IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-14532-CC

D.C. Docket No. 2:11-cv-2746-SLB
UNITED STATES OF AMERICA, *Plaintiff-Appellant*,
vs.
THE STATE OF ALABAMA, et al., *Defendants-Appellees*

No. 11-14535-CC

D.C. Docket No. 5:11-cv-2484-SLB
HISPANIC INTEREST COALITION OF ALABAMA, et al., *Plaintiffs-Appellants*,
vs.
GOVERNOR ROBERT BENTLEY, et al., *Defendants-Appellees*

On appeal from the United States District Court for the
Northern District of Alabama

STATE DEFENDANTS' OPPOSITION TO THE APPELLANTS' MOTIONS FOR INJUNCTION PENDING APPEAL

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United States v. Alabama
11th Circuit Case No. 11-14532-CC

HICA v. Bentley
11th Circuit Case No. 11-14535-CC

Certificate of Interested Persons

Pursuant to 11th Cir. Rule 26.1-1, counsel for State Defendants certify that they believe that the Certificates of Interested Persons and Corporate Disclosure Statements contained in the Appellants' Motions for Injunction Pending Appeal are correct, but for the following additional parties:

Blackburn, Sharon L., United States District Judge

Strange, Luther, Alabama Attorney General

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STATE DEFENDANTS'[1] OPPOSITION TO THE APPELLANTS' MOTIONS FOR INJUNCTION PENDING APPEAL

At issue in these motions is whether the Court should grant the Plaintiffs the precise relief they seek in this appeal—a preliminary injunction partially barring enforcement of Alabama's new immigration law—only on less briefing and after less consideration by the Court. The Court should resist any temptation to grant this injunction on something less than a full and faithful application of the established prerequisites for such extraordinary relief.

After hundreds of pages of briefing, almost nine hours of oral argument, and more than six weeks of consideration, the District Court did fully and faithfully apply these standards. To be sure, its decision was not error-free, as it wrongly enjoined enforcement of some sections of the new law. But correcting errors of this sort is what the appeal is for.

For the reasons that follow, it is clear this Court should deny Plaintiffs' motions and decide theses issues only after full briefing. Plaintiffs have not shown that there will be such irreparable harm while this appeal is pending to justify giving short shrift to issues of this importance and complexity.

[1] State Defendants in Appeal No. 11-14532 are the State of Alabama and Governor Robert Bentley. State Defendants in Appeal No. 11-14535 are Governor Robert Bentley, Attorney General Luther Strange, Interim Superintendent Larry E. Craven, Chancellor Freida Hill, and District Attorney Robert L. Broussard. State Defendants, in both cases, join in this opposition.

I. INTRODUCTION.

The Immigration and Nationality Act ("INA"), 8 U.S.C. §§1101-537, provides specific criteria by which aliens may enter and remain in this country. Millions, however, flout immigration law by residing here illegally. "Sheer incapability or lax enforcement of the laws … has resulted in the creation of a substantial 'shadow population' … within our borders." *Plyler v. Doe*, 457 U.S. 202, 218 (1982). As President Obama acknowledged, "[w]e've got an immigration system that's broken right now, where too many folks are breaking the law."[2]

Although the resulting crisis has hit States like Arizona and Texas the hardest, it has also extended to States like Alabama. By one estimate, between 75,000 and 160,000 illegal aliens currently live in this State. (HICA Doc. 110-1, attached as Exh. A, at 25 of 33.)[3] Many of these people are taking jobs away from United States citizens and authorized aliens who desperately want to work in these hard economic times: while the unemployment rate in Alabama stands at 10%,[4] approximately 4% of Alabama's workforce consists of illegal aliens.[5] And the difficulties in collecting taxes from these persons, many of whom work "off the books," means that many of them are utilizing Alabama's public resources without

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[2] http://www.whitehouse.gov/the-press-office/2011/07/06/remarks-president-twitter-town-hall.
[3] Documents filed in D.C. Docket No. 2:11-cv-2746-SLB will be referred to as "U.S. Doc. __." Documents filed in D.C. Docket No. 5:11-cv-2484-SLB will be referred to as "HICA Doc. __." From August 3, 2011 until September 1, 2011, these cases were consolidated, along with No. 5:11-cv-02736-SLB, and documents in the three cases were filed under 5:11-cv-2484-SLB.
[4] http://www2.dir.state.al.us/LAUS/CLF/ALUS.aspx
[5] HICA Doc. 110-1 (Exh. A) at 26 of 33.

paying their fair share. Illegal aliens also form a substantial part of the State's prison population, and thus exact on the State not only the social costs of their crimes, but also the fiscal costs of their incarceration. (HICA Doc. 110-2, attached as Exh. B.)

Act No. 2011-535 marks Alabama's effort to address these problems. But it does not seek to replace the immigration laws passed by the federal government. It instead simply requires its officials to take certain steps, fully within the State's traditional police powers, and fully consistent with federal law, to help ensure that federal immigration law is respected.

The Plaintiffs contend, however, that Alabama has no room to act in the area of immigration, even to gather information or to cooperate with federal officials. They claim that the *inaction* of the Executive Branch – not the directives of Congress – preempts state action. The mantra of the Department of Justice is, "If we ignore the law, States, so must you – and you also must bear the costs thereof."

In Plaintiffs' view, the Act causes irreparable harm when an illegal alien fears that his violation of federal law will come to light. In their view, it is disorder for a State to dare attempt to bring order by identifying persons violating federal immigration law, reporting these persons to federal officials, and leaving to federal officials whether to deport these persons.

The Plaintiffs are wrong. Congress left room for States to act, and Alabama's Act fits comfortably in the space allowed. The District Court correctly ruled that Plaintiffs are not entitled to a preliminary injunction concerning the sections of the Act at issue here, and Plaintiffs' present motions should be denied for the same reasons: Plaintiffs are not likely to prevail on the merits and the equities do not weigh in favor of an injunction. Plaintiffs' motions should be denied.

II. STANDARD OF REVIEW.

"For this Court to grant the extraordinary remedy of an injunction pending appeal, the petitioners must show: (1) a substantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury to the [petitioners] unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest." *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000). "[P]reliminary injunctions of legislative enactments – because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits – must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts." *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990).

The HICA Plaintiffs suggest that they are entitled to an injunction if they show only a "substantial case on the merits," and that they need not show a probability of success, citing *Ruiz v. Estelle*, 650 F.2d 555,565 (5th Cir. 1981) (*Ruiz I*). (We note that the United States does not cite *Ruiz* here, although it did so in the District Court, *see* U.S. doc. 96). *Ruiz*, however, involved a request for a *stay*, not an injunction, and that makes a difference. For an injunction, a "substantial case" will not suffice: "For this Court to grant the extraordinary remedy of an injunction pending appeal, the petitioners must show a substantial likelihood that they will prevail on the merits of the appeal." *Touchston*, 234 F.3d at 1132.

A stay and an injunction are not the same. *Nken v. Holder*, 129 S.Ct. 1749, 1761 (2009). A stay is directed toward the court's own judgment, the court staying its own hand (not the parties'). *Id.* at 1757. In contrast, "[w]hen a court employs the extraordinary remedy of injunction, it directs the conduct of a party, and does so with the backing of its full coercive powers." *Id.* (citations omitted).

By its terms, then, the lesser standard of *Ruiz I* applies only to stays. This makes sense, because to apply *Ruiz I* to injunctions would eviscerate the standard. Although an applicant for a preliminary injunction must show a substantial likelihood of success on the merits, under Plaintiffs' view, if the applicant fails to

make that showing the first time, he may obtain the exact same relief, on a lesser showing, by appealing and seeking an injunction pending appeal.

Even if *Ruiz I* applies, it is not as lenient a standard as Plaintiffs suggest. It is not a free pass on the first prong. In *Ruiz II*, the Court explained:

> In the short time that has elapsed since *Ruiz I*, many applicants for stay seem to have assumed that *Ruiz I* was a coup de grace for the likelihood-of-success criterion in this circuit. This assumption, however, is unwarranted, for it ignores the careful language of *Ruiz I*. Likelihood of success remains a prerequisite in the usual case even if it not an invariable requirement. Only "if the balance of equities (i.e., consideration of the other three [stay] factors) is … heavily tilted in the movant's favor" will we issue a stay in its absence, and, even then, the issue must be one with patent substantial merit.

Ruiz v. Estelle, 666 F.2d 854, 856-57 (5th Cir. 1982) ("*Ruiz II*"). Thus, even if *Ruiz I* and *II* apply to injunctions, and even if Plaintiffs show that the other three stay factors are "heavily tilted" in their favor (which they cannot), Plaintiffs still must show that their case has "patent substantial merit." *Id.* Plaintiffs have not met that burden either, and their motion is due to be denied.[6]

III. THE APPELLANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS.

Before this opposition explains why Plaintiffs have not satisfied their heavy burden of establishing a substantial likelihood of showing that particular provisions

[6] The District Court did not have to resolve whether *Ruiz* applies in this instance because it found that Plaintiffs have not met either standard: "[P]laintiffs have not shown that they are 'likely to prevail' nor that they have a 'substantial case' on the merits." HICA Doc. 147 at 2.

of the Act are not preempted (or otherwise prohibited), a few remarks about Plaintiffs' general approach to preemption are warranted.

A. The United States Advocates an Unprecedented Approach to Preemption.

The District Court properly began its preemption analysis by recognizing two principal "cornerstones:"

> First, the purpose of Congress is the ultimate touchstone in every preemption case. Second, [i]n all preemption cases, and particularly in those in which Congress has legislated … in a field which the States have traditionally occupied, … [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

(U.S. Doc. 93 at 14-15, quoting *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009)).

The United States seeks to expand the doctrine of implied preemption far beyond the bounds that governing precedents allow. Under the United States' novel understanding of *De Canas v. Bica*, 424 U.S. 351 (1976), the implied-preemption doctrine effectively precludes the States from enacting *any* law intended to help the federal government curb illegal immigration. The United States consistently advances a theory of preemption-by-executive-inaction that, if it became the law, would jeopardize the federal-state balance in virtually every area in which the federal government might operate.

De Canas does not foreclose all state laws addressing any possible aspect of immigration. The *De Canas* Court laid out a three-part test for determining

whether a state law affecting immigration is displaced through implied preemption. (*See* HICA Doc. 82 at 39.) Under that test, a state law is preempted only:

(1) if it falls into the narrow category of laws deemed to be 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.

Under this test – and this is *the* test for implied preemption – Act No. 2011-535 must be allowed to go into effect.

The United States essentially adds a fourth category of impliedly preempted laws to this list. The federal government asserts that under *De Canas*, "a state exceeds its power to enact regulations touching on aliens generally if the regulation is not passed pursuant to state 'police powers' that are 'focuse[d] directly upon' and 'tailored to combat' what are 'essentially local problems.'" (U.S. Doc. 2 at 26 of 85, quoting *De Canas*, 424 U.S. at 356-57.)

As the District Court recognized, *De Canas* says no such thing. The *De Canas* Court noted that the state law in question addressed "local problems" – protection of the State's fiscal interests and lawful residential labor force, much the same as Alabama's motivations – but never said that any law addressing "non-local" problems is preempted. (*See* U.S. Doc. 93 at 25, noting that *De Canas*

rejected the notion that Congress "has occupied the field through the INA," and citing *United States v. Arizona*, 703 F. Supp. 2d 980, 999 (D. Ariz. 2010) ("[In *De Canas*] the Supreme Court rejected the possibility that the INA is so comprehensive that it leaves no room for state action that impacts aliens.")

Moreover, arguing that the Act is impliedly preempted, the United States repeatedly points not to what Congress has said, but rather to informal actions—or, perhaps more to the point, failures to act—of the Executive Branch. This approach marks a substantial and unwarranted attempt to aggrandize the Executive Branch's powers at the expense of both Congress and the States.

First, a particular Administration's decision not to enforce a federal law cannot preempt the States from taking measures that are consistent with that law as Congress has written it. If the Administration's theory were accepted by the courts, then the President could displace all sorts of state regulation merely by declaring his or her intent not to enforce certain federal laws that operate in the same spheres as particular state laws.

That is not how preemption works. The Supremacy Clause gives preemptive force to *only* the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States." U.S. CONST. art. VI, cl. 2. It does not give that preemptive force to the exercise of unilateral prosecutorial discretion by the Executive Branch.

Along the same lines, the United States is wrong when it suggests that state laws that push too hard against the current Administration's sense of an implicit, unstated "balance" in federal immigration law are impliedly preempted. (*See* U.S. Doc. 2 at 12-14, 64-65, 68, 77, 81 of 85.) The Supreme Court rejected that sort of approach, in the immigration context in particular, earlier this year in *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1983 (2011).[7] There the Chamber of Commerce had argued that an Arizona law that stripped licenses from businesses that employed illegal aliens and required businesses to use the E-Verify system was impliedly preempted because the Immigration Reform and Control Act "reflect[ed] Congress's careful balancing of several policy considerations," and the Arizona law's alleged "harshness . . . exert[ed] an extraneous pull on the scheme established by Congress that impermissibly upsets that balance." *Id.* (internal quotation marks omitted).

[7] *Whiting* was a plurality decision but its holding is binding precedent. Chief Justice Roberts authored the opinion of the Court. The fifth vote to affirm was Justice Thomas's, who joined Parts I, II-A, and III-A of the opinion and concurred in the judgment. *See* 131 S. Ct. at 1973 n*. The rationale Chief Justice Roberts offered for upholding the Arizona law in Parts II-B and III-B—namely, his finding that the law was not impliedly preempted—was narrower than Justice Thomas's apparent rationale that "purposes and objectives" preemption doctrine should be overruled altogether. Justice Thomas did not write separately to explain why he did not join Parts II-B and III-B, but previously he has explained that he would overrule "purposes and objectives" preemption doctrine and will not join opinions that apply it. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1217 (2009) (Thomas, J., concurring in the judgment). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cnty.*, 337 F.3d 1251, 1260 n.10 (11th Cir. 2003) (citation and internal quotation marks omitted).

The *Whiting* Court rejected this theory, explaining that every federal statute "strike[s] a balance among a variety of interests." *Id.* at 1984-85. But it is the statute itself—and not some sort of unstated "balance"—that has the preemptive effect. "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.* at 1985 (citations omitted).

To be sure, in the recent challenge to Arizona's immigration statute, a two-judge majority in the Ninth Circuit bought the United States' contrary argument on this point. *See United States v. Arizona*, 641 F.3d 339, 351-52 (9th Cir. 2011). But this Court does not have to follow the Ninth Circuit, and the District Court properly followed the dissent's view that "[t]he internal policies of [the Bureau of Immigration and Customs Enforcement] do not and cannot change" the fact that Congressional action preempts, not Executive "priorities and strategies." *Id.* at 379-80 (Bea, J., dissenting in part).

Second, the United States takes its theory of Executive Branch preemption to even more troubling heights by asserting that numerous provisions in the Act are impliedly preempted because they conflict with the current Administration's views of what makes for good foreign policy. The Ninth Circuit majority bought that argument as well, but once again Judge Bea had it right in dissent. As he

explained, when it comes to federal preemption of state laws that address illegal immigration, "[w]e do not grant other nations' foreign ministries a 'heckler's veto.'" *Id.* at 383. The District Court was correct to follow the dissent in the *Arizona* case, and this Court should as well.

The District Court was therefore correct to hold that "the Supreme Court appears to have rejected" the notion that "Congress has occupied the field through the INA." (U.S. Doc. 93 at 25.) "It is not inconsistent with the purpose of Congress to do that which Congress has already done." *Id.*, citations omitted. Under this reasonable view, the challenged sections of the Act are not preempted.

B. The Challenged Sections Are Not Preempted.

1. Section 10 is not preempted.

Section 10 of Act No. 2011-535 makes it a Class C misdemeanor under Alabama law, subject to a fine of not more than one hundred dollars ($100) and not more than 30 days in jail, for an unlawfully present alien to be in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), the federal provisions that require aliens to complete and carry federal registration documents. As provided by the Act generally, Section 10 requires State and local law enforcement officials not to attempt to independently determine the alien's immigration status, but to verify the alien's status with the federal government pursuant to 8 U.S.C. § 1373(c), the federal provision obligating the Bureau of Immigration and Customs Enforcement

("ICE") to respond to immigration status verification inquiries from federal, State, or local government agencies.

The United States opposes Section 10 as an impermissible State regulation of immigration. In doing so, the United States seeks to make new law in this Court. The United States disagrees with the District Court's conclusion that "Alabama ha[s] avoided the defects of the state registration requirement that was held invalid by the Supreme Court in *Hines* [*v. Davidowitz*, 312 U.S. 52, 62 (1941)] because Alabama is imposing new penalties for violations of federal law rather than creating an independent registration requirement." U.S. Mot. 14 (citing U.S. Doc. 93 at 23). The United States grounds its disagreement in the assertion that "the federal registration provisions in the INA are [only] one component of Congress's exercise of its exclusive power over immigration," but does not explain what the other "component[s]" are. *Id.* Instead, the United States refers to a "comprehensive and exclusive federal scheme," and says Alabama has "no authority" to "intrude upon and alter" this scheme. *Id.*

For support, the United States cites to the Ninth Circuit's decision in the *Arizona* case, asserting that because "[n]othing in the text of the INA's registration provision indicates that Congress intended for states to participate in the enforcement or punishment of federal immigration rules," Alabama cannot do what it has done in Section 10. *Id.* (quoting *Arizona*, 641 F.3d at 355). The United States

thus asks this Court to break new ground in the area of immigration law, as the Ninth Circuit has done. This would indeed be new ground because, as the District Court stated:

> Unless Congress has occupied the field through the INA – a conclusion the Supreme Court appears to have rejected, *see De Canas*, 424 U.S. at 358; *United States v. Arizona*, 703 F. Supp. 2d 980, 999 (D. Ariz. 2010) ("[In *De Canas*] the Supreme Court rejected the possibility that the INA is so comprehensive that it leaves no room for state action that impacts aliens.") – it is not "inconsistent[] with the purposes of Congress" to do that which Congress has already done. *See Hines*, 312 U.S. at 66. The Court has uniformly held that the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own 'inherent sovereignty,' not from the Federal Government. *Heath v. Alabama*, 474 U.S. 82, 89 (1985).

(U.S. Doc. 93 at 25.) "The fact that [S]tates can enact laws which impose state penalties for conduct that federal law also sanctions, without being preempted, is 'too plain to need more than statement.' *Westfall v. United States*, 274 U.S. 256, 258 (1927)." (*Id.*) Alabama is a separate sovereign and, in that capacity, is free to make violations of federal law violations of state law too, consistent with the purposes of Congress.

The United States ignores *De Canas* and *Whiting*, the cases that actually dealt with preemption in the immigration law context, and instead cites *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986), *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), and

Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000). None of these cases supports the United States' position.

The United States says *Gould* and *Buckman* stand for the proposition that States do not have the authority "to impose penalties for violations of federal law in addition to those deemed appropriate by Congress." U.S. Mot. 14-15. In other words, the United States argues, contrary to the District Court's determination, Alabama cannot make a violation of federal law a violation of state law, too.

But *Gould* and *Buckman* cannot be cited for this purpose. In *Gould*, the State of Wisconsin prohibited its state procurement agents from doing business with certain repeat violators of the National Labor Relations Act. *Gould*, 475 U.S. at 284. *Gould* thus dealt with specific legislation, the NLRA, which legislation Congress intended to "largely displace[] state regulation of industrial relations." *Id.* at 286. The *Gould* Court reiterated the settled rule regarding the NLRA that "States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Id.* Only then did the *Gould* Court use the language quoted by the United States – "[b]ecause 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,' the [settled] rule [regarding the NLRA] prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own

regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [NLRA].” *Id.* (internal citations omitted).

There is no such settled rule regarding the INA. *De Canas* and *Whiting* explain that far from state legislation being “largely displaced,” States are expressly welcome to legislate in certain areas touching upon immigration law, and to cooperate in others where Congress has not intended otherwise. *See De Canas*, 424 U.S. at 355, 357, 363; *Whiting*, 131 S. Ct. at 1984-85.

In the context of personal-injury plaintiffs suing a medical device lobbyist for injuries caused from an FDA-approved device that the lobbyist helped gain FDA approval, *Buckman* held that “the plaintiffs’ state-law fraud-on-the-FDA claims conflict with, and are therefore impliedly pre-empted by, federal law.” *Buckman*, 531 U.S. at 348. The Court explained that the pertinent federal laws empower the FDA, as the victim of the fraud, “to punish and deter fraud against [itself].” *Id.* The Court stated that the FDA uses this power “to achieve a somewhat delicate balance of statutory objectives” and that this balance “[could] be skewed by allowing fraud-on-the-FDA claims under state tort law.” *Id.*

The difference here, in the context of tens of thousands of illegal aliens in Alabama, is that Alabama is not simply seeking to vindicate wrongs against the federal government with Act No. 2011-535. Alabama is seeking to vindicate wrongs against *itself*, as a separate sovereign, in the form of costs associated with

tens of thousands of people who are not lawfully present within the State. "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz v. United States*, 521 U.S. 898, 928 (1997). Moreover, "it is not 'inconsistent[] with the purpose of Congress' to do that which Congress has already done." (U.S. Doc. 93 at 25, quoting *Hines*, 312 U.S. at 66). Accordingly, the Supreme Court rejected the Chamber's citation to *Buckman*'s "balance" language in *Whiting*, and the Court should do the same here. *Whiting*, 131 S. Ct. at 1983.

The United States' citation to *Crosby*, as a case that more recently followed *Gould*, is not helpful. On the basis of preemption, *Crosby* struck down a Massachusetts statute that restricted the ability of Massachusetts and its agencies to do business with companies that did business with Burma. *Crosby*, 530 U.S. at 366. Alabama's Act No. 2011-535 does not interfere with Congressionally-stated foreign policy goals, and it is not within the prerogatives of the Executive Branch to alter immigration law based on its sense of foreign policy goals that is different from the balance struck by Congress. *See also Arizona*, 641 F.3d at 383 (When it comes to federal preemption of state laws that address the problem of illegal immigration, "[w]e do not grant other nations' foreign ministries a 'heckler's veto.'") (Bea, J., dissenting in part).

With regard to the assertion that Act No. 2011-535 criminalizes mere "unlawful presence," the truth is Section 10 does so no more than federal law does. Section 10 does not criminalize "unlawful presence," but instead applies only to illegal aliens who have committed the federal crimes defined in 8 U.S.C. § 1304(e) and 8 U.S.C. § 1306(a). Large numbers of illegal aliens are not covered by these federal statutes—and, thus, by extension, Section 10. For example, aliens under the age of 18 are not required to carry registration documents. *See* 8 U.S.C. § 1304(e). And aliens who have been in the United States for fewer than 30 days are not required to register at all. *See id.* § 1302(a). It is impossible for an alien to violate Section 10 without also committing a federal crime. There is thus no conflict between Section 10 and federal law.

Regarding the Plaintiffs' allegations that the Act somehow "invites discrimination," presumably because State and local law officials will target individuals based on their race, color, or national origin, Section 10 expressly forbids such behavior - as does the Act generally. *See* U.S. Mot. 2; Act No. 2011-535 § 10(c) ("A law enforcement official … may not consider race, color, or national origin in the enforcement of this section …")

Regarding the Plaintiffs' arguments that the Act impermissibly encompasses individuals who are known to the federal government but who have not yet been issued documentation such that they occupy a "gray area" of immigration status,

Section 10 accounts for such situations, maintaining a tenet that runs through the entire Act – cooperation with and deference to federal immigration officials, to whose judgment about a person's immigration status the Act always defers. *See* HICA Mot. 8 (noting that some immigrants "have a path to legalization which will require time for the federal government to process"); Act No. 2011-535 § 10(d) ("This section does not apply to a person who maintains authorization from the federal government to be present in the United States."). *Accord* Act No. 2011-535 § 10(b) ("an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government").

There is no likelihood that Section 10 is preempted.

2. Sections 12 and 18 are not preempted.

The picture of how neatly the Executive Branch has turned immigration law – and Congressional intent – on its head is starkest in its attack on Sections 12 and 18 of Act No. 2011-535. Section 12 requires that, upon any lawful stop, detention or arrest, where reasonable suspicion exists that the person stopped, detained or arrested, is an unlawfully present alien, "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." Act No. 2011-535 § 12(a). As with Section 10, and the Act generally, the determination shall be made by contacting the federal government pursuant to 8 U.S.C. § 1373(c). *Id.* If

an alien is determined by the federal government to be unlawfully present, the local official "shall cooperate in the transfer of the alien to the custody of the federal government, if the federal government so requests." *Id.* § 12(e).

Section 18 amends the State statute requiring motorists to carry their driver's licenses to further require officers who arrest a person for a violation of the statute and who are unable to determine "by any other means that the person has a valid driver's license," to "transport the person to the nearest or most accessible magistrate" so that the person's immigration status can be verified with the federal government pursuant to 8 U.S.C. § 1373(c). Act No. 2011-535 § 18. "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." *Id.*

As with the protocols of Section 10, the provisions of Sections 12 and 18 maintain the careful tenet running through the entire Act – cooperation with and deference to federal immigration officials. The United States sees a very different statute, however, and asserts that these provisions cannot "plausibly be styled as 'cooperation," because they "radically curb[] the discretion of state officials to tailor their efforts to respond to federal priorities." U.S. Mot. 16. How so? Because, the United States asserts, these Sections impose an "inflexible mandate" on local law enforcement officers "to check the immigration status of broad categories of

people," presumably burdening the federal immigration status inquiry system set up pursuant to 8 U.S.C. § 1373(c). *Id.* Thus the United States suggests that if Alabama authorities have reason to believe a person in their custody is in violation of federal immigration law, the federal government doesn't want to hear about it – in spite of a federal provision requiring the federal government to listen.

Indeed, federal law requires that:

> [ICE] 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). Judge Bea's dissent in the *Arizona* case aptly points out the absurdity of the United States' position in this regard:

> The majority also finds that [in requiring] state officers [to] report[] illegal aliens to federal officers, Arizona would interfere with ICE's "priorities and strategies." Maj. Op. at 351. It is only by speaking in such important-sounding abstractions—"priorities and strategies"—that such an argument can be made palatable to the unquestioning. How can simply informing federal authorities of the presence of an illegal alien, which represents the full extent of Section 2(B)'s limited scope of state-federal interaction, possibly interfere with federal priorities and strategies—unless such priorities and strategies are to avoid learning of the presence of illegal aliens? What would we say to a fire station which told its community not to report fires because such information would interfere with the fire station's "priorities and strategies" for detecting and extinguishing fires?

Arizona, 641 F.3d at 379-80 (Bea, J., dissenting in part).

The United States goes further and asserts that Sections 12 and 18 "serve[] as an obstacle in every instance" to local officers' ability "to cooperate with

federal officers administering federal policies and discretion as the circumstances of the particular case require." U.S. Mot. 16. How so? The United States doesn't explain. Of course Sections 12 and 18 do no such thing. Section 12(e) defers to federal officers' policies and discretion by stating that local officials "shall cooperate in the transfer" of the unlawfully present alien "to the custody of the federal government, if the federal government so requests." Similarly, Section 18 states that the unlawfully present alien is detained "until prosecution" of some State crime "or until handed over to federal immigration authorities," that is, of course, if the federal authorities agree to receive the alien.

The United States caps off its criticism of Sections 12 and 18 by repeating its charge of Act No. 2011-535 "inviting discrimination" in that "reasonable suspicion of unlawful presence will often exist even for persons who have authorization to remain in the country" and Sections 12 and 18 will subject these persons to improper "inquisitorial practices and police surveillance." U.S. Mot. 16 (citing *Hines*, 312 U.S. at 74) (internal quotation marks omitted). This unfounded speculation should be rejected out of hand. As explained in regard to Section 10, *supra*, the Act expressly provides that law enforcement officers "shall not attempt to independently make a final determination of whether an alien is lawfully present" and "may not consider race, color, or national origin in implementing the requirements of this section." Act No. 2011-535 § 12(c). The United States

disregards the latter and seeks to use the former as a sword to attack Alabama's deference to federal immigration authorities and call it a failure to cooperate. *See* U.S. Mot. 16. The Court should decline the United States' invitation to read the Act this way.

The HICA Plaintiffs suggest that Sections 12 and 18 are preempted because "[s]tate and local law enforcement officers have no power to make arrests for suspected civil immigration violations such as unlawful presence." HICA Mot. 14. But as courts have repeatedly recognized, 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. *See, e.g., United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999); HICA Doc. 82 at 57-59 (collecting cases).[8] Indeed, Judge Bea recognized in the *Arizona* case that "the authority of states to authorize warrantless arrests for violations of federal law is well established." *Arizona*, 641 F.3d at 386 (Bea, J., dissenting in part).

The State's 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 Plaintiffs draw on the "civil" nature of some federal immigration provisions changes nothing. The Supreme Court has

[8] The United States does not dispute this principle. *See* HICA Doc. 110-3, attached as Exh. C ("the authority to arrest for a violation of federal law inheres in the States").

explained, in the immigration context in particular, that State officers do "not need reasonable suspicion" to ask a person about her "immigration status," recognizing the inherent authority State officers possess to enforce the civil provisions of immigration law. *Muehler v. Mena*, 544 U.S. 93, 101 (2001). Moreover, any authorization needed from the federal government to detain an individual any longer than he would otherwise be detained for purposes of transferring him to federal custody would, naturally, come from the federal government.

There is no likelihood that Sections 12 and 18 are preempted.

3. Sections 27 and 30 are not preempted.

Nor have Plaintiffs satisfied their burden of establishing a substantial likelihood of success on Sections 27 and 30. Plaintiffs have no statutory text to rely on here; instead they invoke unsupported assertions that these provisions are contrary to current, Executive Branch immigration policy. That is no basis for implied-preemption, and the Plaintiffs thus have no likelihood of succeeding on this argument.

Section 27 provides that Alabama State courts are not to "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," except in certain circumstances.[9] Section 30 provides that "[a]n alien not lawfully present in the United States shall not enter into or attempt to enter into a business transaction with the state or a political subdivision of the state." The District Court determined that the provision applies to licenses, but not registration requirements. (U.S. Doc. 93 at 112-14; *id.* at 113, n.25.) The preemption arguments against these Sections are substantially similar, and they will be treated together.

The United States argues that Sections 27 and 30 are preempted because they "lack even the appearance of efforts to cooperate in the enforcement of federal immigration laws" and equate to a "regime of self-deportation." U.S. Mot. 17-18. Similarly, the HICA Plaintiffs argue that these sections are preempted because they amount to "impermissible state regulation of immigration" HICA Mot. 24, and "affect 'the conditions under which a legal entrant may remain,'" *id.* at 21.

The District Court correctly rejected these arguments. As to Section 27, the District Court noted that while Congress never expressed an intent that such contracts be unenforceable, it also never expressed an intent that they must be enforceable. (U.S. Doc. 93 at 102.) The District Court was correct, because a "preemption by omission" analysis does not work. *See Whiting*, 131 S.Ct. at 1985; *De Canas*, 424 U.S. at 360-61 (both rejecting a "preemption by omission"

[9] By its terms, Section 27 does not apply to contracts authorized by federal law, to contracts for food or medical services, or to contracts for a night's lodging.

argument). Thus, "Federal immigration law does not prohibit Alabama from passing a law regarding the enforceability of contracts involving aliens unlawfully present in the United States." (U.S. Doc. 93 at 102.)[10]

Concerning Section 30, the District Court found that it "is intended to prohibit the state from issuing a license to an unlawfully-present alien," U.S. Doc. 93 at 113, and "[t]he United States has not demonstrated that Congress has – expressly or implicitly – preempted the power of the states to refuse to license an unlawfully-present alien," *id.* at 114.

The United States identifies no statutory provision in conflict with Section 30, but instead suggests that Section 30 is in tension with extant immigration policies. That assertion cannot do the heavy lifting here. It is the express intent of *Congress* that determines preemption, and invoking Executive policy cannot satisfy the Plaintiffs' steep burden.

Nor can the United States back into a finding of implied preemption by asserting that Section 30 imposes distinct, unusual, and extraordinary burdens and obligations upon aliens. Preemption does not turn on the "burdensomeness" or inconvenience that a state law places on an alien unlawfully present in the United States. That is especially so since federal immigration law itself places numerous

[10] The District Court also correctly found that Section 27 is not barred or preempted by 42 U.S.C. § 1981 because that statute may reach discrimination based on alienage, but "does not protect a person from discrimination on the basis of unlawful presence." (HICA Doc. 137 at 93).

burdens on illegal aliens. There is no Congressional policy that aliens unlawfully present must always be treated exactly the same as persons who have not violated the Nation's immigration laws. There cannot be, for Congress has already drawn distinctions, such as prohibiting illegal aliens from obtaining driver's licenses. *See* Pub. L. 104-208, § 502, 110 Stat. 3009-671 (1996); *cf. Plyler*, 457 U.S. 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.").

In addition, the United States cannot possibly prevail on the merits of their challenges to Sections 27 and 30 because they raise a *facial* challenge to each. Their burden is therefore to "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). There are, however, unquestionably valid applications of each.

For example, Section 30 prohibits an alien unlawfully present from applying for a driver's license. This application does not conflict with federal law, which in fact encourages (and for all practical purposes, requires) a State to deny a driver's license to illegal aliens. By federal statute, an alien unlawfully present "is not eligible for any State or local public benefit." 8 U.S.C. § 1621(a). The privilege of driving is a public benefit, but there is even more specific evidence of Congressional intent regarding driver's licenses. First, in 1996 Congress expressly

provided for "the State's denying driver's licenses to aliens who are not lawfully present in the United States":

> Pursuant to guidelines prescribed by the Attorney General not later than 6 months after [Sept. 30, 1996], all States may conduct pilot programs within their State to determine the viability, advisability, and cost-effectiveness of the State's denying driver's licenses to aliens who are not lawfully present in the United States. *Under a pilot program a State may deny a driver's license to aliens who are not lawfully present in the United States*.

Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, § 502, 110 Stat. 3009-671 (1996) (emphasis supplied). Then, in 2005, Congress enacted the Real ID Act and effectively made it impermissible for States to issue driver's licenses to illegal aliens. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005, Pub. L. 109-13, § 202, 119 Stat. 231, 302 (2005).[11] Consequently, if Alabama gave driver's licenses to all comers, regardless of status, then under the Real ID Act, an Alabama driver's license could not be used for any official purpose by any federal agency, such as getting through TSA's airport security. No federal law requires States to engage in business transactions with illegal aliens, and the United States' facial challenge thus fails.

[11] The Real ID Act provides that no federal agency may accept a State's Driver's License for any official purpose unless the State meets the standards of the Act. Pub. L. 109-13, § 202(a)(1). One of those standards that the State must meet is to confirm the citizenship or lawful immigration status of all applicants. Pub. L. 109-13, § 202(c)(2)(B).

Likewise, the United States cannot show that every possible application of Section 27 is invalid. Many contracts affected by Section 27 are already prohibited by federal law. *See, e.g.*, 8 U.S.C. §§ 1324a(a)(1) & (4), 1323(a)(2), 1324(a)(1)(A)(ii) & (iii). "As a general proposition, a court will not aid either party to an illegal contract, in enforcing or rescinding that contract." *Youngblood v. Bailey*, 459 So. 2d 855, 859 (Ala. 1984). Section 27 simply codifies this principle with respect to contracts that require an illegal alien to remain unlawfully present in the country.

For all these reasons, Plaintiffs are not likely to prevail on their claim that Sections 27 and 30 are preempted.

4. Section 28 is not preempted.

The Plaintiffs are also unlikely to succeed on the merits of their claim that Section 28 is preempted. This Section requires public elementary and secondary schools to request a student's birth certificate from his or her parent or guardian at the time of enrollment. If the birth certificate shows that the student was born outside the United States, or if a birth certificate is unavailable, the student's parent or guardian is asked to notify the school within 30 days of the citizenship or immigration status of the student. Enrollment is a one-time event (HICA Doc. 137 at 98), and Section 28 does not require schools to investigate the immigration status of parents (U.S. Doc. 93 at 106). Moreover, Section 28 provides no

enforcement mechanism in the event that a parent or guardian declines to provide the requested information. Finally, and most importantly, this data collection system does not prevent any child from enrolling in school.

The United States argues that Section 28 "deters even children who are lawfully present … from attending school by making their enrollment a tool for discovering the status of their parents and family members." U.S. Mot. 17. It argued in the District Court that Section 28 "is preempted as an 'impermissibl[e] … registration scheme for children (and derivatively their parents) akin to the one the Supreme Court invalidated in *Hines*.'" (U.S. Doc. 93 at 107.)

Section 28 does not effectively acquire information about a parent or guardian's immigration status. While Section 28 states that the public schools "shall determine whether the student . . . is the child of an alien not lawfully present," Section 28(a)(1), the schools are to do so by "rely[ing] upon the presentation of the student's original birth certificate or a certified copy thereof," Section 28(a)(2), and the birth certificates are not likely to have that information. (U.S. Doc. 93 at 106 ("[S]uch information is not included on the birth certificate.")). Section 28 does not authorize any investigation, and it does not impose any sanctions in the event that any requested information is not provided.

Section 28 calls for data collection at the time of enrollment, but does not prevent any child from enrolling. The data collection leads to a student being

coded with a "1" or a "0" in a database, (HICA Doc. 82-3 (Exh. D) at 4), and that data is then used to generate a report for the Legislature. Regardless of how a student is coded, the student is enrolled. *See* Exhibit D.

Section 28 is thus nothing like the impermissible registration system in *Hines*. There, Pennsylvania passed a statute requiring all aliens, legal or illegal, to register annually, for a fee, subject to State penalties, and that registration scheme conflicted with a federal requirement. 312 U.S. 52. The District Court found that Section 28 "bears no resemblance to the Pennsylvania statute." (U.S. Doc. 93 at 107.) Based on the text of Section 28 and its actual (not imaginary) requirements, the finding of the District Court is unassailable: Section 28 "does not create an independent, state-specific registration scheme, attempt to register anyone, or create registration requirements in addition to those established by Congress in the INA. The standard for registration provided by Congress remains uniform." (*Id.* at 108.) The United States is therefore not likely to succeed on the merits.

C. The HICA Plaintiffs' Equal Protection Argument Also Fails.

Like the United States, the HICA Plaintiffs argue that Sections 10, 12, 18, 27, 28, and 30 are preempted. The State Defendants responded to those arguments above and will now explain why the HICA Plaintiffs are unlikely to prevail on the single, nonpreemption argument they advance here: their claim that Section 28 violates the Equal Protection Clause. As discussed above, Section 28 requires only

that public elementary and secondary schools request birth certificates to determine the status of children at the time of enrollment. Because Section 28 contains no enforcement mechanism (and does not prevent anyone from enrolling), it does not result in disparate treatment. At bottom, Section 28 is about data collection, not disparate treatment.

Some of the individual HICA Plaintiffs complain that Section 28 will *deter* them from enrolling themselves or their children in Alabama public schools, but as the District Court correctly held, (HICA Doc. 137 at 98-99), none of them have standing on this theory. First, as to any students who already are enrolled in school—which includes John Doe #1 and some individual HICA Plaintiffs' school-aged children—Section 28 simply will not apply to them. That is because "enrollment," the trigger for Section 28's status inquiry, occurs only when a student first enters the school system. (*See* HICA Doc. 137 at 98.) Before this Court, the HICA Plaintiffs speculate that Alabama school officials might "retract" this understanding of "enrollment" and begin requiring annual inquiries into students' immigration status. HICA Mot. 20. But this unfounded speculation cannot trump the evidence submitted to the District Court, as well as new evidence submitted to this Court, showing that State education officials are implementing

Section 28 exactly as the State officials have said they would.[12] (*See* HICA Doc. 82-3, attached as Exh. D; Exh. E.) Unless any of these currently enrolled students leave the school system and then later attempt to *re*-enroll—a scenario entirely too speculative to constitute "imminent harm" for standing purposes—they will never be asked for the information required by Section 28 and thus cannot plausibly be injured by it.

It does not matter that one of the Plaintiffs, Jane Doe #3, has children who *are* likely, in the foreseeable future, to enter the school system for the first time. Jane Doe #3 and her children are all United States citizens, but she argues that school officials might report her husband's unlawful presence. The problem for Jane Doe #3's standing argument here is that none of the documentation actually required by Section 28 could give school officials any inkling about her husband's status. As the District Court found, (HICA Doc. 137 at 97), birth certificates, from whatever issuing authority, do not contain this information. And any follow-up documents—"official" immigration "documentation" or a sworn parental "declaration," §28(a)(4)—would speak only to the *student's* status, not the

[12] The HICA Plaintiffs cite *Harrell v. Florida Bar*, 608 F.3d 1241, 1265-68 (11th Cir. 2010), on this point, presumably to imply that the Court should not take the State Defendants' word that "enrollment" occurs only when a student first enters the school system. But that case simply applies the mootness doctrine's voluntary-cessation exception and thus hardly speaks to what constitutes a cognizable "injury" in the first instance. If anything, the case actually supports the District Court's conclusion that Section 28 will not affect students who already are enrolled in the system given its recognition of a "rebuttable presumption" *favoring* governmental actors' representations about the policies they administer. *Id.* at 1266.

parent's. *See* Exhibit D. So, far from assuming that school officials would "ignore" Section 28's express provisions, the District Court recognized, as a practical matter, that there is basically no chance under this provision of school officials ever learning the status of Jane Doe #3's husband.[13]

The organizational HICA Plaintiffs, finally, lack standing as well. Before this Court, these organizations still have not identified a single member with standing to challenge Section 28. (*Cf.* HICA Doc. 137 at 100.) They therefore stake their entire claim of standing with respect to this section on the fact that they have spent their own resources "educating" information-session attendees about this provision. *See* HICA Mot. 19 & n.28. As they did below, they cite *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350-51 (11th Cir. 2009) (organization engaged in mobilizing voters can challenge statute that raises the cost of voting), and *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1164-66 (11th Cir. 2008) (same), for the proposition that an organization's expenditure of resources can amount to an "injury" for Article III purposes. But these two cases—and the Supreme Court decision on which they are based, *Havens Realty Corp. v.*

[13] Moreover, even if school officials might learn the immigration status of Jane Doe #3's husband in the course of complying with Section 28, there is no imminent likelihood of someone reporting him to federal immigration authorities. Taken together, Section 28(e) (which merely *authorizes* the disclosure of personally identifiable information obtained under Section 28 for reporting purposes) and Sections 5 and 6 (which merely require officials' *compliance* with federal immigration law and Act No. 2011-535 in general terms) do not require such a report. The prospect of school officials voluntarily reporting his immigration status—information which, again, they are highly unlikely to obtain—is too speculative to give Jane Doe #3 standing.

Coleman, 455 U.S. 363 (1982)—cannot be extended so far. In each of these decisions, the challenged effectively *required* organizational plaintiffs to expend additional resources if they desired to continue engaging in established, pre-conduct activities. In other words, there was a very close connection between the challenged conduct, established activities of the organization that would be frustrated by that conduct, and the expenditure of the additional resources. There is simply no such connection here. As the District Court observed, none of these Plaintiffs have alleged that they are engaged in enrolling aliens, let alone that they have been doing so on an established basis. (HICA Doc. 137 at 101.) To hold otherwise would be effectively to allow any organization to manufacture Article III standing on demand.

The HICA Plaintiffs fare no better on the merits of their Equal Protection challenge. The main thrust of that argument is that Section 28 *deters* the enrollment of children on the basis of their parents' unlawful presence in the United States in violation of *Plyler v. Doe*, 457 U.S. 202 (1982). But that argument misapprehends both the limited holding of *Plyler* and the effect of Section 28. In addition to recognizing that public education is "not a 'right' granted to individuals by the Constitution," 457 U.S. at 221 (citation omitted), *Plyler* concerned a State's policy of outright denying a public education to children who were unlawfully present. *See id.* at 230. By contrast, Alabama schools remain open under Section

28 to all children regardless of their immigration status (or their parents' status). For that reason, Section 28 does not result in the disparate treatment of students and thus does not implicate the Equal Protection Clause at all. Although Section 28 is written in mandatory terms, it imposes no consequences on any student or parent for failing to comply with it—let alone consequences based on immigration status or any other status. Section 28 is about data collection, pure and simple. *See Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000) (upholding against a similar Equal Protection challenge *criminal sanctions* for failure to complete a U.S. Census form).

Even if this Court concludes that Section 28 discriminates in some manner, it is not along any grounds that would require heightened scrutiny. At most, Section 28 requires schools to request additional documentation of some students' status beyond a birth certificate. *Cf*. HICA Mot. 17 n.26. But it is incorrect to say, as the HICA Plaintiffs have implied, that this group consists only of "children born outside the United States." *Id.* This group in fact consists of *all* students for whom a request for a birth certificate proves inconclusive in determining citizenship, including those whose parents or guardians cannot or will not produce such a document.[14] Accordingly, Section 28 must be upheld if it is justified by a rational

[14] The HICA Plaintiffs also contend Section 28 requires disparate treatment of "children who are presumed to be unlawfully present" and "children whose parents(s) are not lawfully present" in that members of both of these asserted groups are claimed to be "subject to reporting

basis. The Alabama Legislature's desire to collect data about "the costs incurred by school districts" to educate "children who are aliens not lawfully present in the United States," Act No. 2011-535 §2—which seemingly accepts the *Plyler* Court's invitation to collect this sort of data, 457 U.S. at 229—clearly supplies that justification here.

IV. THE EQUITIES DO NOT FAVOR AN INJUNCTION PENDING APPEAL.

A. The United States Will Not Suffer Irreparable Harm if the Challenged Sections Are Enforced During this Expedited Appeal.

The United States asserts that it will suffer harm in several ways if the challenged sections are enforced while this expedited appeal is pending. First, it claims a constitutional injury whenever Alabama law is allowed to be "supreme" over federal law. U.S. Mot. 19. That, of course, begs the question and is tied to the merits of the appeal, on which the United States is not likely to prevail. There will be no such injury because federal law does not preempt the challenged sections.[15]

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requirements." HICA Mot. 17 n.26. As explained in the preceding footnote, the notion that school officials will voluntarily report immigration violations to federal authorities is pure speculation, and the HICA Plaintiffs have presented no evidence that would warrant such a finding.

[15] S*ee* U.S. Doc. 93 at 36 ("[T]he court finds the United States has not established a likelihood of success on its claim that H.B. 56 § 10 is preempted by federal law."); *id.* at 69-70 ("[T]he court concludes that the United States is not likely to succeed on its claim that H.B. 56 § 12 conflicts with Congressional intent as expressed in provisions of the INA."); *id.* at 100 ("[T]he court finds the United States has not shown a likelihood of success on its claim that Section 18 is impliedly preempted by federal law."); *id.* at 102 ("[T]he court finds that the United States has not established a likelihood of success on its claim that Section 27 is preempted by federal law."); *id.* at 109 ("[T]he United States has not shown a likelihood of success on its claim that Section 28 is preempted by federal law."); *id*. at 114 ("[Section 30] is not preempted.")

And if there is such an injury – that is, if the United States is due to win on the merits, which it is not – the injury can be undone at the end of this appeal as easily and effectively as it can be done today.

Second, the United States claims that the statute is "driving aliens from the State of Alabama, thus imposing burdens on other States." *Id.* The United States has offered no evidence of any burdens imposed on other States. And is the United States effectively admitting that the presence of a person unlawfully present is a burden on the State?

Third, the United States claims that the Act "is highly likely to expose persons lawfully in the United States, including school children, to new difficulties in routine dealings with private persons and the State." *Id.* The United States offers nothing but bare assertions on this front, which is hardly sufficient to obtain the extraordinary relief it requests.

And fourth, the United States argues that the Act will impact "our dealings with other nations." *Id.* at 19-20. However, as the District Court correctly noted, "[t]he United States has not cited the court to a specific conflict between Section 10, or any other Section of H.B. 56, and some Congressionally-granted Executive Branch authority directly relating to foreign policy." (U.S. Doc. 93 at 33.) And, "[t]here is no evidence before the court that Section 10, or any other provision of

H.B. 56, conflicts with Congressional intent regarding national foreign policy goals." (*Id.* at 36.)

The United States' claims regarding harm simply cannot be squared with what the District Court found after a thorough consideration of the Act, upon full briefing and argument:

- "The court finds H.B. 56 § 10 does not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (U.S. Doc. 93 at 32.)
- "H.B. 56 § 12 reflects an intent to cooperate with the federal government." (*Id.* at 68.)
- "[T]he federal government still retains discretion as to whether it wishes to pursue those found to be unlawfully present." (*Id.* at 69.)
- "[T]his court finds Section 12(a) is consistent with the purposes of Congress . . . The court is not persuaded that H.B. 56 § 12 must be preempted because it will result in 'substantial burdens on lawful immigrants.'" (*Id.*)
- "[T]he court finds the United States has not submitted sufficient evidence that Section 12 conflicts with federally-established foreign policy goals." (*Id.*)
- "[T]this court agrees with the State Defendants that the verification requirements … amended by Section 18, do not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Id.* at 100.)
- "The United States argues that Section 27 is preempted by federal immigration laws contending that 'Alabama has impermissibly altered the conditions imposed by Congress upon admission, naturalization and *residence* of aliens in the United States or the several states.' . . . However, … nothing shows Congress intended that such contracts would be enforceable." (*Id.* at 101-02) (quoting U.S. Doc. 2 at 51 of 85.)

- "Section 28 does not create an independent, state-specific registration scheme, attempt to register anyone, or create registration requirements in addition to those established by Congress in the INA." (*Id.* at 108.)
- "[T]he court finds the United States has not submitted evidence sufficient that Section 28 conflicts with federally-established foreign policy goals." (*Id.* at 109.)
- "[With respect to Section 30, the] United States has not demonstrated that Congress has – expressly or implicitly – preempted the power of the states to refuse to license an unlawfully-present alien." (*Id.* at 114.) (citation omitted).

Does it really cause harm to the United States when a State informs the federal government of persons who are in violation of federal law, and then leaves it to the federal government to decide whether to initiate deportation proceedings? Does it really harm the United States for the State to gather information about how much it is spending to educate illegally-present children? Of course not. The District Court was right, the United States is wrong, and the United States will not suffer harm if these sections are enforced during the time this appeal is pending.

B. The HICA Plaintiffs Will Not Suffer Irreparable Harm if the Challenged Sections Are Enforced During this Expedited Appeal.

The HICA Plaintiffs include advocacy groups, foreign nationals who are present legally, and persons who are unlawfully present. They claim that they will suffer a variety of irreparable harm if the challenged sections remain in effect during this appeal, but the harms they allege are not true harm, are not irreparable,

are not caused by the Act but by misunderstandings and misrepresentations about the Act, and are grossly exaggerated.

Section 10: Section 10 makes it a crime for a person to be (1) "an alien unlawfully present in the United States" (as determined by federal officials pursuant to federal law) *and* (2) in violation of either 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a). Thus, anyone guilty of violating Section 10 is already in violation of federal immigration law.

Plaintiffs claim that if Section 10 remains in force, immigrants "who are currently out of status … are now made criminals because they lack alien registration papers." HICA Mot. 8. But such a person is already guilty of violating *federal* law. Section 10 does not "make" them a criminal; federal law has already done so. The alleged harm is therefore already caused by the federal laws Section10 is linked to. And such harm is not irreparable, because a person prosecuted for violation of Section10 can plead within the state-court prosecution that Section10 is preempted.

Sections 12 and 18: The harm allegedly caused by these sections is that stops and arrests will, Plaintiffs fear, be conducted unreasonably. HICA Mot. 8 (persons are "subject to prolonged detention every time they encounter law enforcement."). That is neither what these sections require nor permit. Instead, law

enforcement officials are required to make only a *reasonable* attempt to verify status in the context of a lawful stop, and only *when practicable*.

Fears of unwarranted deportation are unfounded. As the District Court found, Section 12 requires that State and local officials *communicate* with the federal government, in certain circumstances, regarding citizenship status. However, "[t]he statute does not require the federal government to act upon this information; therefore, the federal government still retains discretion as to whether it wishes to pursue those found to be unlawfully present." (U.S. Doc. 93 at 68-69.)

To the extent Plaintiffs claim that Sections 12 and 18 will harm them because State officials will apply these provisions incorrectly (and conduct unreasonable searches and seizures), there is no evidence that any such case will occur. But if such a case ever arises, it can be addressed, if they arise, in an as-applied challenge. To the extent any person claims that he will be harmed by the Act because he is here unlawfully but has not been caught, and as a result of the Act he will come to the federal government's attention, then he is no more harmed by Alabama's law than by the federal immigration laws he is already violating.

Section 28: There is absolutely nothing about Section 28 that prevents any child from enrolling in school; the provision is nothing more than data collection. If parents are keeping children away from school because of a misunderstanding about what the law does, or due to exaggerated statements by the law's opponents,

that is unfortunate, but such harm is not caused by Section 28. As the District Court noted, "[a]ny injuries caused by intentional or unintentional misapplication of H.B. 56 cannot be said to be the result of implementation and enforcement of the Act." (HICA Doc. 147 at 3.)

Sections 27 and 30: Section 27 does not strip anyone's contract rights, but provides that State courts may not enforce certain contracts if a party knows that the other party is present illegally. Section 30, as construed by the District Court, prevents the State from issuing certain licenses to persons unlawfully present.

Here is a good example of how the harm allegedly caused by these sections is insufficient to entitle the Plaintiffs to extraordinary relief: The HICA Plaintiffs assert that a family was "told by the electric company that it could not have power service restored to its home unless it could prove its qualifying immigration status, prompting the family to leave." HICA Mot. 3. However, Plaintiffs also note that "[s]ince this incident came to light, representatives of Alabama Power have contacted counsel for Appellants and informed them *this is not their policy and it should not recur*." *Id.* at n.9 (emphasis added). The alleged harm has already been cured.

There are two main types of harm that Plaintiffs claim will result from the Act. The first is that persons who have violated federal immigration law and are here illegally now feel less secure in their law-breaking. Such a notion is

insufficient on its face. The second is that people will be harmed because of misunderstandings or misapplications of the law. As the District Court correctly found, such harm, if it occurs, is not caused by Act No. 2011-535. (HICA Doc. 147 at 3.)

The Plaintiffs therefore have not met their burden of showing that irreparable harm will occur if the challenged sections are enforced during the brief time that this appeal is pending.

C. The State and the Public Will Be Harmed if a Valid Legislative Enactment Is Left Unenforced, and On-Again, Off-Again Enforcement Will Confuse the Public.

To meet their burden for an injunction pending appeal, Plaintiffs must show not only a likelihood of success on the merits and irreparable harm, but must also show that there will be "(3) *no* substantial harm to other interested persons; and (4) *no* harm to the public interest. " *Touchston*, 234 F.3d at 1132 (emphasis added). They have not, and cannot, meet this burden.

The State, and the public, will be harmed in at least two ways if the challenged sections are enjoined.[16] The first is that if the Plaintiffs' motions are granted, a valid enactment of the State of Alabama will not be recognized and enforced by the courts as embodying the will of the people. *See Atkin v. State of Kansas*, 191 U.S. 207, 223 (1903).

[16] The State Defendants also rely upon the interests set forth in Section 2 of Act No. 2011-535.

When a State's validly enacted statutes are at stake, those enactments "should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." *Id.* Indeed, "the public interests imperatively demand" this result. *Id.*[17] For this reason, "the harm which would result from an injunction barring enforcement of [these Sections] tips in favor of [State] Defendants and the public, both of whom have an interest in noninterference by a federal court in a state's 'legislative enactments.'" *Reed v. Riley*, 2008 WL 3931612, at *3 (M.D. Ala. Aug. 25, 2008) (citing *Atkin*, 191 U.S. at 223).

The second type of harm is that now that the challenged sections are being enforced, halting enforcement on an interim basis will confuse law enforcement and the public. On-again, off-again enforcement will only muddy the waters and confuse the public.

It bears noting that now that the challenged sections are being enforced, the relief the Plaintiffs seek would not preserve the status quo, but change it. In light of the negligible harm (if any) that Plaintiffs will suffer if the challenged sections are left in force during this expedited appeal, compared to the harm to the State and the

[17] As the District Court recognized, preliminary injunctions of legislative enactments "interfere with the democratic process." (HICA Doc. 137 at 2, quoting *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Florida*, 896 F.2d 1283, 1285 (11th Cir. 1990)).

public of changing the rules again and again, the equities do not favor such drastic relief.

V. CONCLUSION.

The District Court has "carefully and thoroughly reviewed all issues raised by the parties and its lengthy Memorandum Opinion represents the product of its time and effort. It does not foresee a 'substantial' case for reversal." (U.S. Doc. 99 at 3; HICA Doc. 147 at 2-3.) And this Court has entered an order expediting these appeals. Briefing will be complete by November 29, and the ultimate issue on appeal is the same one at issue in these motions, namely, whether Plaintiffs are entitled to a preliminary injunction barring enforcement of sections of the Act.

Two months of enforcement will not cause such harm to justify deciding issues of this complexity and importance on abbreviated briefing. It can wait long enough for this Court to have the benefit of the parties' merits briefs. For all these reasons, the Plaintiffs' motions for injunction pending appeal should be denied.

Respectfully submitted,

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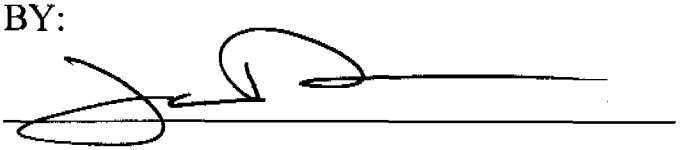

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