___, 2011 WL 2520752, *12,*15 (N.D. Ga. June 27, 2011). Similarly, *De Canas* is also relied upon by the Plaintiffs. *See* Doc. 37, at 19, 24.

somehow be in tension with those theories. For example, they attempt to read much into Congressional silence, suggesting that "an intentional omission on the part of Congress" should have preemptive effect. Doc. 37 at 29. Such omissions do not constitute expressions of "'the clear and manifest purpose of Congress.'" *Altria Group*, 555 U.S. at 77 (*quoting ice*, 331 U.S. at 230). Plaintiffs fall far short of what is necessary to displace the presumption against preemption.

B. THE FRAMEWORK OF IMMIGRATION PREEMPTION ESTABLISHED BY THE SUPREME COURT IN *DE CANAS* AND *WHITING*.

Implied preemption in the immigration context is governed by the Supreme Court's analysis in *De Canas*, a case in which the Court held a California statute prohibiting the employment of unauthorized aliens to not be preempted. In *De Canas*, the Court laid out a three-part test for determining whether a State or local regulation affecting immigration is displaced through implied preemption. A State regulation is only preempted (1) if it falls into the narrow category of a "regulation of immigration," 424 U.S. at 355, (2) if Congress expressed "'the clear and manifest purpose'" of completely occupying the field and displacing all State activity, *id*. at 357, or (3) if the State regulation conflicts with federal laws, such that it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id*. at 363. Otherwise, a State or local government is free to enact a law that discourages illegal immigration or "deals with aliens," without being preempted. *See id*. at 355.

On May 26, 2011, for the first time in thirty-five years, the Supreme Court issued an opinion addressing a federal preemption challenge in the immigration context. In *Chamber of Commerce of the United States v. Whiting*, 563 U.S. _____, 131 S. Ct. 1968 (2011), the Court upheld the Legal Arizona Workers Act against several preemption challenges. The similarities between this case and *Whiting* are numerous and significant. Both involve State laws intended to discourage illegal immigration—in Arizona by preventing the hiring of illegal aliens, and in Alabama by preventing the hiring of illegal aliens, the harboring of illegal aliens, and the provision of public benefits to illegal aliens. Both involve State laws that precisely duplicate the terms of federal immigration law. Both involve State or local laws that expressly rely upon federal verification of an alien's immigration status pursuant to 8 U.S.C. § 1373(c).[24] Both include virtually-identical statutory language to ensure State deference to federal determinations of immigration status.[25] Both involve State or local laws based on the principle of concurrent enforcement – whereby the State or local law prohibits the same activity that is already prohibited by federal law. And both involve conflict

---

[24] *Compare* Ariz. Rev. Stat. § 23-212(B), *with* Act No. 2011-535 §§ 10(b), 11(b), 12(a), 12(b), 12(c), 13(g), 15(h), 17(e), 19(b), 27(d), 30(f).

[25] *Compare* Ariz. Rev. Stat. § 23-212(B) ("A state, county or local official shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States."), *with* Act No. 2011-535 § 10(b) ("A law enforcement officer shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States.").

preemption challenges based not on the unmistakeable text of federal law, but rather on unstated inferences that plaintiffs attempted to read into federal law.

Whiting concerned two broad challenges to the Arizona law, one based on express preemption and one based on conflict preemption. The conflict-preemption portion of the *Whiting* opinion is decisive in the instant case, which involves virtually identical conflict-preemption arguments. In rejecting the conflict preemption arguments of the plaintiffs in that case, the *Whiting* Court applied the *De Canas* test and offered further guidance on how it should be applied by federal courts.

First, the *Whiting* Court once again made clear just how difficult it is to bring an implied preemption challenge in the immigration context: "Our precedents 'establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act.' That threshold is not met here." *Whiting*, 131 S.Ct. at 1985 (*quoting Gade*, 505 U.S. at 110 (Kennedy, J., concurring)).

Second, the *Whiting* Court made clear that tension with unstated congressional objectives is not sufficient to preempt a State law. Like the plaintiffs in *Whiting*, the Plaintiffs here have failed to identify a single federal statute that evinces a congressional intent to preempt laws like Act No. 2011-535. Instead, they base their preemption arguments on a supposed tension with unstated

congressional objectives. The *Whiting* Court emphatically rejected this approach: "Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Id*. (*quoting Gade*, 505 U.S. at 111 (Kennedy, J., concurring)).

Third, the *Whiting* Court made clear that a state statute that uses the terminology of federal immigration law and defers to the federal determination of any alien's immigration status is not conflict preempted. The *Whiting* Court rested its holding heavily on two factors: (1) that the Arizona law used the terminology of federal law precisely; and (2) that the Arizona law relied upon and deferred to federal determinations of an alien's status:

> . . . 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." …
>
> 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.

> The federal determination on which the State must rely is provided under 8 U.S.C. § 1373(c).

Whiting, 131 S.Ct. at 1981-82 (footnote omitted).[26]

The same two factors are present here. Act No. 2011-535 was drafted to use the terminology of federal immigration law. In addition, Act No. 2011-535 contains language nearly identical to Arizona's requiring local officials to rely solely on federal determinations of immigration status. *See* §§ 10(b), 11(b), 12(a), 12(b), 12(c), 13(g), 15(h), 17(e), 19(b), 27(d), 30(f). The presence of nearly-identical language in the two laws is not accidental: Act No. 2011-535 was revised after the Supreme Court decision in *Whiting* in order to ensure that it conformed to the decision of the *Whiting* Court. The Supreme Court has highlighted this specific language and has expressly approved it. *Whiting*, 131 S.Ct. at 1981.

Fourth and finally, the Supreme Court approved the doctrine of concurrent enforcement. Perhaps no preemption doctrine more compellingly supports the State of Alabama's position than the well-established doctrine of concurrent enforcement. "Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized." *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds, Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999), (*citing Paul*, 373 U.S. at 142).

---

[26] IRCA is the Immigration Reform and Control Act of 1986, Pub.L. 99-603, 100 Stat. 3359.

The *Whiting* Court acknowledged that concurrent enforcement is permissible in the immigration arena, emphasizing that the Arizona law "trace[s]" federal law:

> From this basic starting point, the Arizona law continues to trace the federal law. Both the state and federal law prohibit "knowingly" employing an unauthorized alien. But the state law does not stop there in guarding against any conflict with the federal law. The Arizona law provides that … the "term shall be interpreted consistently with 8 United States Code § 1324a and any applicable federal rules and regulations." § 23-211(8).

Whiting, 131 S. Ct. at 1982 (citations omitted). Act No. 2011-535 does the same thing: Section 13(a) is a mirror image of federal law. Section 13(a) prohibits the "conceal[ing]," "harbor[ing]," "shield[ing]," "induc[ing]," "encourag[ing]," or "transport[ing]" of illegal aliens, using the exact language of federal law, found at 8 U.S.C. § 1324(a)(1)(A)(ii)-(iv). Act No. 2011-535 is a textbook example of concurrent enforcement and is therefore not conflict preempted. In drafting their Motion, Plaintiffs have ignored a holding of the United States Supreme Court that is less than three months old. For this reason, and because the Plaintiffs have failed to identify a single federal statute that conflicts with Act No. 2011-535, Plaintiffs cannot prevail in their preemption claims.

C. ACT NO. 2011-535 DOES NOT CONSTITUTE A "REGULATION OF IMMIGRATION," AS DEFINED IN *DE CANAS*.

Plaintiffs' motion devotes no less than eight pages to their claim that Act No. 2011-535 is a preempted regulation of immigration. Yet not once in those eight pages do Plaintiffs actually apply the definition of what constitutes a

preempted "regulation of immigration," as explained by the Supreme Court in *De Canas*. 424 U.S. 355. In *De Canas*, the Supreme Court explained that a "regulation of immigration" for preemption purposes has a very specific, and narrow, meaning:

> [T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which 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*.

De Canas, 424 U.S. at 355 (emphasis added).

Act No. 2011-535 in no way determines who should or should not be admitted into the country. On the contrary, the law defers to federal categories of immigration status and the federal government's determination of any particular alien's immigration status. Under Act No. 2011-535, "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." Act No. 2011-535 §§ 10(b), 11(b). Nothing in the law can plausibly be construed as an attempt to define which aliens may lawfully enter the United States.

Nor does Act No. 2011-535 determine "the conditions under which a legal entrant may remain" in the United States. *De Canas*, 424 U.S. at 355. The law does not purport to establish any new condition that an alien must satisfy to remain

classified as an alien lawfully present in the United States. That is entirely a question of federal law, determined under 8 U.S.C. §§ 1101, *et seq*. Nor does it establish conditions for any legal entrant to remain within the borders of the United States. Perhaps aware that Act No. 2011-535 does not set "the conditions under which a legal entrant may remain [in the United States]," *De Canas*, 424 U.S. at 355, Plaintiffs attempt to massage this standard into something entirely different. Plaintiffs suggest that any law that "alters the conditions" of routine interactions with the State is a preempted regulation of immigration. Doc. 37 at 21. However, altering the atmosphere of interactions with the State is nothing like establishing a condition that must be met for an alien to retain lawful presence in the United States.

Plaintiffs also complain that Act No. 2011-535 requires aliens who are lawfully present to repeatedly verify their immigration status, as a condition of receiving certain benefits from the State. Doc. 37 at 21. It is true that Act No. 2011-535 does establish conditions that any person (citizens and aliens alike) must meet in order to obtain public benefits, obtain employment, and attend public institutions of higher education in the State of Alabama. But this requirement no more establishes a condition for a legal entrant to remain lawfully present in the United States than a State law establishing requirements for obtaining a driver's license imposes such a condition.

Moreover, States are *required* by federal law to verify the lawful presence of aliens in a variety of contexts. For example, 8 U.S.C. § 1621 requires States to deny public benefits to illegal aliens, necessarily compelling States to verify aliens' lawful presence if States are going to make any public benefits available to aliens. In addition, 6 C.F.R. § 37.13(b) requires States to use the Systematic Alien Verification for Entitlements (SAVE) program to verify the lawful immigration status of an alien seeking to obtaining a driver's license that complies with the REAL-ID Act. Pub. L. 109-13, 119 Stat. 231 (2005). In any event, Plaintiffs' argument again misses the point. Requiring the verification of an alien's immigration status as a condition of receiving some benefit is not the same thing as establishing a legal condition that must be met for an alien to retain lawful presence in the United States. The latter is entirely a question of federal law to which Act No. 2011-535 defers.

As the Supreme Court has made clear, a State is free to enact legislation discouraging illegal immigration into its jurisdiction without being preempted:

> In this case, California has 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; 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* … .

De Canas, 424 U.S. at 355-56 (emphasis supplied). Likewise, Act No. 2011-535 is not a constitutionally-proscribed regulation of immigration.

Instead of applying the definition of "regulation of immigration" supplied by the Supreme Court in *De Canas*, Plaintiffs offer rhetoric that has little bearing on the legal question of what constitutes a "regulation of immigration." They declare that "HB 56 [*sic*] consists of provisions that directly relate to the expulsion of immigrants from Alabama." Doc. 37 at 20. Plaintiffs' statement is incorrect. Nothing in the law attempts to expel or deport any alien from the State of Alabama or from the United States. The State cannot, and does not, seek to create a State-level deportation process. It should also be noted that, while the law does seek to discourage *illegal* aliens from remaining unlawfully present in Alabama, it does not in any way discourage aliens who are lawfully present in the United States from remaining. Regardless, the Supreme Court in *De Canas* made clear what a preempted regulation is; and, despite Plaintiffs' protests, Act No. 2011-535 does not qualify as one. *De Canas*, 424 U.S. at 355.

Finally, Plaintiffs offer the statements of individual legislators—statements which they characterize as legislative history supporting their assessment that Act No. 2011-535 regulates immigration. Doc. 37 at 22-23. However, a legislator's reference to the word "immigration" does not convert a law that permissibly affects aliens in the State into a law that constitutes a "regulation of immigration"

under the definition of *De Canas*. See 424 U.S. at 355. Indeed, even if a legislator had actually stated that he intended Act No. 2011-535 to regulate immigration (which none of Plaintiffs' quoted statements say), it would not matter. The term "regulation of immigration" has a fixed meaning established by the Supreme Court. Statements of these individual legislators in determining whether Act No. 2011-535 regulates immigration are irrelevant to the legal question at hand. *See United States v.O'Brien*, 391 U.S. 367, 384 (1968) ("It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it.").

D. ACT NO. 2011-535 IS NOT CONFLICT PREEMPTED

As noted above, the Supreme Court made clear in *Whiting* that the hurdle for establishing conflict preemption in the immigration context is a high one. "'[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.'" *Whiting*, 131 S. Ct. at 1985 (*quoting Gade*, 505 U.S. at 110). None of Plaintiffs' conflict preemption claims come close to clearing this hurdle. Plaintiffs are therefore unlikely to prevail on their conflict preemption claims.

1. Act No. 2011-535 Does Not Create Any Alien Classification.

Plaintiffs point out (correctly) that Act No. 2011-535 repeatedly uses the phrase "alien lawfully present in the United States" or "alien unlawfully present in the United States." Doc. 37 at 28. They then suggest that the phrase "alien unlawfully present in the United States" is used only in a narrow and technical way with no application to the Act, *id.* at 29, n.9, and imply that Act No. 2011-535 must be creating a new alien classification. However, "alien unlawfully present" is the most frequently used term for illegal aliens in federal law. It was used in Act No. 2011-535 for precisely that reason.

Act No. 2011-535 was drafted to use the terms of federal law. The claim that "alien lawfully present in the United States" is a State-created classification is an extraordinary one, given that it is *the* most-frequently used terminology in federal law to describe the concept. Here are just a few examples of federal statutes using the phrase:

> 8 U.S.C. § 1229a(c)(2) ("the alien has the burden of establishing ... by clear and convincing evidence, that the alien is lawfully present in the United States");
>
> 8 U.S.C. § 1357(g)(10) ("for any officer or employee of a State or political subdivision of a State ... (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States");
>
> 8 U.S.C. § 1182(a)(9)(B)(i)(II) ("Any alien … who … has been unlawfully present in the United States for one year or more, and who

again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible");

8 U.S.C. § 1623 ("[A]n alien who is not lawfully present in the United States shall not be eligible … for any postsecondary education benefit …");

8 U.S.C. § 1621(d) ("A State may provide that an alien who is not lawfully present in the United States is eligible …");

42 U.S.C. § 1436a(a)(3) ("an alien who is lawfully present in the United States pursuant to an admission under section 1157 of Title 8 …");

42 U.S.C. § 1436a(a)(5) ("an alien who is lawfully present in the United States as a result of the Attorney General's withholding deportation pursuant to section 1231(b)(3) of Title 8");

42 U.S.C. § 4605 ("[A] displaced person shall not be eligible to receive relocation payments or any other assistance under this Chapter if the displaced person is an alien not lawfully present in the United States");

26 U.S.C. § 3304(a)(14)(A) ("compensation shall not be payable on the basis of services performed by an alien unless such alien … was lawfully present …"); and

7 U.S.C. § 2015(f) ("No individual … shall be eligible to participate [in the supplemental nutrition assistance program] … unless he or she is …an alien who is lawfully present in the United States as a result of an exercise of discretion by the Attorney General for emergent reasons").

And Congress used the phrase recently and repeatedly in the national healthcare law, the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), requiring for eligibility in the case of an alien an "attestation that the

individual is an alien lawfully present in the United States." *Id.*, § 1411(c)(2)(B)(ii)(II); *see also id.*, §§ 1402(e)(2), 1411(c)(2)(B)(i)(I).

Apparently, Plaintiffs believe that none of the sections of federal law cited above have any coherent meaning. How can the benefits of the new national health care program be denied to aliens who are not lawfully present in the United States if the phrase has no meaning? How can the Department of Homeland Security cooperate with a municipality to remove aliens not lawfully present in the United States pursuant to 8 U.S.C. § 1357(g)(10) if the term has no meaning? How can the Department of Housing and Urban Development deny housing assistance to an alien not lawfully present in the United States pursuant to 42 U.S.C. § 1436a(a)(3) if the term has no meaning? How can a state deny in-state tuition to an alien not lawfully present in the United States pursuant to 8 U.S.C. § 1623 if the term has no meaning? If Plaintiffs are correct, then none of these provisions of federal law can be meaningfully enforced.

Not only is the phrase "alien lawfully present in the United States" the predominant terminology used by federal statutes, it is also the phrase used by the Supreme Court. *See Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147 (2002) (referring to statute as "designed to deny employment to aliens who … are not lawfully present in the United States"); *Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) ("When an alien has been found to be unlawfully present in the United

States …"). The Eleventh Circuit also uses the phrase repeatedly. *See, e.g., United States v. Aguilar*, 398 Fed. Appx. 443 (11th Cir. 2010) (affirming sentence of alien pleading guilty to being an "unlawfully present alien" in possession of a firearm); *United States v. Palacios-Casquete*, 55 F.3d 557, 560 (11th Cir.1995) (holding that 8 U.S.C. § 1326 denounces the substantive crime of "unlawful presence" in the United States after having been deported).

Plaintiffs are also mistaken when they declare that federal law contains no definition of the phrase. Doc. 37 at 29-30. On the contrary, Department of Justice regulations define "alien who is lawfully present in the United States" at 8 C.F.R. § 103.12, and define the inverse of the term – an "alien unlawfully in the United States" – equally well:

> **Alien illegally or unlawfully in the United States**. Aliens who are unlawfully in the United States are not in valid immigrant, nonimmigrant or parole status. The term includes any alien
> (a) Who unlawfully entered the United States without inspection and authorization by an immigration officer and who has not been paroled into the United States under section 212(d)(5) of the Immigration and Nationality Act (INA);
> (b) Who is a nonimmigrant and whose authorized period of stay has expired or who has violated the terms of the nonimmigrant category in which he or she was admitted;
> (c) Paroled under INA section 212(d)(5) whose authorized period of parole has expired or whose parole status has been terminated; or
> (d) Under an order of deportation, exclusion, or removal, or under an order to depart the United States voluntarily, whether or not he or she has left the United States.

27 C.F.R. § 478.11. Note that the regulation specifically defines unlawful presence with reference to immigration status. In other words, if an alien possesses one of various lawful immigration statuses, he is lawfully present. If not, he is not lawfully present. Rather than define the term as a matter of state law, the State of Alabama appropriately defers to federal applications of this federal term. Act No. 2011-535 § 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).") This approach, under which a state defers to any federal determination of an alien's status, was expressly approved by the Supreme Court in *Whiting*. 131 S.Ct. 1981-82.

Finally, it should be noted that the Plaintiffs repeatedly use a term that is unknown to federal law: "undocumented immigrants." *See* Doc. 37 at 15, 16-17-22. The phrase appears *nowhere* in the immigration laws of the United States, or anywhere else in federal law. *See* 8 U.S.C. §§ 1101, *et seq*. Indeed, the phrase is self-contradictory. The term "immigrant" has a fixed and well-known meaning in federal immigration law – a lawful permanent resident alien (or "green card" holder).[27] By definition, an "immigrant" is lawfully present, and therefore not

[27] "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an *immigrant* in

"undocumented." The Plaintiffs' use of this term is ironic, considering how much criticism they heap upon the correct term prescribed by federal law: "alien not lawfully present in the United States."[28]

In summary, Plaintiffs' argument cannot be sustained. It is contradicted by the text of federal law, by the definitions found in federal regulations, and by the decisions of the Supreme Court, and must accordingly be rejected.

2. Act No. 2011-535's Arrest Provisions are Not Preempted.

Plaintiffs next contend that federal law limits state officers' arrest authority with respect to illegal aliens that they encounter during their routine law enforcement activities. Plaintiffs then object to the various provisions of Act No.2011-535 that allow state law enforcement officers to temporarily detain illegal aliens after their immigration status is confirmed by Immigration and Customs Enforcement ("ICE"), and then transfer such illegal aliens to federal custody. Doc. 37 at 32. To this end, Plaintiffs spend a page and a half laying out their view that state officers are *only* permitted to make immigration arrests in the circumstances described by four federal statutes 8 U.S.C. § 1252c, 8 U.S.C. § 1324(c), 8 U.S.C. § 1103(a)(10), and 8 U.S.C. § 1357(g). Doc. 37 at 32. What is missing from Plaintiffs' exposition is any supporting case law. That is because every Circuit of

---

accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20) (emphasis supplied).

[28] The other term used by federal law is "illegal alien." *See*, *e.g.*, 8 U.S.C. § 1356(r)(3)(ii); 8 U.S.C. § 1366(1).

the U.S. Courts of Appeals that has addressed the question has concluded that states have the inherent authority to make arrests of individuals that they encounter who are illegal aliens, in order to transfer those illegal aliens to federal custody.

The authority of state police to make arrests for violations of federal law is not limited to situations in which state officers are exercising power delegated by the federal government to the states. Rather, it is an inherent authority based on the fact that the states retain their sovereignty in the U.S. constitutional framework. The states' arrest authority is derived from the basic power of one sovereign to assist another sovereign. This is the same inherent authority that is exercised whenever a state law enforcement officer witnesses a federal crime being committed and makes an arrest. That officer is not acting pursuant to delegated federal power. Rather, he is exercising the inherent power of his state to assist another sovereign.

There is abundant case law on this point. In *Gonzales v. City of Peoria*, the Ninth Circuit opined with respect to immigration arrests that "[t]he general rule is that local police are not precluded from enforcing federal statutes." 722 F.2d at 474 (citations omitted). The Tenth Circuit has reviewed this question on several occasions, concluding squarely that "[a] state trooper has general investigatory authority to inquire into possible immigration violations." *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984). There is a

"preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999). In 2001, the Tenth Circuit reiterated that "state and local police officers [have] implicit authority within their respective jurisdictions 'to investigate and make arrests for violations of federal law, including immigration laws.'" *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001) (*quoting Vasquez-Alvarez*, 176 F.3d at 1295). None of these Tenth Circuit holdings drew any distinction between criminal violations of the INA and civil provisions that render an alien deportable. Indeed, in all of the cases, the officers involved inquired generally into possible immigration violations, often arresting without certainty as to whether the aliens' immigration violations were of a civil or criminal nature. Rather, the court described an inherent arrest authority that extends generally to all immigration violations.

Numerous precedents have affirmed the authority of state officers to act at every stage of the process. The Supreme Court has held that during a lawful detention, an officer can inquire into the detainee's immigration status without a prior reasonable suspicion of unlawful immigration status. *Muehler v. Mena*, 544 U.S. 93, 101 (2005). If the officer forms a reasonable suspicion of unlawful status, the officer may verify that suspicion by contacting the federal government. The

U.S. Courts of Appeals uniformly hold that officers may during a lawful stop (1) inquire into immigration status, (2) verify a suspect's status with ICE upon a reasonable suspicion that the person is unlawfully present, and (3) detain the alien if he is unlawfully present. *Estrada v. Rhode Island*; 594 F.3d 56 (1st Cir. 2010); *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 2001); *United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 619 (8th Cir. 2001); *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1300 (10th Cir. 1984); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001); *United States v. Favela-Favela*, 41 F. App'x 185, 191 (10th Cir. 2002). This agreement among the Circuits is not surprising, as Congress expressly encourages concurrent enforcement. 8 U.S.C. §§ 1357(g)(10), 1373(a)-(b).

Additionally, Plaintiffs' unsupported claim that "[f]ederal law contains narrow authorizations for state and local police to enforce federal immigration laws only specific circumstances," ignores cases in which courts have upheld an officer's detention and arrest of illegal aliens in contexts well beyond the limitations sought by Plaintiffs. For example, in *Vasquez-Alvarez*, 176 F.3d 1294, the Tenth Circuit rejected a preemption argument similar to Plaintiffs'—that "all arrests not authorized by § 1252c are prohibited by it" through preemption. *Id.* at 1297. Instead, the Tenth Circuit upheld the arrest, which was "based solely on the

fact that Vasquez was an illegal alien." *Id.* at 1295. The court explained that Congress' intent was to "displace [any] perceived federal limitation on the ability of state and local officers to arrest aliens in the United States," *id.* at 1298-99. In *Martinez-Medina*, 2010 U.S. App. LEXIS 10663, the Ninth Circuit upheld an officer's detention of an alien on nothing more than an admission of alien status and failure to possess "green cards." *See id.* at 2, 5-6.

In 1996, Congress enacted 8 U.S.C. § 1357(g), which allows state and local officers to be deputized as immigration agents. This congressionally-delegated authority is broader than, and distinct from, police officers' inherent authority to inquire into immigration status and arrest for immigration violations, in order to transfer illegal aliens to federal custody.[29] But Congress reaffirmed that a state's inherent authority to enforce federal immigration law was not restricted and that states could continue to assist in immigration enforcement *without any express authorization from Congress*. 8 U.S.C. § 1375(g)(10). Plaintiffs ignore Congress's intent expressed in 8 U.S.C. § 1375(g)(10).

Congress has passed numerous acts illustrating the clear and manifest intent to welcome state involvement in arresting illegal aliens and transferring them to federal custody. Congress has expressed its intent not to preempt state cooperation

[29] For a full elaboration of the difference between the authority conveyed by a 8 U.S.C. § 1357(g) agreement and the inherent authority possessed by all state law enforcement officers, see Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALBANY L. REV. 179, 196-201 (2005).

by (1) expressly reserving inherent state authority in immigration law enforcement (8 U.S.C. § 1357(g)(10)), (2) banning sanctuary policies that interfere with exercising that authority (8 U.S.C. §§ 1373(a)-(b), 1644), (3) requiring federal officials to respond to state inquiries (8 U.S.C. § 1373(c)), (4) simplifying the process for making such inquiries (through the 24/7 Law Enforcement Support Center ("LESC")), (5) deputizing state and local officers as immigration agents (8 U.S.C. § 1357(g)(1)), and (6) compensating states that assist (8 U.S.C. § 1103(a)(11)).

In encouraging cooperative immigration law enforcement, Congress did not displace State and local enforcement activity. *See Gonzales*, 722 F.2d at 475; *Salinas-Calderon*, 728 F.2d at 1301 n.3 (State and local officers have "general investigatory authority to inquire into possible immigration violations."). Instead, Congress wanted to expand state authority because it worried that "perceived federal limitation[s]" could hamper law enforcement officials. *See Vasquez-Alvarez*, 176 F.3d at 1298 (quoting 142 Cong. Rec. 4619 (1996) (comments of Rep. Doolittle)). Congress enacted 8 U.S.C. § 1252c to clarify that federal law does not preempt state and local officers from arresting an illegally present alien convicted of a felony and ordered deported. *Vasquez-Alvarez*, 176 F.3d at 1298. Section 1252c also does not preempt states from assisting in enforcement outside of those preconditions; instead Section 1252c "displace[s] a perceived federal

limitation on the ability of state and local officers to arrest aliens . . . in violation of Federal immigration laws." *Vasquez-Alvarez*, 176 F.3d at 1298-99.

Congress was also concerned that municipal sanctuary policies were prohibiting officers from contacting the then-INS about possible immigration violations. In response, Congress passed two statutes in 1996 to ban sanctuary policies. 8 U.S.C. § 1644 forbids state or local official actions that "prohibit[], or in any way restrict[]" a state or local government entity's ability to "send[] to or receiv[e] . . . information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. § 1373(a)-(b) expands preemption of sanctuary policies to those that prohibit or restrict government entities or officials from sending or receiving information regarding "citizenship or immigration status" and also preempts laws that prohibit or restrict immigration status information sharing. *See, e.g., City of New York v. United States*, 179 F.3d 29, 31-32 (2d Cir. 1999) (upholding constitutionality of law banning sanctuary policies).

In the same section, Congress also recognized the interest of cities in "[s]ending" and "[m]aintaining" such "information regarding the immigration status, lawful or unlawful, of any individual." 8 U.S.C. §§ 1373(b)(1)-(2). The fact that Congress wanted municipalities to be able to *send* and *maintain* information – not just receive it – about an alien's legal status is definitive proof that Congress expected state and local governments to implement programs under

which they would make inquiries about the legal status of aliens. In addition, the Senate Report accompanying this legislation reiterated Congress's objective of encouraging states to make their own efforts to assist in immigration enforcement:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. 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, 104th Cong., 2d Sess., at 19-20 (1996) (emphasis supplied). The Ordinance was built around 8 U.S.C. § 1373 and the cooperative effort that it envisions. Indeed the Ordinance makes express reference to this federal statute. *See, e.g.*, § 26-119(B)(7).

Another action by Congress that demonstrated its objective of increasing and facilitating local efforts to stop illegal immigration took place in 1994. In that year, Congress created and began appropriating funds for the Law Enforcement Support Center (LESC). "The primary mission of the LESC is to support other law enforcement agencies by helping them determine if a person they have contact with, or have in custody, is an illegal, criminal, or fugitive alien. The LESC provides a 24/7 link between federal, state, and local officers and the databases maintained by the INS."[30] To ensure cooperation by federal officials, Congress in

---

[30] Testimony of Joseph R. Green, Acting Dep. Exec. Assoc. Comm'r for Field Operations, INS, before Subcommittees of the House Comm. on Gov. Reform, 107th Cong., 1st Sess. 97

1996 *required* immigration authorities to respond to state and local inquiries seeking to "verify or ascertain the citizenship or immigration status of any individual . . . ." 8 U.S.C. § 1373(c).

All of these congressional actions were designed to encourage maximum state and local assistance in the arrest of illegal aliens. For Plaintiffs to contend that Alabama's efforts to cooperate in this endeavor are preempted, they must ignore this mountain of case law and statutory support for Act No.2011-535. For this reason, they will not prevail in this preemption claim.

3. Act No. 2011-535 Does Not Create a Registration Scheme.

Plaintiffs next claim that Act No.2011-535 is preempted because Section 10 of the law allegedly "establishes an Alabama-specific alien registration regime by creating a new state criminal offense for failure to carry certain immigration documents." Doc. 37 at 35. Plaintiffs then simply cite the *Hines v. Davidowitz* decision of 1941 in support of their broad assertion that any state law involving registration documents is somehow preempted. *Hines v. Davidowitz,* 312 U.S. 52, 62 (1941), cited in Doc. 37 at 26-27.

At the outset, Plaintiffs mischaracterize what Section 10 does. It merely states that if an individual is violating either 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), and the individual is also an alien unlawfully present in the United

---

(2001).

States, then the individual is committing a Class C misdemeanor under Alabama law. Section 10 does not attempt to register anyone. Section 10 does not establish a state registration system. Section 10 does not attempt to create any documentation for anyone. It cannot plausibly be described as an "Alabama-specific alien registration regime."

The relevant sections of federal law concern the federal government's registration and documentation system for aliens in the United States. 8 U.S.C. § 1304(e) provides:

> Every 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 pursuant to subsection (d). Any alien who fails to comply with the provisions of this subsection shall be 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.

8 U.S.C. § 1306(a) 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 shall be 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.

In comparison, Section 10 of Act No. 2011-535 requires no registration on its own terms, but says only the following: "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." Act No. 2011-535 § 10(a). It imposes a misdemeanor penalty smaller than that of federal law, namely a fine of not more than $100, and imprisonment of not more than 30 days. Act No. 2011-535 § 10(f).

Hines does not support Plaintiffs' assertion that Section 10 is preempted. The *Hines* Court sustained an as-applied conflict-preemption challenge to Pennsylvania's 1939 alien registration law, acknowledging at the outset that the Court's "primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to . . . the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. In *Hines*, there was a clear conflict between the Pennsylvania law and the federal scheme. First, the Pennsylvania law established a separate, state-specific alien registration system that required all aliens to register with the state and required the state to collect and maintain its own registration records. The Court determined that Congress intended an integrated national registration system maintained by the federal government. *Id.* at 60-61, 74. Second, the Pennsylvania law required aliens to carry their registration with them at all times. *Id.* at 60-61. Congress had explicitly rejected such a provision in the 1940 Federal Act. *Id.* at 72.

In contrast, no such conflict exists between Section 10 of Act No. 2011-535 and 8 U.S.C. §§ 1304(e) and 1306(a). Section 10 does not create an Alabama-specific registration system or improperly "complement" the federal scheme, but instead directly relies on the federal alien registration scheme in defining when an Alabama misdemeanor has occurred. Also, Congress amended the alien registration laws in 1952 to require aliens to carry their registration documents on their persons. When Congress passed the 1952 law making an alien's failure to carry his registration document 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." 1952 U.S.C.C.A.N. 1723. Congressional opponents and proponents both recognized that the 1952 legislation made it a crime for aliens not to carry their registration documents with them. *See* 98 Cong. Rec. 4432-33 (1952) (statement of Rep. Chudoff) ("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."). As a result, Section 10 does not suffer the same conflict preemption problem that the 1939 Pennsylvania statute did when Congress excluded a "carry" requirement in the 1940 federal act.

Another distinction between Act No. 2011-535 and the 1939 Pennsylvania statute is that Alabama expressly provides for and defers to federal immigration

status determinations. It does so in two ways: (1) it requires the state to rely on a federal verification of any alien's status, pursuant to 8 U.S.C. § 1373(c), Act No. 2011-535 § 10(e); and (2) it exempts from state prosecution "any person who maintains authorization from the federal government to remain in the United States," Act No. 2011-535 § 10(d). As the Supreme Court recently noted in *Whiting*, such deference to federal determinations of an alien's immigration status militates against a finding of conflict preemption:

> 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. … The federal determination on which the State must rely is provided under 8 U.S.C. § 1373(c).

131 S. Ct. at 1981. The Supreme Court in *Whiting* made clear that such reliance on federal determinations means that "there can by definition be no conflict between state and federal law…." *Id.*

Plaintiffs also assert that Section 10's "additional state criminal penalties are in conflict with those set by federal law." Doc. 37 at 36. Here too, Plaintiff's assertion is squarely contradicted by Supreme Court case law. While Section 10 imposes State misdemeanor penalties, that alone does not mean that the law

conflicts with Congress' objectives. States can enact laws which impose State penalties for conduct that federal law also sanctions, without being preempted. *See Bartkus v. Illinois*, 359 U.S. 121, 131-132 (1959); *Moore v. Illinois*, 55 U.S. 13, 21-22 (1852). In fact, the Supreme Court has twice held in the immigration context that states can enact laws that sanction a defendant, even though the federal law lacks a corresponding sanction, so long as the state law does not conflict with Congress's purposes. *De Canas*, 424 U.S. at 358, 360; *Whiting*, 131 S. Ct. at 1981-83 (rejecting conflict preemption argument against Arizona state law imposing sanction of loss of license on employers hiring illegal aliens, over and above federal penalties). As explained below, concurrent enforcement of state and federal penalties against the same conduct is a principle that Article III courts have consistently sustained against preemption challenges. As the *Whiting* Court favorably noted, "From this basic starting point, the Arizona law continues to trace the federal law." *Id.* at 1982. "Where state enforcement activities do not impair federal regulatory interests *concurrent enforcement activity is authorized*." *Gonzales*, 722 F.2d at 474 (citing *Paul*, 373 U.S. at 142 (emphasis supplied)).

Finally, Plaintiffs assert that the federal Executive Branch no longer regards 8 U.S.C. § 1304(e) and 8 U.S.C. § 1306(a) as worth enforcing. They then assert that a decision by the federal Executive Branch not to fully enforce the law somehow has preemptive effect. Doc. 37 at 27-28. According to one declaration

submitted by Plaintiffs, the Executive Branch is disregarding the statutory requirement, imposed by Congress, for aliens lawfully present in the United States to carry certain documents on their persons. Declaration of Bo Cooper, Doc. 37, Exhibit D to Exhibit 42[31] at ¶¶ 25-29 (opining that 8 U.S.C. § 1304(e) and 8 U.S.C. § 1306(a) "have become practically and effectively obsolete and unenforceable"). However, *it is Congress, not the Executive Branch*, that possesses the power to preempt. *North Dakota v. United States*, 495 U.S. 423, 442 (1990). Inaction by the Executive Branch has no preemptive effect.

When it comes to congressional intent, it is clear that Congress wants these laws to be enforced. The Supreme Court has recognized that Congress sought to restrict aliens in the United States to those persons with demonstrated eligibility for classification in some valid immigration status. *United States v. Campos-Serrano*, 404 U.S. 293, 299-300 (1971) (the purpose of alien registration is to identify the alien and govern his activity and presence in this country); *see also United States v. Ritter*, 752 F.2d 435, 438 (9th Cir. 1985) (requiring lawfully present aliens to comply with alien registration laws is an entirely foreseeable and permissible inconvenience).[32] Section 10 furthers Congress's goal of ensuring that all aliens

---

[31] There is no electronic stamp from this Court at the top of the declarations cited in this paragraph providing for the page numbering used elsewhere in this response.

[32] The information displayed on an alien registration document is not confidential. *Ascencio-Guzman v. Chertoff*, 2009 WL 1064962, *6-*7, 2009 U.S. Dist. LEXIS 32203 (S.D. Tex. 2009).

are properly registered with the federal government. The Alabama law merely codifies federal requirements and requires state officers to rely entirely on the federal government's determination of an alien's immigration status.

For the above-stated reasons, Plaintiffs will not prevail in their challenge to Section 10 of Act No. 2011-535.

4. Act No. 2011-535's Employment Provisions are Not Preempted.

Section 11(a) prohibits unauthorized aliens, who are by definition ineligible to work in the United States, from performing or seeking work in Alabama. Plaintiffs claim that because federal law only punishes the employer of an unauthorized alien with civil fines and criminal prosecution, and because federal law is silent on whether the unauthorized alien should face a penalty, Section 11(a) is preempted. Doc. 37 at 38-39. Plaintiffs simply observe that federal law does not impose a criminal penalty on the unauthorized worker and then declare in conclusory fashion that Act No. 2011-535 is therefore preempted. They offer no explanation for this leap in logic. *Id*.

There are two glaring problems with Plaintiffs' preemption argument. First, no provision of federal law suggests that Congress intended to preempt a State from penalizing an unauthorized alien who violates federal law by working in the United States. Second, the Immigration Reform and Control Act's (IRCA's) express preemption clause is expressly limited to preempting certain State "civil

and criminal sanctions" against *employers*. 8 U.S.C. § 1324a(h)(2). Congress knew how to preempt State laws that criminalized the acceptance or solicitation of unauthorized employment. Congress could have easily included other items in this list of preempted actions concerning the employment of unauthorized aliens, but it chose not to do so. Instead, Congress only preempted State or local "civil and criminal sanctions" on *employers* who hire unauthorized workers. 8 U.S.C. § 1324a(h)(2). If any implication is drawn from Congressional action, it must be that Congress did *not* intend to preempt State laws that criminalized the solicitation and acceptance of work by unauthorized workers.

Plaintiffs' argument is an attempt to revive the discredited theory of "preemption by omission," namely that the State statute is conflict preempted because Congress chose to penalize employers for employing unauthorized aliens but did not also criminalize unauthorized workers for performing work. Therefore, the argument goes, since Congress omitted any penalty for the unauthorized alien worker, the states are somehow preempted from imposing such a penalty.

First, it should be noted that Supreme Court precedent "establish[es] that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Whiting*, 131 S. Ct. at 1985 (*quoting Gade*, 505 U.S. at 110 (Kennedy, J., concurring in part and concurring in the judgment)). And when reviewing an implied preemption challenge, a court should avoid a "free-wheeling

judicial inquiry into whether a state statute is in tension with federal objectives" because "such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Whiting*, 131 S. Ct. at 1985 (*quoting Gade*, 505 U.S. at 111 (Kennedy, J., concurring in part and concurring in the judgment)). Plaintiffs' preemption by omission theory cannot overcome this hurdle.

In *Whiting*, the plaintiffs made a similar "preemption by omission" argument in claiming that an Arizona law which required the use of E-Verify was conflict preempted by federal law. 131 S. Ct. at 1986. E-Verify is a program that Congress created to allow employers to verify the work authorization of their employees. *Id*. Under federal law, the program is currently voluntary for employers, and the Secretary of Homeland Security is prohibited from making it mandatory. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub.L. 104-208 § 402(a), 110 Stat. 3009-656. Despite the program's voluntary nature at the federal level and the prohibition on the Secretary of Homeland Security from making it mandatory, the State of Arizona made its use mandatory for all Arizona employers. The Supreme Court noted that the statutory text "contains no language circumscribing state action," but instead only language that "constrain[s] federal action." *Whiting*, 131 S. Ct. at 1985. Because the text only circumscribed federal action, the Court refused to read into the statute a limit

on state action. *Id.*; *see also Gray v. City of Valley Park*, 2008 WL 294292, *19, 2008 U.S. Dist. LEXIS, 7238, 58 (D. Mo. 2007) ("Congress's decision not to make the [E-Verify] program mandatory," does not "restrict[] a state or local government's authority [to do so] under the police powers.").

Additionally, in *De Canas*, 424 U.S. 351, Plaintiffs' preemption by omission argument was likewise rejected. In *De Canas*, the plaintiffs argued that the "Texas proviso," a since-repealed exemption from the federal harboring law that excluded the employment of illegal aliens as a violation of the statute, preempted a California State law criminalizing the employment of illegal aliens. *See De Canas*, 424 U.S. at 360. Instead of agreeing with plaintiffs that preemption occurred because Congress *exempted* mere employment of illegal aliens as a crime, and that this omission had preemptive effect, the Supreme Court upheld the State statute. *Id.* at 361. Plaintiffs here are arguing exactly what the Supreme Court has twice rejected in the immigration preemption context—that because Congress has prohibited one action while declining to address other actions, State laws concerning actions not prohibited by Congress should therefore be preempted. That is not proper preemption analysis. Indeed, it is a preemption approach that the Supreme Court has repeatedly rejected.

Plaintiffs specifically cite 8 U.S.C. § 1324a as their evidence of preemption. However, the § 1324a(h)(2) preemption clause only preempts State laws that

penalize employers of unauthorized aliens by imposing fines and criminal penalties. The Supreme Court has recently analyzed this very section of federal law and has declined to infer additional congressional intent beyond the plain meaning of the words. "When a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Whiting*, 131 S. Ct. at 1977 (*quoting CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Neither IRCA's preemption clause of 8 U.S.C. § 1324a(h)(2), nor anything else in IRCA's text, indicates that Congress intended to preempt States from penalizing employees for seeking and performing unauthorized work in a State.

A "preemption by omission" theory turns preemption analysis upside-down. This Court must "begin [its preemption] analysis with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Group, Inc. v. Good*, 555 U.S. at 77. Plaintiffs ask this Court to begin with a presumption of preemption—because Congress did not act, it must have meant to preempt—rather than the opposite and correct presumption.

Finally, it must be remembered that the "assumption [against preemption] applies with particular force when Congress has legislated in a field traditionally

occupied by the States." *Altria*, 555 U.S. at 77.[33] The Congressional legislation cited by plaintiffs, IRCA, is in the field of employment, an area in which States enjoy "broad authority under their police powers." *De Canas*, 351 U.S. at 356. Like California in *De Canas*, Alabama drafted Section 11 to focus on the "local problems" of unauthorized alien employment in the State. *Id.* at 357. As such, the presumption applies with "particular force" to Section 11. For all of these reasons, Plaintiffs' Section 11 preemption challenge is not likely to succeed.[34]

5. Section 13's Harboring and Related Provisions Constitute Concurrent Enforcement.

Plaintiffs next claim that Section 13 of Act No.2011-535, which prohibits concealing, harboring, shielding, encouraging, inducing, and transporting illegal aliens in a manner that facilitates their continued unlawful presence in the United States, is preempted. Doc. 37 at 39-42. However, the language in Section 13 is taken directly from 8 U.S.C. § 1324(a)(1)(A)(ii)-(iv). It is perfect concurrent enforcement against the same criminal activity that is already prohibited by federal law.

---

[33] *See also Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009) ("…particularly [when] 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.")

[34] Section 11's restrictions on employment by illegal aliens are also not *field* preempted, *De Canas*, 424 U.S. at 357, nor are they expressly preempted. The "express preemption" clause of the employer sanctions statute, 8 U.S.C. § 1324a(h)(2), targets employers, not employees. *See Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 863 (9th Cir. 2009) (express preemption clause prohibits sanctions against *employers*).

States are not preempted in the immigration arena when they prohibit the same activity that is already prohibited under federal law. "Where state enforcement activities do not impair federal regulatory interests *concurrent enforcement activity is authorized*." *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983) (*overruled on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (citing *Paul*, 373 U.S. at 142 (emphasis supplied)). Where "[f]ederal and local enforcement have identical purposes," preemption does not occur. *Id*. at 474. "No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws." *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987).

Federal district courts recently reviewing laws similar to Act No.2011-535 have upheld those laws, based on the doctrine of concurrent enforcement. The District of Arizona has pointed out that conflict preemption cannot occur where concurrent enforcement exists:

> The mere fact that the parallel procedures could result in an employer being found in violation of the [state] Act but not IRCA does not establish conflict preemption. That is simply the result of the *concurrent enforcement activity* in our federal system where Congress has specifically preserved state authority.

Ariz. Contractors Ass'n, 2007 U.S. Dist. LEXIS 96194 at *38 (emphasis supplied). The Eastern District of Missouri has also applied the concurrent enforcement doctrine in rejecting a similar conflict preemption challenge:

> [G]enerally, a state has concurrent jurisdiction with the federal government to enforce federal laws. … This allows for greater enforcement of the federal law, while providing additional local sanctions through the licensing law. There is no conflict between the two laws.

Gray, 2008 U.S. Dist. LEXIS 7238 at *33 (*citing Gonzales*, 722 F.2d at 474).

Act No. 2011-535 was drafted to precisely match the terminology and scope of federal law. Section 13 of Act No. 2011-535 reads as follows:

> (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.

Act No. 2011-535 §§ 13(a)(1)-(3). These provisions are a mirror image of the equivalent provisions of 8 U.S.C. § 1324(a)(1)(A), which impose criminal penalties on:

> Any person who…
>
> (ii) 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, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;
>
> (iii) 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, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law;

8 U.S.C. § 1324(a)(1)(A).

Plaintiffs incorrectly state that the federal provision at 8 U.S.C. § 1324(a)(1)(A)(iv) is different from Act No. 2011-535 because the federal provision only prohibits encouraging an illegal alien to enter the United States. Doc. 37 at 30. However, the federal law prohibits a person from "encourag[ing] or induc[ing] an [illegal] alien to come to, enter, or *reside* in the United States…." 8 U.S.C. § 1324(a)(1)(A)(iv) (emphasis added).

Moreover, it would not matter even if small differences did exist. Conflict preemption analysis does not require perfect symmetry between local and federal law. In *De Canas*, the Supreme Court stated that the duty of a court is to *reconcile* any differences in federal and state law in preemption cases, not to seize upon

minute distinctions as the basis for finding preemption: "[T]he proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.'" *De Canas*, 424 U.S. at 358 (*quoting Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973)). "A mere difference between state and federal law is not conflict." *Ariz. Contractors Ass'n. v. Candelaria*, 534 F. Supp. 2d 1036, 1053 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *aff'd sub nom. Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (*citing Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-46 (1963)). "While the Court recognizes Plaintiffs' assertion that there need only be a conflict with the purpose of the federal statute, … this does not mean that every slight difference in emphasis between the federal requirements and the local requirements creates such a conflict." *Gray*, 2008 U.S. Dist. LEXIS 7238 at *48.

Plaintiffs also object to the fact that Section 13(a)(4) of Act No.2011-535 specifically singles out a particular form of harboring—providing an illegal alien with an apartment, knowing that the alien is unlawfully present in the United States—and specifically identifies that form of harboring as one that is prohibited. Doc. 37 at 40-41. Although there are other forms of harboring beyond knowingly providing rental housing to an illegal alien, Section 13(a)(4) focuses on preventing

the subset of harboring activities that is perhaps the most widespread violation of 8 U.S.C. § 1324(a)(1)(A)(iii).

Plaintiffs argue that knowingly providing an illegal alien an apartment is not encompassed within the federal crime of harboring. The Third Circuit decision they cite in support of this assertion is no longer good law. *Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), *vacated*, No. 10-772, 2011 WL 2175213 (June 6, 2011). It was vacated by the Third Circuit on July 29, 2011. (Case No. 07-3531, Document 003110610596). Plaintiffs argue that the Supreme Court vacated the Lozano case "on other grounds." However, the Supreme Court vacated the *entire Lozano* decision and remanded the case back to the Third Circuit without specifying on which grounds it was vacating the decision. Supreme Court Order No. 10-772, 2011 WL 2175213.

The remaining case law is on the other side of the question. The U.S. Courts of Appeals have repeatedly held that the category of conduct proscribed by the federal crime of harboring is very broad – certainly broad enough to encompass knowingly renting an apartment to an illegal alien. A wide variety of activities are covered by 8 U.S.C. § 1324(a)(1)(A)(iii). "Clearly the words 'in any place' are meant to be broadly inclusive, not restrictive." *United States v. Cantu*, 557 F.2d 1173, 1180 (5th Cir. 1977). "Congress intended to broadly proscribe any knowing or willful conduct fairly within any of these terms that tends to substantially

facilitate an alien's remaining in the United States illegally." *United States v. Rubio-Gonzales*, 674 F.2d 1067, 1073 n.5 (5th Cir. 1982). "[W]e hold that to 'substantially facilitate' means to make an alien's illegal presence in the United States substantially 'easier or less difficult.'" *United States v. Shum*, 496 F.3d. 390, 392 (5th Cir. 2007) (*quoting United States v. Dixon*, 132 F.3d 192, 200 (5th Cir. 1997)). No concealment or other action to prevent government officials from detecting the illegal alien is necessary for harboring to occur. *United States v. Herrera*, 584 F.2d 1137, 1144 (2nd Cir. 1978) (to prove harboring, the government must show that the "conduct tend[ed] substantially to facilitate an alien's 'remaining in the United States illegally'" but "[s]uch conduct need not be clandestine") (internal citations omitted); *United States v. Martinez-Medina*, No. 08-30150, 2009 U.S. App. LEXIS 890, *3 (5th Cir. Jan. 16, 2009) (defendant was "incorrect that the Government must prove that he actively hid aliens from detection").

The Former Fifth Circuit has specifically held that providing illegal aliens with "lodging" constitutes harboring. *United States v. Varkonyi*, 645 F.2d 453, 459 (5th Cir. 1981) (providing illegal aliens "with employment and lodging while they were unlawfully in the United States … went beyond mere employment, and thus, constituted harboring"). *See also United States v. Balderas*, 91 Fed. Appx. 354 (5th Cir. 2004) (providing illegal aliens with accommodations in a section of home

constitutes harboring). Charging rent does not negate the crime; harboring can occur regardless of whether or not the illegal alien pays for his living quarters. Indeed, harboring "for the purpose of commercial advantage or private financial gain" increases the severity of the crime. 8 U.S.C. § 1324(a)(1)(B)(i). *See United States v. Zheng*, 306 F.3d 1080 (11th Cir. 2002).

The federal harboring statute prohibits "a wide range of conduct … including providing unlawful aliens with housing," *United States v. Kim*, 193 F.3d 567, 574 (2nd Cir. 1999), or "provid[ing] an apartment for the undocumented aliens." *United States v. Tipton*, 518 F.3d 591, 594 (8th Cir. 2008). Making an apartment available to an illegal alien has repeatedly been a basis for conviction under the federal statute. *Id.*; *United States v. Aguilar*, 883 F.2d 662, 669-70 (9th Cir. 1989); *United States v. Sanchez*, 963 F.2d 152, 155 (8th Cir. 1992).[35]

Finally, it must be remembered that conflict preemption analysis does not require perfect symmetry between local and federal law. In *De Canas*, the Supreme Court stated that the duty of a court is to *reconcile* any differences in federal and state law in preemption cases, not to seize upon minute distinctions as the basis for finding preemption: "[T]he proper approach is to reconcile 'the

[35] The only Circuit to come to the opposite conclusion and hold that renting an apartment to an illegal alien does not constitute harboring is the Third Circuit, which differs from most of the other circuits by requiring active concealment from law enforcement before harboring exists. *Lozano v. City of Hazelton*, 620 F.3d at 223 (recognizing that "other Courts of Appeals have held that a showing of concealment is unnecessary"). The Fifth Circuit does not require concealment. *Martinez-Medina*, 2009 U.S. App. LEXIS 890 at *3.

operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.'" *De Canas*, 424 U.S. at 358 (*quoting Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973)). "A mere difference between state and federal law is not conflict." *Ariz. Contractors Ass'n. v. Candelaria*, 534 F. Supp. 2d 1036, 1053 (D. Ariz. 2008), *aff'd sub nom. Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *aff'd sub nom. Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (*citing Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-46 (1963)). "While the Court recognizes Plaintiffs' assertion that there need only be a conflict with the purpose of the federal statute, … this does not mean that every slight difference in emphasis between the federal requirements and the local requirements creates such a conflict." *Gray*, 2008 U.S. Dist. LEXIS 7238 at *48. Knowingly renting an apartment or house to an illegal alien plainly falls within the broader concept of harboring.

Plainly, the doctrine of concurrent enforcement supports Section 13 of Act No.2011-535 against any conflict preemption challenge. As the Supreme Court has indicated, where a state statute "trace[s] the federal law," conflict preemption is unlikely. *Whiting*, 131 U.S. at 1982. For this reason, Plaintiffs are unlikely to succeed in their preemption challenge to Section 13.

6. Act No. 2011-535's Contract Provision Does Not Conflict with Federal Law.

Plaintiffs offer an even weaker preemption claim with respect to Section 27 of Act No. 2011-535. Section 27 states the following:

> 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.

Act No. 2011-535 § 27(a). Contracts for the purchase of food, for medical services, for hotel lodging, and for transportation to the illegal alien's country of origin are expressly excluded. Act No. 2011-535 § 27(b). Contracts authorized by federal law are also excluded. Act No. 2011-535 § 27(c).

Plaintiffs claim, without any explanation or support, that Section 27 is a "preempted as a regulation of immigration and based on a conflict with federal immigration statutes…." Doc. 37 at 43. As noted above, Plaintiffs fail to apply the Supreme Court's narrow definition of "regulation of immigration" laid out in *De Canas*, 424 U.S. at 355; consequently their bare assertion on this point is meritless. With respect to conflict preemption, Plaintiffs do not specify which federal immigration statute could possibly conflict with Section 27. That is because *there is no such federal immigration statute preserving the right of illegal*

aliens to contract in the United States. *See* 8 U.S.C. § 1101, *et seq*. Indeed there are multiple federal immigration provisions that prohibit contracts with illegal aliens—contracts that would be perfectly permissible with an alien lawfully present in the United States. For example, an employer may not contract to hire an unauthorized alien as an employee, 8 U.S.C. § 1324a(a)(1); a person may not "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," 8 U.S.C. § 1324a(a)(4); a person may not contract to bring an illegal alien into the United States, *see* 8 U.S.C. § 1323(a)(2), *see also* 8 U.S.C. § 1324(a)(2); contract to knowingly transport an illegal alien within the United States in furtherance of the aliens continued unlawful presence, *see* 8 U.S.C. § 1324(a)(1)(A)(ii); or contract to harbor an illegal alien "in any place, including in any building," *see* 8 U.S.C. § 1324(a)(1)(A)(iii). In short, federal immigration law is rife with provisions barring contracts with illegal aliens.

Plaintiffs then conclude their challenge to Section 27 by claiming that it is in conflict with 42 U.S.C. § 1981. Doc. 37 at 43. No such conflict exists. Enacted in the wake of the Civil War to prohibit the "black codes" of the unreconstructed South, 42 U.S.C. § 1981 provides that "all persons" shall have the same right to make and enforce contracts as "white citizens." The threshold question is whether illegal aliens constitute "persons" within the meaning of § 1981.

The Supreme Court has held that § 1981 prohibits public discrimination against *legal* aliens; however, it has never held that § 1981 prohibits discrimination against illegal aliens. *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 418-20 (1948). In *Takahashi*, the Supreme Court found that a state could not "prevent *lawfully* admitted aliens within its borders from earning a living." *Id.* (emphasis added). Although the Court was not presented with the question of whether illegal aliens were protected under § 1981, the Court's purposeful use of the phrase "lawfully admitted aliens" demonstrates that a different result likely would have occurred if the plaintiff had been an illegal alien. *See also Graham v. Richardson*, 403 U.S. 365, 378 (1971) (using phrase "aliens lawfully within the United States").

The only way that Plaintiffs' argument could succeed would be if "persons" under § 1981 had the same broad meaning as "person" in the Fourteenth Amendment. But there are numerous precedents establishing that the protections of § 1981 are not commensurate with those of the Fourteenth Amendment. For example, "section 1981 does not prohibit discrimination based on the basis of gender or religion." *Anderson v. Conboy*, 156 F.3d 167, 171 (2d Cir. 1998); *Runyon v. McCrary*, 427 U.S. 160, 167 (1976). Rather it prohibits discrimination based on race or on national origin. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987). It is principally "limited to issues of *racial* discrimination in the

making and enforcing of contracts." *Anjelino v. The New York Times Company*, 200 F.3d 73, 98 (3d Cir. 1999)(emphasis added).

Section 27 restricts the enforcement of contracts based upon lawful versus unlawful immigration status, not based upon race or alienage. "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." *Anderson*, 156 F.3d at 180.

It is also important to note that federal statutes enacted later in time than § 1981 can limit the scope and applicability of § 1981. With the exception of a few provisions from the antebellum period, the entirety of federal immigration law was enacted after § 1981. Consequently, any contract that requires a violation of any subsequently-enacted federal immigration law cannot be protected by § 1981. As the Supreme Court stated nearly two centuries ago, a contract that entails the violation of law cannot be given force by the courts. "[W]here the contract grows immediately out of, and is connected with, an illegal or immoral act, a Court of justice will not lend its aid to enforce it." *Armstrong v. Toler*, 24 U.S. 258, 278. (1826) (internal quotation marks omitted).

For all of these reasons, Plaintiffs' challenge to Section 27 finds no support in case law or in statute. They have no likelihood of success; and a preliminary injuction is unwarranted.

7. Inquiries to Federal Databases are Not Conflict Preempted.

Plaintiffs final conflict preemption claim asserts that Act No. 2011-535 is preempted simply because it utilizes the mechanism that Congress established in 1996—codified at 8 U.S.C. § 1373(c)—to verify with the federal government the immigration status of aliens. Plaintiffs assert that these communications with the federal government "impose an impermissible burden on federal resources…." Doc. 37 at 44-45.

Before delving into the legal infirmities of Plaintiffs' argument, it should be noted at the outset that Plaintiffs have absolutely no idea how many telephone calls and email communications will be made to ICE once Act No. 2011-535 takes effect. Their argument is based on rank speculation that Alabama's law will "vastly increas[e] the number of immigration status verification queries to the federal government." Doc. 37 at 45. How many is too many? Plaintiffs don't know and don't say. This argument illustrates perfectly why the Supreme Court disfavors facial challenges based on what *might* happen when a law goes into effect. "In determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 44-950 (2008)

As stated above, it is the intent of *Congress* that controls all preemption cases. "The purpose of Congress is the ultimate touchsone in every pre-emption case." *Medtronic*, 518 U.S. at 494. And Congress made clear that on this question, the Executive Branch *must* respond to all verification inquiries from State and local governments. Congress enacted 8 U.S.C. § 1373(c) to expressly authorize such requests. Congress requires the Department of Homeland Security ("DHS") to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status . . . for any purpose authorized by law, by providing the requested verification or status information." 8 U.S.C. § 1373(c). Congress placed no limit on the number of requests that state and local officials could submit and no conditions on DHS's obligation to respond to inquiries. Congress also enacted several other statutory provisions to ensure that state and local authorities make maximum use of this federal database.[36]

Congress created a federal "obligation to respond to inquiries," mandating that federal immigration authorities "shall respond" to every inquiry. In other words, Congress *ordered* the federal government to prioritize its resources in this manner; responding state and local inquiries would henceforth be one of its highest priorities. As the District of Arizona correctly observed in the immigration

[36] *See, e.g.,* 8 U.S.C. § 1357(g)(10) (2006); *Id*. §§ 1373(a)-(b), 1644 (2006).

preemption case involving 8 U.S.C. § 1373 that would end up in the Supreme Court as *Whiting*: "Congress encourages state and federal authorities to communicate regarding immigration status. … The fact that the Act will result in additional inquiries to the federal government is consistent with federal law." *Arizona Contractors Assoc. v. Candelaria*, No. CV07-1355-PHX-NVW, 2007 U.S. Dist. LEXIS 96194, *43-*44 (D. Ariz. Dec. 21, 2007), *aff'd sub nom. Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *aff'd sub nom. Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011).

Inquiries to DHS can be answered in a variety of ways, by either ICE or the United States Bureau of Citizenship and Immigration Services ("USCIS"). But the primary mechanism that Congress created to respond quickly to such inquiries is the Law Enforcement Support Center, a 24/7 telephone hotline run by ICE. Plaintiffs ignore Congress's purpose for establishing the LESC. The LESC exists to *foster* state and local police cooperation in the "apprehension, detention or removal of [illegal] aliens." 8 U.S.C. § 1357(g)(10)(B).[37] Congress intended the LESC's primary users to be "state and local law enforcement officers in the field who need information about foreign nationals they encounter in the course of their

[37] Indeed, the vast majority of the million queries processed last year by the LESC involve aliens who were arrested or encountered at a traffic stop by law enforcement. The LESC handles a very large volume of inquiries already, with no difficulty. In 2005, for example, the LESC responded to 504,678 calls from state and local law enforcement officers. Kobach, 69 ALBANY L. REV. at 204.

daily duties." U.S. Immigration and Customs Enforcement, Programs, Law Enforcement Support Center, http://www.ice.gov/partners/lesc/lesc_factsheet.htm.

In *Whiting*, the Supreme Court expressly approved State reliance on the 8 U.S.C. § 1373(c) verification process. "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. … The federal determination on which the State must rely is provided under 8 U.S.C. § 1373(c)." *Whiting*, 131 S.Ct. at 1981.

Congress did not express any concern that the federal executive branch might feel a burden in carrying out Congress's mandate. Plaintiffs' assertion that such a burden might emerge in the future is irrelevant for adjudicating a preemption challenge, which turns on the intent of Congress. For these reasons, Plaintiffs will not prevail in this preemption challenge.

V. FOURTH AMENDMENT

Plaintiffs offer a three-pronged attack on Act No. 2011-535 based on the Fourth Amendment. First, Plaintiffs assert that Section 12(a) of the Act will result in individuals being detained unlawfully while their immigration status is investigated. Doc. 37 at 50-52. Second, Plaintiffs assert that Section 12(e) of the Act will "requir[e] law enforcement to take custody of individuals if they are verified as being 'unlawfully present.'" Doc. 37 at 52-53. Third, Plaintiffs allege that Sections 18, 19, and 20 of the Act will cause individuals who are lawfully

taken into to custody to be denied a timely release, and thus unconstitutionally detained. Doc. 37 at 54-55.

A. PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits . . . ." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

1. Plaintiffs' claim that Section 12(a) will result in individuals being detained unlawfully while their immigration status is investigated.

Plaintiffs argue that Section 12(a) of Act No. 2011-535 will require State and local law enforcement to unconstitutionally detain individuals while their immigration status is investigated following a lawful stop, detention, or arrest. Doc. 37 at 50. They allege that the investigation will "take[] an average of 80 minutes when a determination can be made through a database search, and up to several days when a search of paper files is required." *Id.* In making this argument, the Plaintiffs rely on a declaration by David C. Palmatier, who was the Unit Chief for the Law Enforcement Support Center (LESC) within Immigration and Customs Enforcement (ICE) at the time that the declaration was made and filed in the Arizona litigation last summer (and may still be). *See* Doc. 37, Exhibit A to Exhibit 42 at ¶ 1. Plaintiffs also rely on the declarations of Etowah County Sheriff Todd Entrekin, doc. 37-37, and Jefferson County Sheriff Mike Hale, doc.

37-38, as well as the declarations of two individuals who are apparently offered as law enforcement experts, doc. 37-39; doc. 37-40.[38]

We begin with a factual clarification. Plaintiffs argue that the investigation will "take[] an average of 80 minutes when a determination can be made through a database search, and up to several days when a search of paper files is required." Doc. 37 at 50. For this proposition, they rely first on Mr. Palmatier. *Id.* His declaration actually says that "the average query waits for approximately 70 minutes" before a federal employee gets to the request and initiates the search. Doc. 37, Exhibit A to Exhibit 42 at ¶ 8. "On average, it takes an additional 11 minutes per query to research DHS data systems and to provide the written alien status determination." *Id.* Moreover, Mr. Palmatier also talked about prioritizing requests, noting that time sensitive requests "such as roadside traffic stops" are prioritized. *Id.* at ¶ 7. As to the additional time beyond 80 minutes, that seems to be tied to Mr. Palmatier's comments about "quality assurance"; "approximately 5% of all alien status determination responses" are selected for a paper file review which "may take two days or more." *Id.* at ¶ 11. Plaintiffs have also cited portions of Mr. Palmatier's declaration wherein he talks about the potential for a "no

[38] The declarations of George Gascón and Eduardo González are interesting insofar as these out-of-State declarants simultaneously warn of a lack of resources to enforce the law, Doc. 37-39 at ¶ 17; Doc. 37-40 at ¶ 16, and a danger of pre-textual stops aimed at enforcement, Doc. 37-39 at ¶ 13; Doc. 37-40 at ¶ 20.

match" response, *see* doc. 37 at 50, but these portions do not indicate that any lengthier response times pertain, *see* Doc. 37, Exhibit A to Exhibit 42 at ¶¶ 12, 19.

As to the substance of Fourth Amendment law, the State Defendants are in complete agreement "that once an officer has briefly stopped a motor vehicle operator for the purpose of issuing a traffic violation (*i.e.,* a ticker), the officer's continuing detention of the vehicle's occupants is authorized under the Fourth Amendment only if the officer can point to specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant the intrusion." *United States v. Pruitt*, 174 F.3d 1215, 1219 (11th Cir. 1999) (internal quotation marks and citations omitted). *See also Muehler v. Mena*, 544 U.S. 93, 101 (2005) ("[A] lawful seizure can become unlawful if it is prolonged beyond the time reasonably required to complete that mission . . . .") (internal quotation marks and citation omitted).

Where the State Defendants and the Plaintiffs part company is with respect to what Section 12(a) actually requires. For their part, the Plaintiffs speculate about how Section 12(a) will be implemented: "By requiring officers to prolong a traffic stop well beyond the time needed to address the original basis for the stop—by an average of 80 minutes, under the best-case scenario—HB 56 [*sic*] will result in systemic violation of the Fourth Amendment." Doc. 37 at 52. And, of course, that speculation relates to the fact that Act No. 2011-535 has not yet been

implemented and, therefore, not a single Plaintiff has any practical experience with the implementation of the Act.

By contrast, the State Defendants rely on the text of Section 12(a), and we assume that the law will be enforced in an appropriate way and in compliance with its terms. Section 12(a) provides:

> Upon any lawful stop, detention, or arrest made by a [S]tate, county or municipal law enforcement officer of this [S]tate *in the enforcement of any [S]tate 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.

Section 12(a), doc. 1-2 at 34 (emphasis added).

According to the text of Section 12(a), the Alabama Legislature is not encouraging State and local law enforcement to enforce federal immigration law as a primary matter. Instead, it is imposing an additional responsibility on them *as they enforce State laws and local ordinances*. *See* Section 12(a), doc. 1-2 at 34 ("in the enforcement of any [S]tate law or ordinance of any political subdivision thereof").[39]

[39] The concerns of Mr. Gascón and Mr. González about a danger of pre-textual stops aimed at immigration enforcement are unfounded. Doc. 37-39 at ¶ 13; Doc. 37-40 at ¶ 20.

According to the text of Section 12(a), the Alabama Legislature is not encouraging State and local law enforcement to check everyone's immigration status. Checks are only implicated where the officer has a "reasonable suspicion . . . that the person is an alien who is unlawfully present in the United States." Section 12(a), doc. 1-2 at 34. Moreover, such a suspicion does not arise if the person possesses any of the documents set out in Section 12(d), which give rise to a presumption that the person is not an unlawfully present alien.[40] And, importantly, "A law enforcement officer may not consider race, color, or national origin in implementing the requirements of this section except to the extent

---

[40] Section 12(d) provides:

> (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 [S]tate 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.

Doc. 1-2 at 35-36.

permitted by the United States Constitution or the Constitution of Alabama of 1901." Section 12(c), doc. 1-2 at 34-35.

According to the text of Section 12(a), the Alabama Legislature has instructed State and local law enforcement to make "*a reasonable attempt . . . when practicable*, to determine the citizenship and immigration status of the person" and the Legislature has provided a blanket exception from even reasonable attempts "if the determination may hinder or obstruct an investigation." Section 12(a), doc. 1-2 at 34 (emphasis added). Thus, a reasonable attempt is to be made when doing so is practicable and no investigation will be hindered or obstructed.[41] How does one know what constitutes a reasonable attempt? One would think the starting place would be the Fourth Amendment.[42]

---

[41] The State Defendants note that Section 12(a) refers to "an investigation," not the specific investigation related to the "lawful stop, detention, or arrest." Section 12(a), doc. 1-2 at 34. Accordingly, the Legislature has granted law enforcement flexibility to decline to make a § 1373(c) request if they believe that making the request would hinder or obstruct *any* investigation. Presumably, that would cover both their own investigations and any investigations being conducted by other State, local, or federal officials of which they had knowledge. It only makes sense that the Legislature would thusly prioritize standard law enforcement needs over this ancillary duty to investigate immigration status in limited circumstances and reasonable ways.

[42] It is relevant that the Alabama Attorney General is the one making this argument. 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).

In any event, the Attorney General's view is eminently reasonable. Any other view would not only be inconsistent with federal law but would set up law enforcement officers for

Say a driver is pulled over for speeding, and he has an out-of-State driver's license. If the Plaintiffs are factually correct that 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, *Muehler v. Mena*, 544 U.S. at 101 (internal quotation marks and citation omitted), then it is not *reasonable*, under Act No. 2011-535, to attempt to ascertain the driver's immigration status. Thus, the Act would not require the officer to do an immigration-status check in those circumstances, and Plaintiffs' complaint about the Act has no basis.

By contrast, say someone is arrested—as arrests are also covered by Section 12(a)—and law enforcement develops a reasonable suspicion that the person is an illegal alien. In that situation, law enforcement may have plenty of time to make a § 1373(c) inquiry, and may do so if it is reasonable, practicable, and not going to hinder or obstruct any investigation. *See* Section 12(a), doc. 1-2 at 34. Such a scenario does not raise any concern about prolonged detention—apparently not even for the Plaintiffs.[43]

---

§ 1983 suits for damages—neither result is one that the Alabama Legislature would have intended.

[43] The State Defendants note that the Plaintiffs argument is aimed specifically and solely at stops. Doc. 37 at 50-52. It does not covered detentions or arrests, *id.*, though these are also the subject of Section 12(a), doc. 1-2 at 34. For the reasons stated in the text, the State Defendants do not believe that the Plaintiffs are entitled to a preliminary injunction with respect to their

Plaintiffs' arguments are based on speculation and on legal interpretations of what Act No. 2011-535 requires that vary from the interpretation of the State Defendants. These arguments should be rejected.

2. Plaintiffs assert that Section 12(e) of the Act will "requir[e] law enforcement to take custody of individuals if they are verified as being 'unlawfully present.'" Doc. 37 at 52-53.

Plaintiffs next contend that Section 12(e) "require[es] law enforcement to take custody of individuals if they are verified as being 'unlawfully present'" and to detain said individuals "without any basis other than a civil immigration violation while the federal government coordinates taking custody, for which the law specifies no time limit." Doc. 37 at 52-53. Again, the Plaintiffs' argument is entirely speculative and divorced from the plain text of Act No. 2011-535.

Section 12(e) provides:

> 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.

Doc. 1-2 at 36.

Section 12(e) does not direct any State or local law enforcement officer to take custody of anyone. Instead, it presumes that the person is already lawfully in custody and directs cooperation with the federal government.

---

attack on Section 12(a). If, however, this Court disagrees, any injunction should clearly be limited to "stops."

To the extent that the Plaintiffs contend to the contrary, their theories are based on speculation and the legal analyses of Sheriff Entrekin and George Gascón. It is the interpretation offered by the State Defendants, through the Alabama Attorney General, that is entitled to deference. 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).

3. Plaintiffs allege that Sections 18, 19, and 20 of the Act will cause individuals who are lawfully taken into to custody to be denied a timely release, and thus unconstitutionally detained.

Plaintiffs allege that Sections 18, 19, and 20 of Act No. 2011-535 all cause persons to be unlawfully detained "solely on the basis of suspected federal civil immigration violations." Doc. 37 at 54.

Turning first to Section 20, the Act does not actually say that anyone will have his or her detention extended based on immigration status. Section 20 provides:

> If an alien who is unlawfully present in the United States is convicted of a violation of [S]tate 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.

Doc. 1-2 at 51-52.

Nowhere does Section 20 command anyone to take custody of anyone or extend any detention. Instead, Section 20 first considers persons who are "within 30 days of release," doc. 1-2 at 51, obviously intending to allow adequate time for a § 1373(c) inquiry and for the proper arrangements to be made. No fault with that provision is apparent.

Next, Section 20 makes reference to persons who "ha[ve] paid any fine as required by operation of law,"[44] doc. 1-2 at 51, and from this the Plaintiffs apparently surmise that such persons will otherwise be entitled to their freedom and that Section 20 commands their continued detention. That argument is based on speculation about an ambiguous portion of the law. After all, no Plaintiff has been subjected to detention under the circumstances suggested here, and, from all the Plaintiffs have argued about the federal government's prioritization of its resources, it seems unlikely that the federal government would seek custody of

[44] *See, e.g.,* Ala. Code § 13A-5-11, which sets the limitations on fines for felonies.

someone for whom it would not issue a federal detainer or have a federal basis for assuming custody.

In any event, the ambiguity of the fines portion of Section 20 calls out for certification to the Alabama Supreme Court. The sentence is ambiguous because, immediately after the reference to fines being paid, Section 20 speaks to "the agency responsible for his or her incarceration," doc. 1-2 at 51, thereby implying that the individuals are in fact lawfully in custody. And, again, nowhere does Section 20 explicitly state that anyone should obtain custody of an individual in order to facilitate a transfer to federal custody. Doc. 1-2 at 51-52. Instead, the entire Section speaks to a situation where the individual is already in custody.

Turning to Sections 18(d) and 19(b), the Plaintiffs argue that these provisions require persons to be held in custody "*solely* on suspicion of federal civil immigration violations." Doc. 37 at 54.

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 [S]tate, 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.

Doc. 1-2 at 51. Accordingly, given the context of Section 19(a), Section 19(b) is saying that a "person . . . determined to be an alien unlawfully present in the United States [shall] be considered a flight risk" and, on that basis, shall be denied bail pending prosecution, *i.e.,* "detained until prosecution." The fact that someone is a flight risk is a traditional basis for denying bail.[45] Plaintiffs have offered no argument that the Legislature has constitutionally erred in establishing a presumption of a flight risk in the case of aliens unlawfully present in the United States and facing criminal charges. Plaintiffs instead cite cases that stand for the proposition that a person may not be detained after the lawful basis for their detention has expired. Section 19, by contrast, sets a basis for continued detention and the Plaintiffs have not argued that it exceeds constitutional bounds in so doing. Accordingly, Plaintiffs have not met their burden.

---

[45] *Cf.* Ala. R. Crim. P. 7.2(a) ("(a) Before Conviction. Any defendant charged with an offense bailable as a matter of right may be released pending or during trial on his or her personal recognizance or on an appearance bond *unless the court or magistrate determines that such a release will not reasonably assure the defendant's appearance as required*, or that the defendant's being at large will pose a real and present danger to others or to the public at large.") (emphasis added); *United States v.Medina*, 775 F.2d 1398, 1402 (11th Cir. 1985) ("Thus the magistrate properly applied a preponderance of the evidence standard in determining that Medina should be detained pending trial because he posed a high risk of flight. Moreover, the magistrate appropriately took into consideration the statutory presumption in favor of pretrial detention that arose following the magistrate's finding of probable cause, concluding that the totality of the evidence in this case provides a strong indication that defendant Medina would be a risk to flee, if released on bail.") (internal quotations omitted).

Section 19(b) does provide an alternative to detaining "an alien unlawfully present in the United States" pending prosecution, and that is that the person may be "handed over to federal immigration authorities." Doc. 1-2 at 51. The Court should read Section 19 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." *Id*. As previously noted, Act No. 2011-535 is careful to encourage cooperation with the federal government and compliance with federal law. There is no basis for presuming—in the absence of an actual controversy and facts establishing the same—that any law enforcement officer would actually detain a person indefinitely, that is, after prosecution and any sentence has been served, while waiting for the federal government to take custody.[46] Nor is there any basis for presuming that the federal government would be so delayed.

[46] To the extent that the Plaintiffs contend to the contrary, their theories are based on speculation and their own legal analyses. It is the interpretation offered by the State Defendants, through the Alabama Attorney General, that is entitled to deference. 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).

Section 18(d) applies to a person driving without a license and provides:

> 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.

Doc. 1-2 at 50-51 (underlining omitted). Again, the fact that someone is a flight risk is a traditional basis for denying bail. *See* Ala. R. Crim. P. 7.2(a); *United States v.Medina*, 775 F.2d 1398, 1402 (11th Cir. 1985). Plaintiffs have offered no argument that the Legislature has constitutionally erred in establishing a presumption of a flight risk in the case of aliens unlawfully present in the United States and facing criminal charges. Plaintiffs instead cite cases that stand for the proposition that a person may not be detained after the lawful basis for their detention has expired. Section 18, by contrast, sets a basis for continued detention and the Plaintiffs have not argued that it exceeds constitutional bounds in so doing. And, again, for the reasons just stated, the Court should read Section 18(d) 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. 1-2 at 51.

It is true that, prior to the Act, incarceration was not authorized for the crime of driving a motor vehicle without having one's license in his or her possession—the crime which Section 18 amends. That is, Section18 amends Ala. Code § 32-6-9 which concerns driving a motor vehicle without a license in one's immediate possession.[47] Pursuant to Ala. Code § 32-6-18(a), a violation of Ala. Code § 32-6-9 is a misdemeanor punishable by a fine:

> Any person of whom a driver's license is required, who drives a motor vehicle on a public highway in this state without first having complied with this article or the rules and regulations promulgated hereunder shall be guilty of a misdemeanor, and, upon conviction shall be punished by a fine of not less than ten dollars ($10) nor more than one hundred dollars ($100), to be fixed in the discretion of the judge trying the case. In addition to all fines, fees, costs, and punishments prescribed by law, there shall be imposed or assessed an additional penalty of fifty dollars ($50). This additional penalty of fifty dollars ($50) imposed pursuant to this subsection shall be assessed in all criminal and quasi-criminal proceedings in municipal, district, and circuit courts, including, but not limited to, final bond forfeitures, municipal ordinance violations wherein the defendant is adjudged guilty or pleads guilty, and in all juvenile delinquency and youthful offender adjudications.

---

[47] Prior to the amendment by Act No. 2011-535—which, again, is not yet effective—Ala. Code § 32-6-9 provides:

> 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.

Ala. Code § 32-6-18(a). Even if Ala. Code § 32-6-18(a) did not previously provide for incarceration, it is merely a State law, equivalent to Act No. 2011-535, and so the latter has the authority to recognize that a misdemeanor is generally punishable by up to one year incarceration and to provide for detention pending prosecution. Plaintiffs have provided no authority prohibiting a State from establishing the punishment options for violation of State law, and no authority pointing toward a constitutional defect justifying the "extraordinary and drastic remedy" of a preliminary injunction. *United States v.Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983).

B. THE PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY ARE LIKELY TO SUFFER IRREPARABLE INJURY IN THE ABSENCE OF AN INJUNCTION.

Plaintiffs contend that "[i]f HB 56 [*sic*] goes into effect, it will immediately subject numerous Plaintiffs and members of Plaintiff organizations to the risk of unconstitutional and extended detention while police officers investigate their immigration status." Doc. 37 at 71 (citations omitted).

In *Steffel v. Thompson*, the Supreme Court held that "regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no [S]tate prosecution is pending and a federal plaintiff demonstrates *a genuine threat* of enforcement of a disputed criminal statute, whether an attack is

made on the constitutionality of the statute on its face or as applied." 415 U.S. 452, 475 (1974) (emphasis added).[48] A concurring opinion noted:

> Our decision today must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law is unconstitutional, even if he genuinely feels 'chilled' in his freedom of action by the law's existence, and even if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it.
>
> As the Court stated in *Younger v. Harris*, 401 U.S. 37, 52:
>
> 'The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . . '
>
> *See also Boyle v. Landry*, 401 U.S. 77, 80-81.
>
> The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the State. He has, therefore, demonstrated 'a genuine threat of enforcement of a disputed state criminal statute . . . .' Cases where such a 'genuine threat' can be demonstrated will, I think, be exceedingly rare.

415 U.S. at 476 (Stewart, J., concurring) (footnote omitted).

In *Ellis v. Dyson*, the Court repeated the "genuine threat of enforcement" language, recognizing that this goes to a showing of an Article III controversy. 421 U.S. 426, 432-33, 434 (1975). In *Babbitt v. United Farm Workers National*

---

[48] Injunctive relief might be unavailable due to an inability to show irreparable injury, while a declaratory judgment does not require the same and is a "less intrusive" mechanism for testing the constitutionality of a State criminal statute. 415 U.S. at 462-63 (Circuit Court held that an injunction was not appropriate); *id.* at 463-73 (discussing the reasons for the declaratory judgment option).

Union, the Court again stated a strong test, talking about the need to have a "credible threat of prosecution" as opposed to "imaginary or speculative" "fears", but found the State criminal statute subject to challenge without the same level of solidity that existed in S*teffel*, perhaps because constitutional rights were allegedly being chilled. 442 U.S. 289, 297-99, 302-03 (1979). Then, in *Kolender v. Lawson*, the Court noted that there was "never [a] challenge[] to the propriety of declaratory and injunctive relief in this case," *citing Steffel*, or to the plaintiff's standing, but nonetheless assured that "there is a 'credible threat' that [Plaintiff] might be detained again." 461 U.S. 352, 354 n.3 (1983).

Of course, these cases dealt directly with a criminal provision, while we deal here not with the criminal statute but with the sort of Fourth Amendment claim that would typically be raised during the course of criminal proceedings or in a § 1983 action subsequent to some law enforcement encounter where an individual believes his rights were concretely violated. Nonetheless, these principles may be instructive, especially insofar as we recognize that the Plaintiffs' claims are actually a step removed from the challenges that required a genuine or credible threat. Here, we deal with speculation about what will happen during the course of interactions with law enforcement.

In an attempt to demonstrate irreparable harm the Plaintiffs offer the following:

- Jane Doe #3 fears that her "husband will be detained in any routine traffic stop" and "deported." Doc. 37-27 at ¶ 5. Given the State Defendants' interpretation of Act No. 2011-535, this fear is speculative and imaginary.
- Mohammad Abdollahi Ali-Bek filed a declaration on behalf of DreamActivist.org in which he expresses concerns about what DREAM Act students confronting confused law enforcement. Doc. 37-10 at 1, ¶ 7. However, "DREAM Activist.org is a multicultural, migrant-youth led movement to pass the federal DREAM Act." *Id.* at ¶ 1. It is not at all clear that the rights DreamActivist.org is seeking to protect here are "germane to the organization's purpose" as is necessary for organizational standing. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).[49]
- Maria D. Ceja Zamora speculates that she will be racially profiled and unlawfully detained, and she notes that she "will be forced to limit [her] travel" to decrease the chances of being stopped by police. Doc. 37-14 at ¶¶ 7-9. Given the State Defendants' interpretation of Act No. 2011-535, this

[49] "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343.

declarant's fears about long detentions are speculative and imaginary. Moreover, as previously noted, the Act specifically forbids racial profiling; neither a facial challenge nor a speculative as-applied challenge should proceed in the face of the clear language of the Act.

- Eliso Medina filed a declaration on behalf of the Service Employees International Union asserting that some of its members have already been asked for immigration papers and speculating that persons will stop participating in rallies, *etc.* for fear of being stopped on the way. Doc. 37-7 at 1, ¶¶ 9-10. As to the assertion that some have already been stopped, the declarant offers no information as to how many stops were made or how recently. For all the declaration says on its face, the stops could have been in the 1970s. While they presumably were not, this Court should not presume that any useful evidence has been offered here in the absence of specifics. Moreover, the Act is not yet effective and so any stops based on the Act would be the result of local error, not the text of Act No. 2011-535. As to the concern about rallies and such, the declarant is speculating about the behavior of others and is doing so based on a misunderstanding of what Act No. 2011-535 authorizes.
- Harris Raynor filed a declaration on behalf of Southern Regional Joint Board of Workers' United which echoes Eliso Medina's concerns. Doc. 37-8 at 1,

¶¶ 5-7. It should be rejected for the same reasons. Mr. Raynor's additional concerns about racial profiling should be rejected for the reasons stated as to Maria D. Ceja Zamora.

- Pastor Christopher Barton Thau declares that he warns others that law enforcement will make a point of racially profiling and harassing immigrants. Doc. 37-17 at ¶ 20. He further says "some municipalities . . . have a history of harassing immigrants." *Id.* If true, that is certainly unacceptable, but it is not authorized by Act No. 2011-535.
- Jane Doe #1, Jane Doe # 2, Jane Doe #5, John Doe #3 and Jane Doe #4 are all fearful of an immigration check during a routine traffic stop, and some assert that they will travel less as a result. Doc. 37-25 at ¶¶ 5-6; doc. 37-26 at ¶¶ 5, 13; doc. 37-29 at ¶10; doc 37-33 at ¶ 11; doc. 37-28 at ¶¶ 6-7. Given the State Defendants' interpretation of Act No. 2011-535, these fears are speculative and imaginary.
- John Doe #4 is similarly concerned about an immigration check during a routine traffic stop, but goes further by drawing a connection between a failure to have a driver's license and further inquiry into immigration status. Doc. 37-34 at ¶¶ 8-9. On this point, it bears emphasizing that the merits of the Plaintiffs' Fourth Amendment challenge with respect to Section 18 (concerning driver's licenses) focused on an allegation prolonged detention

pursuant to Section 18(d). Doc. 37 at 54. John Doe #4 seems to focus instead on Section 18(b) and (c), which increase the chances that his immigration status will be determined. In this way, John Doe #4 makes it less speculative that his immigration status will be determined if he happens to be stopped while driving in the first instance, but he does not demonstrate any increased chance of suffering a constitutional harm. John Doe #4 has no more business driving in this State without a license than does someone who has had her license revoked for driving under the influence. Moreover, he has no right to continue living in Alabama, and the United States, unlawfully.

- Joseph Hansen's declaration on behalf of United Food and Commercial Workers International Union is a replay of the declarations of Eliso Medina and Harris Raynor, and should be rejected for the reasons stated as to them. Doc 37-9 at ¶ 9. Moreover, in the case of Mr. Hansen, it is less clear that the interests he seeks to protect herein are "germane to the organization's purpose" as is necessary for organizational standing. *Hunt*, 432 U.S. at 343.

These Plaintiffs have not established an irreparable injury sufficient to invoke the extraordinary remedy of a preliminary injunction. More fundamentally, a lack of standing and ripeness stand as a jurisdictional bar.

C. THE PLAINTIFFS HAVE NOT ESTABLISHED THAT THE BALANCE OF EQUITIES TIPS IN THEIR FAVOR AND THAT AN INJUNCTION IS IN THE PUBLIC INTEREST.

The Plaintiffs' views on how Act No. 2011-535 will be implemented are speculative. Neither the balance of equities nor the public interest favors allowing Plaintiffs to prevent the implementation of legislation passed by the Alabama Legislature and signed by the Alabama Governor, before any opportunity for lawful enforcement. For these reasons, and in light of the important State interests set out in Section 2 of the Act, Plaintiffs have failed to establish that the balance of equities favor an injunction or that an injunction is in the public interest.

VI. EQUAL PROTECTION CLAUSE

Plaintiffs allege that Section 8 and Section 28 of Act No. 2011-535 violate the Equal Protection Clause of the Fourteenth Amendment. Section 8 concerns public postsecondary institutions as well as postsecondary education benefits generally. Doc. 1-2 at 24. Section 28 concerns data collection by public elementary and secondary schools. *Id.* at 58-62. As to both of these arguments, the primary disagreement between the parties concerns what Act No. 2011-535 actually requires and how it will be implemented.

A. PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits . . . ." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

1. Plaintiffs' challenge to Section 8.

Plaintiffs read Section 8 to "exclud[e] lawful noncitizens from public colleges and universities." Doc. 37 at 56. From this understanding of the provision, they argue that Section 8 is a classification based on alienage and, as such, is subject to strict scrutiny. *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). It is true that classifications based on alienage trigger strict scrutiny. However, Section 8 does not make any distinction based on alienage. Rather, a line is drawn to the exclusion of illegal aliens.

In *Plyler v. Doe*, the Supreme Court explained that a lower standard of review applies when the line being drawn is to the exclusion of illegal aliens:

> We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class, *see, e.g.,* n. 14, *supra,* has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy."

457 U.S. 202, 219 n.19 (1982); *see also id.* at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'").

Accordingly, absent a fundamental right, the State Defendants need offer only a rational basis for its distinctions. In pertinent part, Section 8 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 [S]tate. An alien attending any public postsecondary institution in this [S]tate must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, *et seq*. . . .

Section 8, doc. 1-2 at 24.

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.

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.[50] This is the way that Section 8 will be implemented by the Alabama Department of Postsecondary Education. *See* Exhibit 4 (Letter from Chancellor Hill). Minimal scrutiny is therefore the appropriate legal standard.

The Plaintiffs include a throw-away line that Section 8 cannot survive rational basis review, doc. 37 at 57, but do not otherwise develop the argument—except insofar as they also cite to declarations in seeking to establish a harm, *id.* at

[50] 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.

75. In the event that the Court considers this sufficient to preserve the argument, the State Defendants briefly address it.

The answer is found in federal law: Congress has declared that the States must stop providing public benefits to illegal aliens, 8 U.S.C. § 1621, and has specifically stated that doing so is a compelling government interest. "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." 8 U.S.C. § 1601(6). Moreover, Congress has defined "state or local public benefit" to include "postsecondary education." 8 U.S.C. § 1621(c)(1)(B).

Thus, access to public institutions of higher education is a valuable public benefit. And the State may reserve that limited public benefit for U.S. citizens and for aliens who are lawfully present in the United States. Aliens unlawfully present in the United States have no right to remain in the United States, much less to occupy a seat at one of Alabama's institutions of higher education, to the exclusion of others.

2. Plaintiffs' challenge to Section 28.

Section 28 of Act No. 2011-535 requires that public elementary and secondary schools make an effort to determine, "at the time of enrollment," whether a student "was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States." Doc. 1-2 at 58. The

data collected are to be analyzed by the State Board of Education and reported back to the Legislature. *Id.* at 59-61. Plaintiffs' challenge to this provision is largely tied to a gross misunderstanding of what Section 28 requires and how it will be implemented, but their argument is also full of speculation and misstatements.

Plaintiffs begin by asserting that *Plyler* "held . . . that all children have a constitutional right to public primary and secondary education regardless of their immigration status." Doc. 37 at 58. In fact, the *Plyler* Court recognized that education is not a fundamental right at all. 457 U.S. at 223. The Court's holding was that Texas failed to demonstrate that its policy of outright denying an education to illegal aliens "further[ed] some substantial goal of the State" such that it could "be considered rational." *Id.* at 224, 230.

Next, the Plaintiffs try to equate Alabama's data collection and reporting requirements to Texas' policy of outright denial. They do so by arguing that Section 28 will deter children—lawful and unlawful, alike—from enrolling in school. Doc. 37 at 58-60. Of course, deterrence is not denial. But, even if deterrence were enough, Plaintiffs' allegations are highly speculative and uninformed. There are several reasons why, and they are all evidenced in Superintendent Morton's August 1, 2011 letter of guidance to city and county superintendents, attached hereto as Exhibit 3.

Plaintiffs have assumed that Section 28 will affect them this Fall if they have school age children. *See e.g.,* doc. 1 at ¶ 87 (". . . Pastor Thau has stated he will not provide proof of immigration status to enroll his child in the upcoming school year."). In fact, Section 28 is not effective until September 1, which is after the school year starts. Exhibit 3 at 2 ("This revision applies to all students enrolling in an Alabama public elementary or secondary school for the first time *on or after the September 1, 2011[] date . . ..*") (emphasis added); *id.* at 3 ("The process described above will only apply to the initial enrollment of a student in the public schools of Alabama *on or after September 1, 2011*.") (emphasis added); *id.* ("All students currently enrolled prior to September 1, 2011[] will follow the current admission requirements."); *id.* at 4 (flow chart showing "No further action needed" for those students enrolled prior to September 1); *see also* doc. 1-2 at 72 (Section 34 of the Act sets out the effective dates). All of the Plaintiffs' children who are of school age will already be in class when Section 28's requirements kick in, and so they will be unaffected.

Plaintiffs have also assumed that enrollment is something that happens every year. In fact, the State Board of Education tracks enrollment in a Statewide student management system. Once a child enrolls in an Alabama elementary or secondary school, that child remains enrolled even as he or she moves elsewhere within the State or advances from elementary to secondary school. Exhibit 3 at 2 ("This

revision applies to all students enrolling in an Alabama public elementary or secondary school *for the first time* on or after the September 1, 2011[] date . . ..") (emphasis added); *id.* at 3 ("The process described above will only apply to the *initial enrollment* of a student in the public schools of Alabama on or after September 1, 2011. *That information, once entered into the statewide student management system, remains saved*."). Only if a child withdraws from the Alabama public school system entirely—*e.g.,* by moving to another State or switching to a private school—can enrollment a second time become necessary. Children do register every year, but registration is not the same as enrollment; for many children, enrollment will happen only once. Accordingly, not only are Plaintiffs wrong to believe they will be affected this Fall, some—or all—of them may never be affected because their children are already enrolled, and, thus, the opportunity for injury will never arise.

Of course, Section 28 will eventually impact someone—even if it is not any of the Plaintiffs. But, when that happens, there will still be no injury. Plaintiffs misunderstand the import of Section 5(f) and Section 6(f). As set out in the Interpretative Principles section of this response, Section 5(f) and Section 6(f) do not require school employees to report any students or parents whom they ascertain are here illegally to anybody. Instead, Section 5(f) and Section 6(f) merely require that Section 28 be enforced as written: the public elementary and secondary

schools are to request the data, they are to report the data to the State Board of Education, and the State Board of Education is to analyze the data and report back to the Legislature. Doc. 1-2 at 58-62. Nowhere does Section 28 compel school employees to turn in illegal aliens, and, hence, Section 5(f) and Section 6(f) do not ramp up any compulsion to do.

Superintendent Morton's letter to city and county superintendents includes a flow chart to help local officials understand the process for requesting a birth certificate and, when necessary, supplemental documentation. Exhibit 3 at 4. It makes clear that, once Section 28's requirements become effective, the schools will be charged with seeking data and coding the child in the Statewide student management system as either a "1" or a "0"; thereafter, "No further action [will be] needed." Exhibit 3 at 4.[51] That is, the State Board of Education does not read Act No. 2011-535 to require further action in the form of a phone call, *etc*., reporting anyone is an illegal alien. Since the State Board of Education likewise does not forbid such reporting, there is no argument that it has failed to implement the Act

[51] A child is coded "1" if his parents produce a birth certificate showing his birth in the U.S., if his parents produce "documents including evidence of citizenship or immigration status and [a] signed Attestation", of if his parents sign a "declaration that [he] is a legal citizen or immigrant." Exhibit 3 at 4. If no birth certificate is produced, or if the birth certificate does not show a U.S. birth, and if the supplemental documents are not provided, then the child is coded "0." *Id.* In this way, a U.S. citizen child who refuses to produce the requested documents is coded in the same way as a child who is not lawfully present in the United States. And, irrespective of how the child is coded in the Statewide student management system, the child experiences no real world impact; as discussed below, the child is enrolled.

as required by Section 5, Section 6, and Section 28. Instead, the Board is in full compliance with the Act, including the requirement to "construe all provisions of this section in conformity with federal law." Section 28(g), doc. 1-2 at 62. To the extent that Plaintiffs would protest that a school employee *might* voluntarily report immigration status to someone, they speculate.[52] Act No. 2011-535 does not require it on its face, and no grounds for an injunction exist.

Most importantly, and as noted above, Alabama's policy is not one of denial. Superintendent Morton's letter is clear that no child will be denied an education based on unlawful status or on a failure to provide the requested documentation. The letter includes an insert for the *Alabama School Attendance Manual*, which is reproduced on page 6 and excerpted on page 2 of Exhibit 3. It provides: "No student shall be denied enrollment or admission to the school due to failure to provide the birth certificate of other supplemental documentation described in this section." Superintendent Morton's letter includes a sample letter to be sent to parents seeking documentation. Exhibit 3 at 7. That letter makes clear that the child "is enrolled" and that the school is "request[ing] this information solely to comply with data reporting obligations established by State law and for no other

[52] Section 28 does make an attempt at addressing privacy concerns and ensuring that the data are collected for the statistical purposes discussed in the Legislative findings, Section 2, doc. 1-2 at 6, though the Plaintiffs think these attempts are inadequate.

purpose." *Id.* Indeed, parents should "[r]est assured that it will not be a problem if you are unable or unwilling to provide either of the documents" requested. *Id.*

In short, the students will be educated, and their parents should not be deterred from enrolling them. If the Plaintiffs believe that parents will still be deterred in the future, then a subsequent lawsuit and a good deal of evidence will be needed to prove that theory. Act No. 2011-535 cannot reasonably be construed to lead to any of the speculative injury that Plaintiffs imagine.

With these factual parameters established, it is now appropriate to turn to the legal argument made by Plaintiffs against Section 28. They claim that it is inconsistent with *Plyler*. Doc. 37 at 58. However, they omit a critical section of *Plyler*, one that clearly supports and contemplates the actions taken in Section 28.

Plyler concerned a 1975 Texas law that permitting public school districts to deny illegal alien students enrollment in the K-12 public schools. 457 U.S. at 205. In evaluating the Equal Protection claim brought by the plaintiff students, the Court assessed the asserted State interest in the law. The Court concluded that the State failed to show that its law furthered a substantial goal because it had failed to collect and present evidence regarding the economic effect of illegal aliens attending K-12 public schools in the State:

> But the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State. As the District Court in No. 80-1934 noted, the State failed to offer any "credible supporting evidence that a

> proportionately small diminution of the funds spent on each child [which might result from devoting some state funds to the education of the excluded group] will have a grave impact on the quality of education."

Plyler, 457 U.S. at 229 (inserted text in original) (citation omitted). In other words, the *Plyler* Court ruled against the defendants because they had *failed* to collect statistical information concerning the impact of illegal immigration on the K-12 school system. Plainly, a State that collects this information—information that the Supreme Court has said is necessary to withstand an Equal Protection Clause challenge—cannot be in violation of the Equal Protection Clause for doing so.

B. THE PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY ARE LIKELY TO SUFFER IRREPARABLE INJURY IN THE ABSENCE OF AN INJUNCTION.

"A plaintiff seeking a preliminary injunction must establish . . . that he is likely to suffer irreparable harm in the absence of preliminary relief. . . ." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). "Issuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22 (emphasis added). "[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.*

As to Section 8, Plaintiff Tesfamariam and Plaintiff Haile, who are lawfully present refugees, allege that they will be improperly denied the opportunity to enroll in one of Alabama's public postsecondary institutions. Doc. 37 at 75. Because the State Defendants disagree with the Plaintiffs' reading of Section 8 and will implement Section 8 in a manner that allows these Plaintiffs to attend school, there is no irreparable injury. The State Defendants understand that the statute creates a bit of an ambiguity, but the Plaintiffs must not be able to assert their reading in a facial challenge, denying the State all opportunity to implement the statute in a lawful manner.

Plaintiffs also invoke John Doe #3 in seeking to establish irreparable injury. Doc. 37 at 75. John Doe #3 tells us that he "recently applied to and was accepted at three of Alabama's public universities." Doc. 37-33 at ¶ 5. He won't be attending school in the Fall though, and it is not because of Act No. 2011-535. Instead, money stands in the way. Doc. 37-33 at ¶ 5 ("I am financially unable to enroll right now, but I plan to re-apply in coming years."). There is no likelihood of irreparable injury here; indeed, there is no standing here at all.

As to Section 28, for the reasons stated in the merits discussion, the Plaintiffs have not established that they are likely to suffer an irreparable injury. Indeed, it is not clear that any of the Plaintiffs have standing or that they present ripe claims. Any Plaintiffs whose children are scheduled to start school this Fall

should expect that their children will be enrolled before Section 28 is even effective. And any children who enroll thereafter, should be able to do so assured that Act No. 2011-535 does not compel that they or their families be reported to anyone in the event they are unlawfully present.

C. THE PLAINTIFFS HAVE NOT ESTABLISHED THAT THE BALANCE OF EQUITIES TIPS IN THEIR FAVOR AND THAT AN INJUNCTION IS IN THE PUBLIC INTEREST.

The Alabama Legislature has made a determination that the State of Alabama is suffering adverse consequences from the presence of illegal aliens within her borders. *See* doc. 1-2 at 6 ("The State of Alabama finds that illegal immigration is causing economic hardship and lawlessness in this [S]tate . . . ."); *id.* ("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"). In order to determine the true extent of this problem, the State seeks to "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 [S]tate," *id.*, and to "to ensure the integrity of various governmental programs and services," *id.* at 7. Only with this information in hand can the State move forward to assess its options in protecting

the vitality of Alabama's public education system. If the preliminary injunction is granted, the state will be unable to begin collecting this valuable information. As noted above, this information will be collected only slowly, as individual students initially enroll in the Alabama K-12 system. It is therefore imperative to begin this process as soon as possible. If a preliminary injunctions is granted, any improvements to the system that result from this information-gathering process will be delayed, impairing the public education that is delivered to Alabamians.

For these reasons, and in light of the important State interests set out in Section 2 of the Act, Plaintiffs have failed to establish that the balance of equities favor an injunction or that an injunction is in the public interest.

VII. FIRST AMENDMENT FREEDOM OF EXPRESSION

Pertinent here, the First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. Amend. I. "The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980). Nonetheless, the Supreme Court's "decisions have recognized the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject

to government regulation, and other varieties of speech" *Id.* at 562 (internal quotation marks and citations omitted).

The Plaintiffs argue that "Section 11 [of Act No. 2011-535] violates the First Amendment's right to freedom of expression." Doc. 37 at 62 (boldface and capitalization omitted). They make three arguments: (1) Section 11(f) and Section 11(g) are content-based restrictions on speech, *id.* at 63-65; (2) Section 11(a) is a content-based restriction on speech, *id.* at 65; and, (3), Section 11, generally, is overbroad, *id.* at 65-66.

The relevant provisions of Section 11 provide:

> (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 [S]tate.
>
> . . .
>
> (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 the 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.
>
> . . .

Section 11(a), (f), (g), doc. 1-2 at 31, 33. Section 11(h) provides that a violation of these provisions is a Class C misdemeanor, the penalty for which is a fine of not more than $500. *See* Section 11(h), doc. 1-2 at 33.

A. PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits . . . ." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

1. Plaintiffs' claim that Section 11(f) and Section 11(g) are content-based restrictions on speech.

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.

The very idea that it would be a violation of the First Amendment to prohibit solicitation of the services of a prostitute is laughable. *Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes."). 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. *Id.* at 388-89; *see also id.* at 389 ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.")[53]; *Central Hudson*, 447 U.S. at 563-64 ("The government may ban forms of . . . commercial speech related to illegal activity") (internal citations omitted); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 496 (1982) ("If that activity is

[53] *Fane v. Edenfield*, 945 F.2d 1514, 1517 (11th Cir. 1991) (commercial speech is "expression that is related exclusively to the economic interests of the speaker and audience"); *see also Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("Whatever ambiguities may exist at the margins of the category of commercial speech, it is clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply.") (internal citation omitted); *Pittsburgh Press Co.*, 413 U.S. at 385 ("Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.").

deemed 'speech,' then it is speech proposing an illegal transaction, which a government may regulate or ban entirely.").

Whether the provisions would survive a challenge as content-based[54] 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. *See* doc. 37 at 66.[55]

---

[54] There appears to be an argument to be made that whether the restrictions are content-based is irrelevant to a proper First Amendment analysis of the commercial speech at issue here. *See Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002) (setting out the test from *Central Hudson* "for determining whether a particular commercial speech regulation is constitutionally permissible" without mention of content neutrality); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 475 (1989) (setting out the "mode of analyzing the lawfulness of restrictions on commercial speech" without mention of content neutrality); *Central Hudson*, 447 U.S. at 564 n.6 ("In most other contexts, the First Amendment prohibits regulation based on the content of the message. *Two features of commercial speech permit regulation of its content.* First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.") (internal quotation marks and citations omitted; emphasis added).

[55] John Doe #5 and John Doe #6 appear to be the only Plaintiffs who work as day laborers, and thus have the potential to be impacted by Section 11(f) and Section 11(g). Should these two Plaintiffs be denied pseudonymous status and elect not to proceed under their real names, this claim would fail for lack of a plaintiff with standing to pursue it. *Davis v. Federal Election Com'n,* 554 U.S. 724, 734 (2008) ("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.") (internal citations and quotation marks omitted).

2. Plaintiffs' claim that Section 11(a) is a content-based restriction on speech.

Section 11(a) makes it "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 [S]tate." Doc. 1-2 at 31. Plaintiffs' First Amendment attack seems to be aimed at the prohibition on soliciting work. However, "unauthorized alien," the term used in Section 11(a), *id.*, is defined in Section 3(16) of Act No. 2011-535 to mean "An alien who is not authorized to work in the United States as defined in 8 U.S.C. § 1324a(h)(3)." Doc. 1-2 at 12.[56] Accordingly, in a First Amendment context, Section 11(a)'s function is to prohibit solicitation of work which the relevant persons are forbidden to perform pursuant to federal law.[57]

Again, when the commercial speech[58] being limited is with respect to an underlying transaction that is unlawful, the First Amendment is not offended.

---

[56] In turn, 8 U.S.C. § 1324a(h)(3) provides: "As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General."

[57] *See* Doc. 37 at 65 ("Section 11(a) also imposes a content-based speech restriction on speech by criminalizing the application for or solicitation of work in public areas *by noncitizens who do not have federal work authorization*.") (emphasis added).

[58] *Fane v. Edenfield*, 945 F.2d 1514, 1517 (11th Cir. 1991) (commercial speech is "expression that is related exclusively to the economic interests of the speaker and audience"); *see also Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("Whatever ambiguities may exist at the margins of the category of commercial speech, it is clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply.") (internal

Pittsburgh Press Co., 413 U.S. at 388-89; *Central Hudson*, 447 U.S. at 563-64 ("The government may ban forms of . . . commercial speech related to illegal activity") (internal citations omitted); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 496 (1982) ("If that activity is deemed 'speech,' then it is speech proposing an illegal transaction, which a government may regulate or ban entirely.").

The Plaintiffs' attack on Section 11(a) is immediately followed by an overbreadth attack, which is discussed below. Doc. 37 at 65-66. In the context of the overbreadth attack, the Plaintiffs note Plaintiff Romero, who wants to start looking for a job (*soliciting* a job)—but not actually start work—before he has an Employment Authorization Document from the federal government. *See* Doc. 37 at 66; Doc. 37-16 at 2-3. Since he is only mentioned in the overbreadth argument, it is unclear whether Plaintiff Romero intends to bring an as-applied challenge to Section 11(a). In the event that he does, such a narrow, as-applied claim *ma*y have merit. The State lacks an interest in preventing persons from seeking employment that it will be lawful for them to hold at the time that the employment commences. It clearly was not the intention of the Alabama Legislature to prevent Plaintiff Romero from participating in the Optional Practical Training that his F-1 visa authorizes and that is apparently important to his ability to secure his PhD in

---

citation omitted); *Pittsburgh Press Co.*, 413 U.S. at 385 ("Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.").

Political Theory from the University of Alabama. On the other hand, it may be that the F-1 visa authorization is sufficient to bring Plaintiff Romero outside of the definition of "unauthorized alien." The Plaintiffs have failed to brief this issue for the edification of opposing counsel or the court—perhaps because no claim is intended. Under the circumstances then, Plaintiff Romero has failed to make a sufficient showing to demonstrate a likelihood that he will prevail on the merits such that a preliminary injunction is appropriate. In the alternative, if the Court is inclined to believe that Plaintiff Romero is entitled to some relief at this stage, any relief should be limited to him; he alone is not reason to enjoin Section 11 in its entirety or as applied to others unlike him.

3. Plaintiffs' claim that Section 11, generally, is overbroad.

The earlier Interpretative Principles section of this response discussed the standards applicable to a facial challenge generally, including the content-based restrictions claims raised by the Plaintiffs. However, the Supreme Court's "cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange*, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks and citations omitted). This second standard *may*

apply to the Plaintiffs' final First Amendment claim which alleges overbreadth, though the better argument is that Plaintiffs have failed to state a claim.

The "rationale behind [allowing overbreath challenges to proceed] is that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1269 (11th Cir. 2007); *Bates v. State Bar of Arizona,* 433 U.S. 350, 380 (1977) (". . . An overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute."). Accordingly, "the Court has altered its traditional rules of standing to permit—in the First Amendment area—attacks on overly broad statutes," *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), in a number of contexts, *id.* at 612-13.[59]

Still, "[a]pplication of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. at 613. "[O]verbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct." *Id.* "Additionally, overbreadth

[59] Interestingly, the *DA Mortgage* Court only recognized application of the overbreadth doctrine in cases involving prior restraints, 486 F.3d. at 1269, or where criminal penalties were involved, *id.* at 1269-70, 1273. The Supreme Court does not describe the doctrine in this same manner, and the text adheres to the Supreme Court's views.

scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." *Id.* at 614. Finally, important here, "the overbreadth doctrine does not apply to commercial speech." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 497 (1982) (*citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 565 n.8 (1980)); *Bates*, 433 U.S. at 380-81 (overbreadth doctrine is not applicable where professional advertising is at issue); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980) (characterizing *Bates* as "declar[ing] the overbreadth doctrine to be inapplicable to certain commercial speech cases"); *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 481 (1989) ("[O]verbreadth analysis does not normally apply to commercial speech [because] commercial speech is more hardy, less likely to be 'chilled,' and not in need of surrogate litigators.") (internal citations omitted).

Here, the Plaintiffs argue that "Section 11 is unconstitutionally overbroad," Doc. 37 at 65, and we take this to mean that Sections 11(a), (f) and (g) are all alleged to be overbroad insofar as these are the only provisions in Section 11 which are discussed under the First Amendment heading. Plaintiffs' general argument leading up to this assertion is based on the idea that these provisions prohibit solicitation of work, which is protected commercial speech. Doc. 37 at

63-65. They even cite *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991), *see* doc. 37 at 63, which concerned accountants seeking new clients through personal contacts, an activity similar to day laborers. From the Eleventh Circuit's discussion, it is clear that this activity is commercial speech. *Fane*, 945 F.2d at 1517 (defining commercial speech as "expression that is related exclusively to the economic interests of the speaker and audience" and discussing the same); *see also Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("Whatever ambiguities may exist at the margins of the category of commercial speech, it is clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply.") (internal citation omitted); *Pittsburgh Press Co.*, 413 U.S. at 385 ("Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech."). Thus, it will not support an overbreadth challenge, *Village of Hoffman Estates*, 455 U.S. at 497; *Bates*, 433 U.S. at 380-81; *Village of Schaumberg*, 444 U.S. at 634, and the Plaintiffs' claim fails.

Jumping tracks, and accepting for a moment the Plaintiffs' view that the provisions of Act No. 2011-535 at issue here are about stopping unauthorized aliens from working and from soliciting day laborer jobs, these provisions are much less about regulating speech than about limiting the conduct of soliciting work which one is not authorized—by federal government dictate—to perform.

From this perspective, the Supreme Court has suggested little role for an overbreadth challenge:

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate [S]tate interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. . . .

Broadrick, 413 U.S. at 615 (citation omitted): *see also Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) ("[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds"). In *Broadrick*, the Court concluded that the statute was "not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16 (footnote omitted). Accordingly, even if an

overbreadth challenge is not precluded on grounds that commercial speech is at issue, the Plaintiffs' claims should be viewed with a critical eye.

Nonetheless, proceeding to consider the claims, the Supreme Court "generally do[es] not apply the strong medicine of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law." *Washington State Grange*, 552 U.S. at 449 n.6 (internal quotation marks and citations omitted). Here, Plaintiffs have offered little in terms of arguments about the alleged overbreadth of 11(a), (f), and (g). *See* Doc. 37 at 66. They assert that John Doe #5 and John Doe #6 will be "inhibit[ed] in their willingness to seek day labor work," *id.*, but the State Defendants have explained above why Sections 11(f) and (g) are valid as to them (and, by extension, to those like them). Plaintiffs also contend that Plaintiff Romero, and those like him, will be harmed, *id.*, but Plaintiff Romero is before the Court and so an as-applied, rather than overbreadth, challenge is all that is appropriate. *See Taxpayers for Vincent*, 466 U.S. at 803. That leaves Plaintiffs' assertion that "HB 56 [*sic*] will have a substantial chilling effect on the expressive rights of countless others who regularly solicit work in public forums throughout Alabama, including numerous lawful residents and citizens as well as individuals seeking temporary, informal work for which employment authorization is not required." Doc. 37 at 66. Given that the

statement is unadorned, unexplained, and unsupported, this Court should hold it insufficient to support an overbreadth challenge.

B. THE PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY ARE LIKELY TO SUFFER IRREPARABLE INJURY IN THE ABSENCE OF AN INJUNCTION.

"A plaintiff seeking a preliminary injunction must establish . . . that he is likely to suffer irreparable harm in the absence of preliminary relief. . . ." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). "Issuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22 (emphasis added). "[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.*

Plaintiffs make the following argument:

> The First Amendment violations in Section 5, 6, and 11 constitute further irreparable harms to Plaintiffs. Individuals with the will and ability to work in Alabama will be subject to criminal sanctions for communicating about this subject in a public or private forum. HB § 11 [*sic*]. Like Plaintiffs John Doe #5 and John Doe #6, citizens and noncitizens alike will be chilled from lawfully seeking work for fear of prosecution under HB 56's [*sic*] overbroad speech prohibitions. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.
>
> Plaintiffs would be further harmed by the loss of employment opportunities that flow from this unconstitutional denial of free speech, magnifying the imminent irreparable harms posed by HB 56 [*sic*].

Doc. 37 at 75-76 (internal quotation marks and citations omitted).

First, to the extent that Section 5 and Section 6 are invoked to suggest that they further the enforcement of Section 11, the Plaintiffs are in error for the reasons set out in the Overarching Principles section of this response.

Second, Plaintiffs have failed to make their case. Even assuming that John Doe #5 and John Doe #6 should be treated as plaintiffs in this action, they are not authorized by the federal government to work, doc. 1 at ¶¶ 160, 163, and so suffer no legally cognizable harm in not being able to solicit unlawful employment. Plaintiffs have offered no support for the proposition that citizens will be chilled from lawfully seeking work, or that Section 11 is overbroad. At best, Plaintiff Romero *may* have a claim, but it is not clear that he is making it and he has not supported it.

Plaintiffs also make an argument about an alleged harm being suffered by the organizational Plaintiffs who are devoting resources to the education about Act No. 2011-535. Doc. 37 at 77. It is not at all clear which, if any, claims made by the Plaintiffs in their memorandum are related to these alleged harms. Nonetheless, since the harms appear to be associational we address them here. The argument that the organizational Plaintiffs have had to devote resources to the new law is a non-starter, which the Plaintiffs have not begun to explain. As to the allegations of associational harm, it should suffice—given that the burden of

establishing an entitlement to a preliminary injunction is on the Plaintiffs, *see* Preliminary Injunction Standard, *supra*—to note that the Plaintiffs have failed to argue a violation of their associational rights. The only First Amendment claims argued in the memorandum are speech claims. Doc. 37 at 62-66.

C. THE PLAINTIFFS HAVE NOT ESTABLISHED THAT THE BALANCE OF EQUITIES TIPS IN THEIR FAVOR AND THAT AN INJUNCTION IS IN THE PUBLIC INTEREST.

Given that the Plaintiffs have not established a likelihood of success on the merits or that they will likely suffer irreparable harm, and in light of the important State interests set out in Section 2 of the Act, the equities do not favor the Plaintiffs and an injunction is not in the public interest.

VIII. SIXTH AMENDMENT

In pertinent part, the Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor . . . ." U.S. Const. Amend. VI. The Plaintiffs single out three of the Act's provisions—Sections 10, 11, and 13—as violating the Sixth Amendment.

These sections are similar in that they each create State-law offenses under which an alien's unlawful presence in the United States—as determined by the federal government—acts as a predicate for criminal liability. Section 10

criminalizes the "willful failure to complete or carry an alien registration document" in violation of federal law if the person is "an alien unlawfully present in the United States." Section 10(a), doc. 1-2 at 30. Section 11 makes it unlawful for "an unauthorized alien" to take certain actions in seeking or maintaining a job. Section 11(a), doc. 1-2 at 31. And Section 13 creates a variety of offenses under which it is unlawful to interact with an alien "know[ingly] or recklessly disregard[ing]" the fact that the alien's presence in the United States or other activity is or will be "in violation of federal law." *E.g.,* Section 13(a)(1) (concealing, harboring, or shielding an unlawful alien from detection), doc. 1-2 at 36; Section 13(a)(2) (encouraging or inducing an unlawful alien to reside in the State), doc. 1-2 at 37; Section 13(a)(3) (transporting an unlawful alien in furtherance of his or her unlawful presence), doc. 1-2 at 37-38.

As noted, the unlawful-presence element of each of these new offenses is to be determined solely by the federal government. Identical provisions in these sections govern the proof issues in determining an alien's immigration status, and in particular, establish the federal government's verification of an individual's status pursuant to 8 U.S.C. §1373(c) as conclusive evidence on the issue:

> 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 unlawfully present in the United States.

Section 10(e), doc. 1-2 at 30-31; *see also* Section 11(e), doc. 1-2 at 32-33 (identical language); Section 13(h), doc. 1-2 at 38-39 (same).

The federal statute in question, 8 U.S.C. §1373(c), requires the federal government to provide immigration status information to State and local officials as requested:

> 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).

According to the Plaintiffs, Sections 10(e), 11(e) and 13(h) "restrict[] how [immigration status] can be proven, and in the process violate[] the Confrontation Clause and Compulsory Process Clause of the Sixth Amendment." Doc. 37 at 67. In fact, these provisions bow to a countervailing constitutional principle: the role of the federal government in the regulation of immigration.

Nonetheless, given the stage of proceedings here, the Plaintiffs' inability to demonstrate irreparable injury is sufficient grounds for resolving this issue. "A

plaintiff seeking a preliminary injunction must establish . . . that he is likely to suffer irreparable harm in the absence of preliminary relief. . . ." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). "Issuing a preliminary injunction based only on a *possibility* of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22 (emphasis added). "[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.*

In *Steffel v. Thompson*, the Supreme Court held that "regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no [S]tate prosecution is pending and a federal plaintiff demonstrates *a genuine threat* of enforcement of a disputed criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." 415 U.S. 452, 475 (1974) (emphasis added).[60] A concurring opinion noted:

> Our decision today must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law is unconstitutional, even if he genuinely feels 'chilled' in his freedom of action by the law's existence, and even if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it.

[60] Injunctive relief might be unavailable due to an inability to show irreparable injury, while a declaratory judgment does not require the same and is a "less intrusive" mechanism for testing the constitutionality of a State criminal statute. 415 U.S. at 462-63 (Circuit Court held that an injunction was not appropriate); *id.* at 463-73 (discussing the reasons for the declaratory judgment option).

As the Court stated in *Younger v. Harris*, 401 U.S. 37, 52:

> 'The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . .'
>
> *See also Boyle v. Landry*, 401 U.S. 77, 80-81.
>
> The petitioner in this case has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the State. He has, therefore, demonstrated 'a genuine threat of enforcement of a disputed state criminal statute . . . .' Cases where such a 'genuine threat' can be demonstrated will, I think, be exceedingly rare.

415 U.S. at 476 (Stewart, J., concurring) (footnote omitted).

In *Ellis v. Dyson*, the Court repeated the "genuine threat of enforcement" language, recognizing that this goes to a showing of an Article III controversy. 421 U.S. 426, 432-33, 434 (1975). In *Babbitt v. United Farm Workers National Union*, the Court again stated a strong test, talking about the need to have a "credible threat of prosecution" as opposed to "imaginary or speculative" "fears", but found the State criminal statute subject to challenge without the same level of solidity that existed in S*teffel*, perhaps because constitutional rights were allegedly being chilled. 442 U.S. 289, 297-99, 302-03 (1979). Then, in *Kolender v. Lawson*, the Court noted that there was "never [a] challenge[] to the propriety of declaratory and injunctive relief in this case," *citing Steffel*, or to the plaintiff's standing, but

nonetheless assured that "there is a 'credible threat' that [Plaintiff] might be detained again." 461 U.S. 352, 354 n.3 (1983).

Of course, these cases dealt directly with a criminal provision, while we deal here not with the criminal statute but with assertions of Sixth Amendment rights that would typically be raised during the course of criminal proceedings or in collateral civil proceedings, *i.e.,* habeas proceedings. Nonetheless, these principles are instructive insofar as we recognize that the 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.[61]

---

[61] While "Congress has assigned to the federal courts" "the paramount role" in "protect[ing] constitutional rights," *Steffel*, 415 U.S. at 473, the State courts are not without a role. In *Robb v. Connolly*, the Supreme Court said:

> Upon the [S]tate courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the

(Of course, to the extent that the Plaintiffs are wrong on the merits of their Sixth Amendment arguments and those arguments are rejected in State court, there is no injury. Similarly, where the State courts agree with the Plaintiffs' interpretation of the Sixth Amendment and reject the provisions of Act No. 2011-535 attacked here, there is no injury.)

The bottom line is that it takes layers of speculation to arrive at these asserted injuries. Irreparable harm has not, and cannot, be demonstrated. Accordingly, an injunction—particularly a preliminary injunction—should be denied. Indeed, the Plaintiffs' inability to demonstrate an injury means that the jurisdictional bars of standing and ripeness are at play, and these claims should be dismissed.

In addition to these reasons, it cannot go without stating that the Plaintiffs do not appear to have in any way supported any implicit argument that they will be irreparably harmed as a result of the Sixth Amendment violations they allege.

> constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the [S]tate courts are required to take an oath to support that constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the constitution or laws of any [S]tate to the contrary notwithstanding.' If they fail therein, and withhold or deny rights, privileges, or immunities secured by the constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the [S]tate in which the question could be decided, to this court for final and conclusive determination.

111 U.S. 624, 637 (1884).

Plaintiffs collected their alleged irreparable harms into Section II of their brief. Doc. 37 at 70-77. In that section, they include a paragraph on Fourth Amendment claims, *id.* at 71-72, followed by a paragraph aimed at establishing "the very real threat of unlawful criminal prosecutions," *id.* at 72, and then move on to an assortment of other claims, *id.* at 72-77. Nowhere is the Confrontation Clause, the Compulsory Process Clause or the Sixth Amendment mentioned in Section II of the brief—or in the various paragraphs included in declarations and offered in support of "the very real threat of unlawful criminal prosecutions," *id.* at 72. For this independent reason as well, the Plaintiffs have failed to meet their burden of establishing irreparable harm.

IX. CONCLUSION

For the foregoing reasons, the Plaintiff's motion for a preliminary injunction should be denied.

Respectfully submitted,

LUTHER STRANGE
(ASB-0036-G42L)
Attorney General

BY:

s/James W. Davis
Margaret L. Fleming
(ASB-7942-M34M)
Winfield J. Sinclair
(ASB-1750-S81W)
James W. Davis
(ASB-4063-I58J)
Misty S. Fairbanks
(ASB-1813-T71F)
William G. Parker, Jr.
(ASB-5142-I72P)
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, Alabama 36130-0152
Telephone: 334.242.7300
Facsimile: 334.353.8440
mfleming@ago.state.al.us
wsinclair@ago.state.al.us
jimdavis@ago.state.al.us
mfairbanks@ago.state.al.us
wparker@ago.state.al.us

Of counsel:

John C. Neiman, Jr.
Solicitor General
(ASB-8093-O68N)

Prim F. Escalona
Deputy Solicitor General
(ASB-7447-H69F)

OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, Alabama 36130-0152
Telephone: 334.242.7300
Facsimile: 334.242-4891
jneiman@ago.state.al.us
pescalona@ago.state.al.us

Attorneys for Governor Bentley, Attorney General Strange, Superintendent Morton, Chancellor Hill, and District Attorney Broussard

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Mary Bauer
Samuel J. Brooke
Andrew H. Turner
SOUTHERN POVERTY LAW CENTER
400 Washington Ave.
Montgomery, Alabama 36104
Telephone: 334.956.8200
Facsimile: 334.956.8481
mary.bauer@splcenter.org
sam.brooke@splcenter.org
andrew.turner@splcenter.org

Cecilia D. Wang
Katherine Desormeau
Kenneth J. Sugarman
AMERICAN CIVIL LIBERTIES UNION
39 Drumm Street
San Francisco, California 94111
Telephone: 415.343.0775 Wang
415.343.0778 Desormeau
415.343.0777 Sugarman
Facsimile: 415.395.0950
cwang@aclu.org
kdesormeau@aclu.org
irp_ks@aclu.org

Sin Yen Ling
ASIAN LAW CAUCUS
55 Columbus Avenue
San Francisco, California 94111
Telephone: 415.896.1701 ext. 110
Facsimile: 415.896.1702
sinyenL@asianlawcaucus.org

Michelle R. Lapointe
Naomi Tsu
Daniel Werner
SOUTHERN POVERTY LAW CENTER
233 Peachtree St., NE, Suite 2150
Atlanta, Georgia 30303
Telephone: 404.521.6700 Lapointe & Werner
404.221.5846 Tsu
Facsimile: 404.221.5857
michelle.lapointe@splcenter.org
naomi.tsu@splcenter.org
daniel.werner@splcenter.org

Erin E. Oshiro
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., NW, Suite 1200
Washington, DC 20036
Telephone: 202.296.2300
Facsimile: 202.296.2318
eoshiro@advancingequality.org

G. Brian Spears
G. BRIAN SPEARS PC
1126 Ponce de Leon Avenue
Atlanta, Georgia 30306
Telephone: 404.872.7086
Facsimile: 404.892.1128
bspears@mindspring.com

Ben E. Bruner
BRUNER LAW FIRM
1904 Berryhill Road
Montgomery, Alabama 36117
Telephone: 334.201.0835
brunerlawfirm@gmail.com

Andre Segura
Elora Mukherjee
Omar C. Jadwat
Lee Gelernt
Michael K.T. Tan
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: 212.549.2676 Segura
212.549.2664 Mukherjee
212.549.2620 Jadwat
212.549.2616 Gelernt
212.549.7303 Tan
Facsimile: 212.549.2654
asegura@aclu.org
emukherjee@aclu.org
ojadwat@aclu.org
lgelernt@aclu.org
mtan@aclu.org

Linton Joaquin
Karen C. Tumlin
Vivek Mittal
Melissa S. Keaney
Shiu-Ming Cheer
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, California 90010
Telephone: 213.639.3900
Facsimile: 213.639.3911
joaquin@nilc.org
tumlin@nilc.org
mittal@nilc.org
keaney@nilc.org
cheer@nilc.org

Tanya Broder
NATIONAL IMMIGRATION LAW CENTER
405 14th Street, Suite 1400
Oakland, California 94612
Telephone: 510.663.8282
Facsimile: 510.663.2028
broder@nilc.org

Freddy Rubio
RUBIO LAW FIRM, P.C.
438 Carr Avenue, Suite 1
Birmingham, Alabama 35209
Telephone: 205.443.7858
Facsimile: 205.433.7853
frubio@rubiofirm.com

Herman Watson, Jr.
Eric J. Artrip
Rebekah Keith McKinney
WATSON, MCKINNEY & ARTRIP, LLP
203 Greene Street
Post Office Box 18368
Huntsville, Alabama 35801
Telephone: 256.536.7423
Facsimile: 256.536.2689
watson@watsonmckinney.com
artrip@watsonmckinney.com
mckinney@watsonmckinney.com

Diana S. Sen
LATINOJUSTICE PRLDEF
99 Hudson Street – 14th Floor
New York, New York 10013
Telephone: 212.219.3360
dsen@latinojustice.org

Foster S. Maer
Ghita Schwartz
LATINOJUSTICE PRLDEF
99 Hudson Street – 14th Floor
New York, New York 10013
Telephone: 212.219.3360
fmaer@latinojustice.org
gschwarz@latinojustice.org

Victor Viramontes
Martha L. Gomez
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
634 S. Spring Street, 11th Floor
Los Angeles, California 90014
Telephone: 213.629.2512
vviramontes@maldef.org
mgomez@maldef.org

Amy Pederson
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
1016 16th Street, Suite 100
Washington, D.C. 20036
Telephone: 202.293.2828
apedersen@maldef.org

J.R. Brooks, Jr.
Taylor P. Brooks
LANIER FORD SHAVER & PAYNE, P.C.
Post Office Box 2087
Huntsville, Alabama 35804-2087
Telephone: 256.535.1100
Facsimile: 256.533.9322
jrb@lfsp.com
tpb@lanierford.com

Donald B. Sweeney, Jr.
BRADLEY ARANT BOULT CUMMINGS LLP
One Federal Place
1819 Fifth Avenue North, Seventh Floor
Post Office Box 830709
Birmingham, Alabama 35283-0709
Telephone: 205.521.8000
Facsimile: 205.488.6275
dsweeney@babc.com

C. Lee Reeves, II
Joshua Wilkenfeld
Varu Chilakamarri
U.S. DEPT OF JUSTICE, CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
20 Massachusetts Avenue NW
Washington, DC 20530
lee.reeves@usdoj.gov
Joshua.i.wilkenfeld@usdoj.gov
varudhini.chilakamarri@usdoj.gov

Joyce White Vance
Praveen Krishna
US ATTORNEY'S OFFICE
1801 4th Avenue North
Birmingham, AL 35203-2101
joyce.vance@usdoj.gov
Praveen.krishna@usdoj.gov

Augusta S. Dowd
WHITE ARNOLD & DOWD PC
2025 3rd Avenue, North, Suite 600
Birmingham, AL 35203
adowd@waadlaw.com

Terry McElheny
DOMINICK FLETCHER YEILDING
WOOD & LLOYD
P.O. Box 1387
Birmingham, AL 35201
tmc@dfy.com

F. Grey Redditt, Jr.
VICKERS RIIS MURRAY & CURRAN LLC
106 St. Francis Street, 11th Floor
P.O. Drawer 2568
Mobile, AL 36652-2568
gredditt@vickersriis.com

John F. Whitaker
WHITAKER MUDD SIMMS LUKE
& WELLS LLC
2001 Park Place North, Suite 400
Birmingham, AL 35203
jwhitaker@wmslawfirm.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

Counsel for Plaintiffs

Nina Perales
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
100 Broadway, Suite 300
San Antonio, Texas 78205
Telephone: 210.224.5476
nperales@maldef.org

Respectfully submitted,

LUTHER STRANGE
(ASB-0036-G42L)
Attorney General

BY:

s/James W. Davis
Margaret L. Fleming
(ASB-7942-M34M)
Winfield J. Sinclair
(ASB-1750-S81W)
James W. Davis
(ASB-4063-I58J)
Misty S. Fairbanks
(ASB-1813-T71F)
William G. Parker, Jr.
(ASB-5142-I72P)
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, Alabama 36130-0152
Telephone: 334.242.7300
Facsimile: 334.353.8440
mfleming@ago.state.al.us
wsinclair@ago.state.al.us
jimdavis@ago.state.al.us
mfairbanks@ago.state.al.us
wparker@ago.state.al.us

Of counsel:

John C. Neiman, Jr.
Solicitor General
(ASB-8093-O68N)

Prim F. Escalona
Deputy Solicitor General
(ASB-7447-H69F)

OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, Alabama 36130-0152
Telephone: 334.242.7300
Facsimile: 334.242-4891
jneiman@ago.state.al.us
pescalona@ago.state.al.us

Attorneys for Governor Bentley, Attorney General Strange, Superintendent Morton, Chancellor Hill, and District Attorney Broussard