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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.	)

<u>ALABAMA AND GOVERNOR BENTLEY'S RESPONSE TO UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION (DOC. 2)</u>

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INTRODUCTION

The fact that the United States is a plaintiff here brings into sharp focus what these cases are really about. They are not simply about illegal immigration. They are also, on a more fundamental level, about the system of comity and mutual respect our Constitution establishes between the federal government and the States. For there is a marked difference between this case and other suits filed decades ago, also styled *United States v. Alabama*, during an era of the State's history that is now thankfully part of the past. In contrast to the suits filed then, the United States here has no occasion to allege that Alabama or its leaders are defying federal law. To the contrary, the entire point of the Alabama statute at issue is to require Alabama and its officials to "fully cooperate with federal immigration authorities in the enforcement of federal immigration laws." Act No. 2011-535, § 2. So, the essence of the United States' complaint that Alabama's elected officials are, through this Act, doing *too much* to uphold their duty to "support this Constitution" and "the Laws of the United States which shall be made in Pursuance thereof." U.S. CONST. art. VI. That assertion turns the Supremacy Clause and federalism on their heads, and is no basis for either a lawsuit or an injunction against the Act.

As things currently stand, the public's confidence in the rule of law is being eroded by the millions of people who are intentionally violating federal

immigration statutes by entering and residing in the United States illegally. As President Obama acknowledged during a recent Twitter town hall, "[w]e've got an immigration system that's broken right now, where too many folks are breaking the law."[1]

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. Exh. A at 23. 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%,[2] approximately 4% of Alabama's workforce consists of illegal aliens.[3] And the difficulties in collecting taxes from these persons, a large percentage of whom work "off the books," means that many of them are utilizing Alabama's public resources without 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 and rehabilitation. *See* 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

[1] http://www.whitehouse.gov/the-press-office/2011/07/06/remarks-president-twitter-town-hall.
[2] http://www2.dir.state.al.us/LAUS/CLF/ALUS.aspx
[3] Exh. A at 24.

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 the federal immigration law that Congress put on the books is respected.

The questions now presented are whether the Constitution and federal statutes leave no space for States like Alabama to take steps of this kind, and whether this Court is required to take the dramatic step of enjoining Alabama's good-faith effort to deter illegal immigration before the State has even had a chance to implement the Act or to delineate how its provisions will be applied. Because the answer is an emphatic no, the United States cannot prevail on the merits,[4] and this Court should not grant the federal government's request for a preliminary injunction.

ARGUMENT

I. The United States is not likely to prevail.

No preliminary injunction should issue against the provisions of the Act that the United States is challenging here. Its motion asserts that eleven of the Act's provisions are preempted—nine through implied preemption, and two through express preemption. As explained below, the United States is wrong on all these fronts.

[4] The State Defendants set out the applicable standard of review in their opposition to the preliminary-injunction motion filed by HICA and others. *See HICA* Doc. 82 at 9-12.

A. Federal law does not impliedly preempt any of the Act's provisions.

When it comes to the implied-preemption claims, this brief will address the various provisions challenged by the United States—namely, sections 10, 11(a), 12, 13(a)(1)-(3), 13(a)(4), 18, 27, 28, and 30—in the same order as the United States. And rather than repeat the arguments the State Defendants made against these same claims in the *HICA* preliminary-injunction motion, this brief will, when possible, simply cross-reference the State Defendants' arguments in that opposition. *See HICA* Doc. 82 at 55-91. But two overarching flaws permeate the United States' implied-preemption analysis as a general matter, and those flaws bear emphasis at the outset.

1. The United States advocates an unprecedented approach to preemption.

Even more so than the *HICA* Plaintiffs, the United States is trying to expand the doctrine of implied preemption far beyond the bounds that governing precedents allow—and far beyond common understandings of how federalism and the separation of powers should work. The United States is asking this Court to adopt a cramped reading of the standard the Supreme Court established for immigration-related implied-preemption challenges in *De Canas v. Bica*, 424 U.S. 351 (1976). Under the United States' novel understanding of *De Canas*, the

implied-preemption doctrine effectively precludes the States from enacting *any* law intended to help the federal government curb illegal immigration. Yet the United States is not content to stop there. In analyzing the individual provisions of the Act, the United States consistently advances a novel theory of preemption-by-executive-inaction that, if it became the law, would jeopardize the state-federal balance not only in the immigration context, but in virtually every area in which the federal government might operate.

a. Under De Canas*, the fact that a state law is not focused solely on purely local matters does not render it impliedly preempted.*

The United States begins by trying to create a new category of impliedly preempted immigration laws. 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 if:

(1) it falls into the narrow category of laws deemed to be a "regulation of immigration," *id*. 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.

As explained in the State Defendants' *HICA* response and set forth in more detail below, under this test, the movants in these consolidated cases have no substantial

likelihood of succeeding on the merits of their implied-preemption claims, and Alabama's statute must be allowed to go into effect. *See HICA* Doc 82 at 39-91.

But in its effort to seek a preliminary injunction before the law's effective date, the United States has now tried to add 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 (*quoting De Canas*, 424 U.S. at 356-57). So under the United States' theory, *De Canas* rings the death knell for any state law dealing with illegal aliens that is geared toward putatively "non-local" concerns. Under that approach, apparently, those impermissible "non-local" concerns include the sorts of things that motivated the Alabama Legislature here—namely, desires to decrease illegal immigration within the State and to protect the jobs of citizens and authorized aliens in the State from unfair competition.

But that is not what *De Canas* said, and it is not the law. The full sentence from which the United States has drawn the terminology at issue reads as follows: "In attempting to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens, § 2805(a) focuses directly upon these essentially local problems and

is tailored to combat effectively the perceived evils." *De Canas*, 424 U.S. at 357. That was merely the Court's description of the *impetus* behind the California law at issue in that case. The Court did not, in the course of giving that description, say that to avoid preemption, the state statute must have goals that are "local" in nature. *See id.* at 356-58. The *De Canas* Court could not possibly have intended that reading because the "local problems" the Court identified as the driving forces behind the California law were, in fact, the same sorts of concerns about illegal immigration that motivated Alabama's statute here. As the *De Canas* court explained, California enacted its law addressing the employment of illegal aliens because, among other things, "[e]mployment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs," and "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens." *De Canas*, 424 U.S. at 356-57.

Consequently, the dispositive question here is not whether the Act is "'focuse[d] directly upon' and 'tailored to combat' what are 'essentially local problems.'" *U.S.* Doc. 2 at 26 (*quoting De Canas*, 424 U.S. at 356-57). It is instead whether the Act falls into one of the three categories identified by *De Canas*—laws deemed to be a "regulation of immigration," *id.* at 355, laws for which Congress expressed "'the clear and manifest purpose'" of completely occupying the field and

displacing all State activity, *id*. at 357; and laws that conflict with federal laws, such that they "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id*. at 363.

b. The Executive Branch's decisions not to enforce federal law cannot preempt state laws designed to prohibit the same conduct.

Because the United States does not contend that the Act amounts to a preempted "regulation of immigration" as the *De Canas* Court defined that term, *cf. HICA* Doc. 82 at 44-49 (refuting the *HICA* Plaintiffs' argument along those lines), the United States can prevail on its challenge only by showing either (1) that "Congress has unmistakably … ordained" the ouster of all States from the field (or the nature of the subject matter permits no other conclusion that field preemption has occurred); or (2) that the Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *De Canas*, 424 U.S. at 356, 363. Yet in endeavoring to establish that the Act is impliedly preempted, the United States repeatedly relies not on formal statutes enacted by "Congress," *id.* at 363, but rather on informal actions—or, perhaps more to the point, failures to act—of the Executive Branch. For two reasons, the approach the United States is now advocating marks a substantial and unwarranted attempt to aggrandize the Executive Branch's powers at the expense of both Congress and the States.

i. The actions of Congress, rather than non-enforcement decisions made by a particular presidential administration, are what impliedly preempt state law.

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. Yet that is precisely what the United States is arguing at key points in its brief. *See, e.g.*, *U.S.* Doc. 2 at 68 (arguing that the verification provisions in Sections 12 and 18 are preempted because excessive verification requests would interfere with "DHS's internal enforcement decisions"). If the Administration's theory were accepted by the courts, then the President could displace all sorts of state regulation—and not merely state laws dealing with illegal immigration—merely by declaring his or her intent not to enforce certain federal laws that operate in the same spheres as particular state laws, and by then suing the States on an "implied preemption" theory.

Fortunately, 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. As the Supreme Court recognized in another context, "It is Congress—not the [Department of Defense]—that has the power to pre-empt

otherwise valid state laws." *North Dakota v. United States*, 495 U.S. 423, 442 (1990); *accord Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105, 131 (2d Cir. 2007) ("[T]he Supremacy Clause in article VI, clause 2 grants the power to preempt state law to the Congress, not to appointed officials in the Executive branch."), *rev'd in part on other grounds*, 129 S. Ct. 2710 (2009)); *In re NSA Telcoms. Records Litig.*, 633 F. Supp. 2d 892, 908 (N.D. Cal. 2007) (stating that "[e]xecutive orders, in and of themselves, do not preempt state law" and that "Congress has the exclusive power to make laws necessary and proper to carry out the powers vested by the United States Constitution in the federal government").

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. 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). 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).

The *Whiting* Court rejected this theory, responding 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. Thus, while Arizona's law might "result in more effective enforcement of the prohibition on employing unauthorized aliens" than the federal statute provided alone, the Arizona law was not impliedly preempted because "[t]he balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens, and the state law here simply seeks to enforce that ban." *Id.* at 1985. That conclusion was required because "[i]mplied 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 (*quoting Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)); *accord I.N.S. v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 194 & n.8 (1991) (upholding an Attorney General's rule prohibiting certain unauthorized aliens from working in the United States and rejecting objection that it was contrary to the balance created by the IRCA).

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—hook, line, and sinker. *See United States v. Arizona*, 641 F.3d 339, 351-52 (9th 2011). But this Court does not have to follow the Ninth Circuit, and as Judge Bea recognized in his dissent, the Ninth Circuit's analysis of this issue was flatly wrong. "The internal policies of [the Bureau of Immigration and Customs Enforcement]," he wrote, "do not and cannot change this result." *Id.* at 380 (Bea, J., concurring in part and dissenting in part). That is so because "[t]he power to preempt lies with Congress, not with the Executive; as such, an agency such as ICE can preempt state law only when such power has been delegated to it by Congress." *Id.* (*citing North Dakota*, 495 U.S. at 442). If things were otherwise, Judge Bea correctly concluded, "evolving changes in federal 'priorities and strategies' from year to year and from administration to administration would have the power to preempt state law, despite there being no new Congressional action." *Id.* "Courts would be required to analyze statutes anew to determine whether they conflict with the newest Executive policy." *Id.* That is not the law.

ii. <u>The Executive Branch cannot impliedly preempt state laws relating to immigration by invoking foreign-policy concerns.</u>

Second, the United States takes its theory of executive-branch preemption to even more troubling heights by asserting that numerous provisions in Alabama's

statutes 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 the problem of illegal immigration, "[w]e do not grant other nations' foreign ministries a 'heckler's veto.'" *Arizona*, 641 F.3d at 383 (Bea, J., dissenting in part).

Judge Bea's analysis was correct, and indeed mandated by Supreme Court precedent. In *Barclays Bank PLC v. Franchise Tax Board*, several foreign governments and officials "deplor[ed]" a state statute "in diplomatic notes, *amicus* briefs, and even retaliatory legislation." 512 U.S. 298, 320 (1994). The Court held that these protests were not relevant, reasoning that in the absence of evidence that Congress intended to preempt the statute, the contention that the statute "is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum." *Id.* at 327-28. The Court also rejected the contention that "a series of Executive Branch actions, statements, and *amicus* filings" could preempt the tax statute at issue, *id.* at 328, noting that "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations,'" *id.* at 329.

To support its assertion that the current Administration's foreign-policy concerns preempt provisions in the Alabama statute, the United States has erroneously invoked a number of inapposite Supreme Court precedents that have considered foreign-policy concerns on preemption issues. Those decisions no relevance here because in each case the state law at issue "conflict[ed] with federally *established* foreign relations goals." *Arizona*, 641 F.3d at 381 (Bea, J., dissenting in part) (emphasis in original). The dispositive factor in those cases was that these goals only had preemptive force because they were enshrined in federal statute or treaties. The Court in *Crosby v. National Foreign Trade Council* found the Administration's foreign-policy concerns relevant when considering the preemptive effect of a federal statute imposing a set of mandatory and conditional sanctions on Burma. 530 U.S. 363, 368, 373 (2000). Likewise, the Court in *American Insurance Association v. Garamendi* found the state statute preempted because it conflicted with *specific* foreign policy objectives (concerning Holocaust-related insurance claims) that had been "addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century." 539 U.S. 396, 421 (2003); *see also Arizona*, 641 F.3d at 381 (Bea, J., dissenting in part). Again, the constitutional requirement that preemption can occur only through congressional enactment of a statute or approval of a treaty lay at the foundation of both of these opinions. Also, the *Garamendi* Court was willing to find preemption

of that sort only in an area that was "well within the Executive's responsibility for foreign affairs." 539 U.S. at 420. Immigration issues have much more meaningful effects on the welfare of the States and their domestic policy making. Thus, like the tax issues dealt with in *Barclays Bank*, the field of immigration never been understood to be controlled by the Executive Branch's power to conduct foreign relations. *Cf. Whiting*, 131 S. Ct. at 1983 (noting that in contrast to *Whiting* itself, which involved Arizona's regulation of the employment of unauthorized aliens, *Crosby* and *Garamendi* arose from "area[s] of dominant federal concern").

Any other result would upset settled notions of federalism and the separation of powers. If the United States (and the Ninth Circuit majority) were right, then any President could unilaterally invoke implied preemption against any state law by determining that its existence would "disrupt future U.S. foreign relations efforts." *U.S.* Doc. 2 at 33. The President could thereby effectively abrogate state laws governing the death penalty or marriage, on the theory that they had aroused foreign sentiment against the United States and thereby "interfere[d] with the fundamental authority to conduct foreign affairs." *Id.* That cannot be, and is not, how preemption law works.

2. None of the provisions at issue is impliedly preempted.

With those principles in mind, the fundamental questions here are whether Congress—as opposed to unilateral Executive Branch action or the current

Administration's view of foreign affairs—has expressed clear intent to oust all state laws from the field, or whether any of those provisions "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *De Canas*, 424U.S. at 363 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). As to each of the ten provisions the United States has challenged, the answer is no.

a. Federal law does not preempt Section 10, which parallels the federal requirement that aliens complete and carry registration documents.

First, federal law does not preempt Section 10 of the Act, which imposes parallel state sanctions for violations of the federal statutes that require illegal aliens to complete and carry registration documents.[5] The State Defendants have

[5] Section 10 provides as follows:

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

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

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

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

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

already responded in their *HICA* brief to most of the arguments the United States now makes on this front. *See HICA* Doc. 82 at 63-70. Those points included the following:

- *First*, far from "conflict[ing] with" federal statutes, *U.S.* Doc. 2 at 28, Section 10 simply seeks to *concurrently* enforce Congress's directive that aliens apply for and carry "any certificate of alien registration or alien registration receipt card." 8 U.S.C. § 1304; *HICA* Doc. 82 at 63-67 (citing 8 U.S.C. § 1304; *id.* § 1306(a)). And States have plenary authority to concurrently enforce federal immigration laws. *See HICA* Doc. 82 at 66-68.

- *Second*, far from "allow[ing] for increased and varied punishment for registration violations that happen to occur in Alabama," *U.S.* Doc. 2 at 31, Section 10's penalties mirror or are less stringent than the federal statutory sanctions. *See HICA* Doc. 82 at 67-68. And the Supreme Court has affirmed that States can enact laws that impose sanctions for conduct that federal law also penalizes. *See Bartkus v. Illinois*, 359 U.S. 121, 131-32 (1959); *Moore v. Illinois*, 55 U.S. 13, 21-22 (1852).

- *Third*, far from "choos[ing] a different measure to address the alien's situation" than the one chosen by the federal government, *U.S.* Doc. 2 at 31, Section 10(b) expressly defers to the federal government's determination of an alien's "situation" or immigration status. *HICA* Doc. 82 at 66-67.

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status. A court of this state shall consider only the federal government's verification in determining whether an alien is lawfully present in the United States.

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

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

The United States offers three new arguments aimed at Section 10, but as explained below, these are equally flawed.

i. Congress has not field-preempted this area.

First, unable to identify an actual conflict between Section 10 and federal statutes that would give rise to conflict preemption, the United States erroneously turns to the notion of field preemption, asserting that the federal statutes "leave no room for state legislation in this area." *U.S.* Doc. 2 at 29.

But the authority the United States offers in support of that novel proposition—*Hines v. Davidowitz*, 312 U.S. 52 (1941)—cannot carry that weight. *Hines* dealt with conflict preemption, not field preemption: "Our primary function," the Court said, "is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an *obstacle* to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67 (emphasis added). The Court "expressly [left] open all of appellees' other contentions, including the argument that the federal power *in this field*, whether exercised or unexercised, is exclusive." *Id.* at 62 (emphasis added).

Later precedent makes clear that the federal government's regulation of immigration in general is not so comprehensive that it leaves no room for states to act as well. In the still-controlling precedent of *De Canas*, the Court's review

"d[id] not reveal[] any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." *De Canas*, 424 U.S. at 358 (footnote omitted). As the California Supreme Court has recently noted, the federal circuit courts that have addressed the question "have unanimously concluded Congress has not occupied the field and preempted state assistance in the enforcement of federal criminal immigration law." *In re Jose C.*, 198 P.3d 1087, 1100 (Cal. 2009) (citing *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (*en banc*); *United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001)). Instead, "[t]hese courts recognize that Congress has established a regime of cooperative federalism, in which local, state, and federal governments may work together to ensure the achievement of federal criminal immigration policy." *Id.* "This is the antithesis of preemption." *Id.*

Indeed, Congress has consistently encouraged states to assist in restoring the rule of law to immigration. As the Tenth Circuit has held, "Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999). Three

statutory sections enacted by Congress are particularly noteworthy in this regard. First, 8 U.S.C. § 1373—a statute that plays a critical role in this case—placed the Executive Branch of the federal government under a statutory *obligation* to respond to all local inquiries about any alien's status. Second, 8 U.S.C. § 1357(g) allows states to enter into agreements to deputize specially-trained state officers to exercise the full "function[s] of an immigration officer" of the United States. 8 U.S.C. § 1357(g)(1). Third, 8 U.S.C. § 1252c clarifies that federal law does not preempt state and local officers from arresting an illegally present alien convicted of a felony who had been previously ordered deported. *Vasquez-Alvarez*, 176 F.3d at 1298.

Nor does the "comprehensive" nature of the federal *alien-registration* laws merit field preemption. *U.S.* Doc. 2 at 30. As the State Defendants have already noted, because Alabama's statute "does not establish a state registration system," it does not interfere with the federal government's registration system. *HICA* Doc. 82 at 64. Section 10 of the new Act simply provides for "concurrent enforcement of state and federal penalties against the same conduct." *Id.* at 68. "[M]erely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field." *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 717 (1985).

ii. Section 10 no more criminalizes "unlawful presence" than federal law does.

Second, the United States erroneously asserts that "Section 10 . . . is preempted for the additional reason that it is a thinly veiled and impermissible attempt to criminalize unlawful presence," something "Congress has repeatedly declined to do." *U.S.* Doc. 2 at 31-32. Even putting aside the established principle that doing what Congress has "declined to do" does not constitute a preempted act, *see HICA* Doc. 82 at 70-75 (discussing the non-existence of "preemption by omission,"), the United States is wrong to assert that Alabama has gone beyond what Congress has done.

That is so because Section 10 does not criminalize "unlawful presence." Instead, Section 10 only applies 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).

Indeed, if the United States had any colorable argument that Alabama has now criminalized unlawful presence, it would also have to concede that the federal

government has done so as well. That is so because Section 10 mirrors the statutes and sanctions enacted by Congress. *See HICA* Doc. 82 at 66-67, 69-70. Section 10 applies only to those aliens who have committed the criminal offenses defined in 8 U.S.C. § 1304(e) and 8 U.S.C. § 1306(a), and criminalizes at the state level only conduct that was already a crime at the federal level. It is impossible for an alien to violate Section 10 without also committing a federal crime. There is no conflict here.

iii. Foreign-policy concerns do not impliedly preempt Section 10.

The only other argument the United States offers on Section 10 is that it in the views of the current Administration, the provision undermines "foreign policy goals" and "risks negative reciprocity of the treatment of U.S. citizens abroad." *U.S.* Doc. 2 at 32, 33. As discussed above, the Executive Branch cannot use foreign-policy concerns to preempt state laws of this sort. *See supra* at 12-15; *accord HICA* Doc. 82 at 68-70. And the fact that the Administration would offer foreign-policy concerns as grounds to enjoin Section 10 in particular is extremely telling. Section 10, as noted, simply penalizes the same conduct that is already criminal under federal law. So, by arguing that foreign-policy concerns militate against the enforceability of Section 10, the Administration is implicitly admitting that it does not wish to enforce the parallel provisions of federal law. Perhaps the

decision not to enforce the law as it was enacted by Congress is within the President's discretion under the Constitution, but that non-enforcement decision cannot possibly provide grounds for preempting congruent laws enacted by the states.

b. Federal law does not preempt Section 11(a), which prohibits an unauthorized alien from applying for, soliciting, or performing work.

Likewise, federal law does not preempt Section 11(a), which prohibits unauthorized aliens from seeking, soliciting, or performing work in Alabama.[6] The State Defendants already have responded to most of the arguments the United States now makes on this front. *See HICA* Doc. 82 at 70-75. The salient points are the following:

- The explicit employer sanctions in IRCA, far from "reflect[ing] Congress's deliberate choice" to preclude States from "criminally penaliz[ing] unauthorized aliens for performing work, *U.S.* Doc. 2 at 34, suggests just the opposite. The fact that Congress chose only to preempt certain measures aimed towards employers affirmatively shows that Congress did *not* intend to preempt state laws criminalizing the solicitation and acceptance of employment by unauthorized workers. *See HICA* Doc. 82 at 71-75.

- The "preemption by omission" argument, so critical to the *HICA* Plaintiffs and now the United States, *see U.S.* Doc. 2 at 34, has been rejected by the Supreme Court. *See HICA* Doc. 82 at 71-75.

[6] Section 11(a) provides:

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

- Despite the United States' assertion of "a clear conflict with federal law" and "the objectives of IRCA," *U.S.* Doc. 2 at 36, "[n]either 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." *See HICA* Doc. 82 at 74.

The United States also resorts to two additional arguments, both of which appeal to concerns beyond the text. But neither supports the United States' argument.

i. Legislative history does not impliedly preempt Section 11.

First, legislative history cannot do the trick. The United States cites one House Report stating that the pertinent House committee thought, when enacting the IRCA, that "employer sanctions" were the "most humane" way of addressing the problem of unauthorized-alien employment. *U.S.* Doc 2 at 35. But a statement found in a House Report is not the statement of the full Congress, and "Congress's authoritative statement is the statutory text, not the legislative history." *Whiting*, 131 S. Ct. at 1980 (internal quotation marks omitted). In any event, the House Report says nothing, much less the clear statement it would need to offer in light of the presumption against preemption, about whether state laws on this front are actually preempted. *See HICA* Doc 82 at 37-39 (discussing the presumption against preemption). Moreover, if the United States is saying that Congress affirmatively

wanted unauthorized aliens to maintain jobs in this country, then that assertion is obviously incorrect. After all, Congress enacted IRCA to reinforce the illegality of such employment, and to sanction those employers who hire unauthorized alien employees. Alabama law simply makes that prohibition more effective by trying to cut off the supply of those employees as well. Like the Arizona employer-focused provisions in *Whiting*, Alabama's new law might "result in more effective enforcement of the prohibition on employing unauthorized aliens" than the federal statute provides. *Whiting*, 131 S. Ct. at 1984. But that does not give rise to preemption. *See id.*; *cf. HICA* Doc. 82 at 41-44 (discussing *Whiting* in more detail).

ii. Policy concerns do not impliedly preempt Section 11.

Along the same lines, the United States fails in its attempt to generate implied preemption from a 1986 statement from an Executive Assistant to the INS Commissioner that the INS did not "expect the individual to starve in the United States while exhausting both the administrative and judicial roads the [INA] gives him" to remain in the country. *U.S.* Doc 2 at 24. A statement from a single assistant to an executive official cannot impliedly preempt a state law. And to the extent that the United States is implying that Section 11 would require an illegal alien to "starve" while exhausting his administrative remedies, the United States is ignoring Section 11's language. Section 11 does not make it impermissible for *all*

illegal aliens to solicit or accept employment. It instead prohibits only "unauthorized alien[s]" from doing so. The state defines that term in Section 3(16), consistently with federal law, as "[a]n alien who is not authorized to work in the United States as defined in 8 U.S.C. § 1324a(h)(3)." And that federal statute defines the term as including a person who is not either "an alien lawfully admitted for permanent residence" or, critically for present purposes, "authorized to be so employed by this chapter or by the Attorney General." 8 U.S.C. § 1324a(h)(3). Accordingly, if the United States Attorney General (or Secretary of Homeland Security) has authorized an alien to be employed during his removal proceedings, Section 11 will not apply.

c. Federal law does not preempt Sections 13(a)(1)-(3), which parallel federal law by prohibiting harboring, transporting, and encouraging illegal aliens to enter or remain.

Nor does federal law does preempt Sections 13(a)(1)-(3) of the Act, which impose parallel state sanctions for harboring, concealing, or transporting illegal aliens or encouraging them to come to or reside in Alabama. *See U.S.* Doc. 2 at 43. Alabama has already responded to most of the preemption arguments the United States now makes on this front. *See HICA* Doc. 82 at 75-79. The major points include the following:

- By virtue of Section 13(a), Alabama is not "improperly imposing its own substantive regulation over facets of alien entry into the United States," *U.S.* Doc. 2 at 45, but is instead merely adopting a provision that is effectively the

"mirror image" of equivalent provisions of federal law. *HICA* Doc. 82 at 77 (citing 8 U.S.C. § 1324(a)(1)(A));

- Despite the United States' assertion that "even complementary or auxiliary state regulations would be impermissible in such an area," *U.S.* Doc. 2 at 45, numerous courts, including the Supreme Court in *Whiting*, have upheld concurrent enforcement by separate state regulation against the same behavior prohibited by federal immigration laws when the state activities do not impair federal regulatory interests. *HICA* Doc. 82 at 76-77 (citing *Gonzalez v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1993), *overruled on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999);

- Despite the United States' assertion that "[t]he preemptive force of this constitutional and congressional authority, including Section 1324, has been recognized by several courts," *U.S.* Doc. 2 at 44, courts have consistently upheld state-law immigration provisions when they parallel federal law. *See HICA* Doc. 82 at 76-77 (citing *Ariz. Contractors Ass'n v. Napolitano*, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW, 2007 WL 4570303, at *13 (D. Ariz. 2007), *aff'd sub nom. Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294, at *19, 2008 U.S. Dist. LEXIS 7238, at *33 (E.D. Mo. Jan. 31, 2008)).

The United States does add two new arguments, but neither is availing.

i. <u>The federal provision allowing state officers to "arrest" illegal aliens for federal offenses does not impliedly preempt States from prosecuting illegal aliens for violating parallel state laws.</u>

First, the United States erroneously argues that because Congress expressly provided for state officials to make "arrests" for federal law violations, it intended that States would be barred from imposing any sanction for violations of parallel

state laws like Sections 13(a)(1)-(3). *See U.S.* Doc. 2 at 45. To be sure, 8 U.S.C. § 1324(c) authorizes "all other officers whose duty it is to enforce criminal laws" to "make any arrests for a violation of any provision" of the federal harboring laws. This makes eminent sense in light of the "[t]he general rule . . . that local police are not precluded from enforcing federal statutes." *Gonzales*, 722 F.2d at 474 (citing *Ker v. California*, 374 U.S. 23 (1963); *Miller v. United States*, 357 U.S. 301 (1958); *Johnson v. United States*, 333 U.S. 10 (1948); *United States v. Di Re*, 332 U.S. 581 (1948)). But by authorizing state officers to enforce *federal* criminal laws, Congress did not prevent States from enacting parallel *state* criminal laws that they would also enforce. The United States offers no authority indicating that because the federal government has expressly authorized state law enforcement officers to make arrests for a particular federal immigration crime, that authorization somehow preempts state efforts to further discourage the crime by making it a state offense. *See U.S.* Doc. 2 at 44-45. On the contrary, the fact that Congress has expressly invited state assistance in making arrests suggests that Congress welcomes state efforts to address the problem.

The Arizona Court of Appeals applied the doctrine of concurrent enforcement in rejecting a preemption challenge very similar to the one that the United States now makes. *State v. Flores*, 188 P.3d 706, 711-12 (Ariz. Ct. App. 2008). In 2005, the State of Arizona had enacted the Arizona Human Smuggling

Act, which, like Act No. 2011-535, tracked the language of 8 U.S.C. § 1324(a)(1)(A) with respect to transporting illegal aliens. The Court properly rejected the preemption challenge, applying the concurrent-enforcement doctrine:

> Arizona's human smuggling law is not preempted because it neither conflicts with federal law nor "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the INA." *De Canas* at 363 (quoting *Hines*, 312 U.S. at 67). Rather, we find that Arizona's human smuggling law furthers the legitimate state interest of attempting to curb "the culture of lawlessness" that has arisen around this activity by a classic exercise of its police power. Moreover, to a large extent, Arizona's objectives mirror federal objectives. Congress has enacted a similar provision, which provides in relevant part:
>
> > Any person who . . . knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, 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 . . . shall be punished as provided in subparagraph (B).
>
> 8 U.S.C. § 1324(a)(1)(A)(ii) (2005). *The same act may offend the laws of both the state and the federal government and may be prosecuted and punished by each*. *Abbate v. United States*, 359 U.S. 187, 194-95 (1959). Thus, Arizona may prosecute and punish a person who knowingly transports illegal aliens within its borders for profit or commercial purpose under its human smuggling law, just as the federal government may prosecute and punish a person who knowingly or recklessly transports such illegal aliens within the United States under its laws.

Flores, 188 P.3d at 712-13 (emphasis added). The same analysis applies here. State laws prohibiting the transporting, harboring, encouraging, or inducing of illegal aliens concurrently with federal immigration law are not preempted.

ii. Section 13(a)(1)-(3) do not violate the dormant Commerce Clause.

Second, the United States erroneously asserts that Sections 13(a)(1)-(3) are preempted because they "violate the dormant Commerce Clause." *U.S.* Doc. 2 at 46. "The Dormant Commerce Clause prohibits states from enacting statutes that impose 'substantial burdens' on interstate commerce." *Locke v. Shore*, 634 F.3d 1185, 1192 (11th Cir. 2011). Although the United States posits that "the 'Dormant Commerce Clause' forbids certain state attempts to restrict the movement of people between states," *U.S.* Doc. 2 at 46, it fails to explain how Sections 13(a)(1)-(3), "which create[] parallel state statutory provisions for conduct already prohibited by federal law" in all fifty States, "has a substantial effect on interstate commerce." *United States v. Arizona*, 703 F. Supp. 2d 980, 1003 (D. Ariz. 2010) (rejecting a Commerce Clause challenge to a similar provision in Arizona's immigration statute). A hypothetical possibility that a state statute could burden interstate commerce cannot sustain a facial challenge such as this one. *See Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 395 (1983). Moreover, the United States fails to offer any case law suggesting that the Dormant Commerce Clause protects the transportation of persons in a manner that constitutes a federal crime.

In addition, Sections 13(a)(1)-(3) do not run afoul of the dormant Commerce Clause line of cases concerning facially discriminatory state statutes. A state law affecting interstate commerce is subjected to exacting scrutiny only when it "discriminates against out-of-state residents on its face." *Locke*, 634 F.3d at 1192. "In this context, discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (internal quotation marks omitted). Sections 13(a)(1)-(3) do not differentiate between in-state and out-of-state economic interests. Instead, they prohibit harboring, transporting, encouraging, and inducing of *all* aliens "that ha[ve] come to, ha[ve] entered, or remain[ed] in the United States in violation of federal law." *See* Act No. 2011-535 § 13(a)(1). It does not matter what State the perpetrator or alien is coming from. And it does not matter if the transportation of the alien crosses a state line. Thus, in-state and out-of-state interests are treated the same, and Section 13 is not facially discriminatory.

On the other hand, nondiscriminatory statutes that are "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental" face a lighter burden. *United Haulers Ass'n, Inc.*, 550 U.S. at 346. They do not violate the Dormant Commerce Clause "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.*

(internal quotation marks omitted); *Locke*, 634 F.3d at 1192. Sections 13(a)(1)-(3) pass muster under that test. Alabama has a strong state interest in public safety and reducing the amount of criminal activity—both state and federal—within its borders, and the benefits of reducing illegal immigration are manifold. *See supra* at 2-3. The United States has not identified any burdens on interstate commerce that are "clearly excessive" when compared to these local benefits.

Instead, the United States, relying heavily on the inapposite decision in *Edwards v. California*, 314 U.S. 160 (1941), simply argues that Sections 13(a)(1)-(3) run afoul of the Dormant Commerce Clause because they represent an "'attempt[] on the part of [a] single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.'" *U.S.* Doc. 2 at 46 (quoting *Edwards*, 314 U.S. at 173).) But this case is nothing like *Edwards*. Unlike the unique regulation at issue there, which prohibited the movement of *all* indigent residents into California, *see Edwards*, 314 U.S. at 173, Section 13 does not aim to restrict the transportation of anyone who is lawfully present in the United States. Closing a State's borders to residents of other States who are legally present in the United States is a far cry from enforcing prohibitions on the harboring and transporting of illegal aliens that parallel federal statutes already in place. The United States has no likelihood of prevailing on this challenge to Sections 13(a)(1)-(3).

d. Federal law does not preempt Section 13(a)(4), which parallels federal law by prohibiting harboring illegal aliens by entering into rental agreements with them.

Nor does federal law preempt Section 13(a)(4), which prohibits "harbor[ing] an alien unlawfully present in the United States by entering into a rental agreement." *See U.S.* Doc. 2 at 47. Alabama has already responded to some of the preemption arguments the United States now makes on this front. *See HICA* Doc. 82 at 79-83. The key points include:

- Contrary to the United States' assertion that Section 13(a)(4) imposes auxiliary burdens on the entrance or residence of aliens, *U.S.* Doc. 2 at 47-48, Section 13(a)(4) prohibits a type of "harboring" that is equally prohibited by federal law. *See HICA* Doc. 82 at 80-83 (citing 8 U.S.C. § 1324; *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999)).

- Despite the United States' complaint that "Alabama's housing rental prohibition . . . would prevent the state's unlawful alien population from obtaining practically any kind of housing or shelter," *U.S.* Doc. 2 at 48, federal law is equally prohibitive. *See HICA* Doc. 82 at 79-82 (citing *United States v. Varkonyi*, 645 F.2d 453, 459 (5th Cir. 1981)).

The United States offers a slightly different spin on some of these arguments, but the new spin is equally wrong.

i. <u>Section 13(a)(4) affects illegal aliens' opportunities to obtain rental housing in the same way the federal harboring provision does.</u>

Second, relying on a decision that the Supreme Court has vacated, the United States argues that "[t]he federal government 'has never evidenced an intent for [unlawful aliens] to go homeless.'" *U.S.* Doc. 2 at 48 (quoting *Lozano v. City of Hazelton*, 620 F.3d 170, 224 (3d Cir. 2010), *vacated*, No. 10-772, 2011 WL 2175213 (June 6, 2011)). But the federal government's actions regarding its own harboring provision tell a different story. As the Second Circuit has observed, when enacting the harboring statute, "members of Congress appear to have assumed that one providing shelter with knowledge of the alien's illegal presence would violate the Act." *United States v. Lopez*, 521 F.2d 437, 440 (2d Cir. 1975). And the United States has prosecuted individuals for, in part, providing shelter or lodging to illegal aliens under the harboring statute. *Cf. id.*; *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008); *United States v. Balderas*, 91 Fed. App'x 354, 355 (5th Cir. 2004). The mere fact that the current Administration might choose not to enforce this prohibition as Congress wrote it is, again, hardly a reason to find that Congress itself intended to preempt concurrent state regulation in this area. *See supra* at 4-12.

ii. <u>Section 13(a)(4) does not determine who may lawfully reside within Alabama's borders.</u>

Second, the United States erroneously suggests that through "Section 13(a)(4), Alabama effectively seeks to decide who may reside within its borders,"

something that has "always been a power committed exclusively to the federal government." *U.S.* Doc. 2 at 49. This argument is belied by the plain language of Section 13(a)(4). It is the federal government, not Alabama, that determines an alien's status and whether he or she may reside within the country. Section 13(a)(4) simply enforces that federal determination by implementing a harboring provision that parallels federal law. And a finding that someone has violated the rental provision does not result in a "deci[sion]" as to "which aliens may live in the United States." *U.S.* Doc. 2 at 38. It simply results in a conviction of the landlord for harboring. The implied-preemption doctrine, and the concurrent-enforcement doctrine, allow this state provision to stand.

For clarity's sake, one other point merits brief mention here. The United States adverts at one point to language from *De Canas* in which the Court said that states may "'neither add to nor take from the conditions imposed by Congress upon admission, naturalization and *residence* of aliens in the United States or the several states.'" *U.S.* Doc. 2 at 47 (quoting *De Canas*, 424 U.S. at 358 n.6) (emphasis added in United States' brief). To be clear, the reference to "residence" in the *De Canas* footnote, which was actually a quotation from an the Court's earlier decision in *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948), refers to whether a *legal* alien is authorized to reside *in the United States*—and not to whether an *illegal* alien can reside in a particular *type of abode*. *See De Canas*, 424

U.S. at 358 n.6 (citing *Takahashi*, 334 U.S. at 419). The United States does not appear to be trying to use that language from *De Canas* and *Takahashi* to establish that latter proposition, and with good reason. Section 13(a)(4)'s restriction on rental agreements for illegal aliens simply has no connection to the concept of "residence" of legal aliens discussed in *De Canas* and *Takahashi*.

e. Federal law does not preempt Section 30, which prohibits certain transactions between the State and illegal aliens.

Nor does federal law impliedly preempt Section 30, which prohibits certain transactions between an alien not lawfully present and the State.[7] *See U.S.* Doc. 2 at 49-51. That is so in part because the United States is misinterpreting Section 30. It is also so because the United States is bringing a facial challenge to Section 30 and indisputably cannot show that at least some of its applications are not

[7] Section 30 provides as follows:

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

Act No. 2011-535, § 30(b). The term "business transaction" is defined as

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

Act No. 2011-535, § 30(a).

preempted. And it is also so because even the applications of Section 30 to which the United States points are not preempted under federal law.

i. The United States misinterprets Section 30.

As an initial matter, the United States' challenge to Section 30 cannot even get off the ground because the United States is misinterpreting, or at least exaggerating, Section 30. Its fear that Section 30 would prohibit such aliens from having running water or sewer services, for example, has little basis. *See U.S.* Doc. 2 at 50. Section 30 applies only transactions with the State and its political subdivisions. Many "water and sewer authorities," on the other hand, are public corporations under Alabama law and are "separate entit[ies] from the State and from any political subdivision thereof." *Limestone County Water & Sewer Authority v. City of Athens*, 896 So. 2d 531, 534 (Ala. Civ. App. 2004). Accordingly, Section 30 will not affect an illegal alien's payment of his or her bills in localities where the utilities are run by such authorities. Likewise, the United States offers no logical reason why covered "business transactions" would include the payment of property taxes or the payment of court fees. Neither of those transactions involves the exchange of money for goods or services, and neither creates any contractual duty for the State.

ii. The United States' facial challenge fails because all applications of Section 30 are valid.

Moreover, the United States cannot possibly prevail on a facial challenge to Section 30. Because the United States is asking the Court to strike down Section 30 on its face, the United States 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). Here, every application of the Act would be consistent with federal law.

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 an 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 drivers' 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 the date of the enactment of this Act [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 drivers' 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).[8] Consequently, if Alabama gave drivers' 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.

The State's decision not to contract with illegal aliens for the provision of service or goods to the State is also clearly permissible. No federal law requires States to engage in business transactions with illegal aliens, and no preemption claim could possibly be made on that front. The United States' facial challenge thus fails.

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[8] 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:

> Beginning 3 years after the date of the enactment of this division, a Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State to any person unless the State is meeting the requirements of this section.

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).

iii. The United States identifies no basis for preemption of Section 30.

The United States identifies no statutory provision with which it believes Section 30 conflicts. It instead asserts that Section 30 is in tension with extant immigration "policies." *U.S.* Doc. 2 at 50. That assertion cannot do the heavy lifting here. The burden here—and especially at the preliminary injunction stage, it is a steep one—is on the United States. The presumption—and especially at the preliminary-injunction stage, it is a strong one—is *against* preemption, not for it. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009); *HICA* Doc. 82 at 37-39. Invoking policy cannot satisfy that burden. *See supra* at 12-15.

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." *U.S.* Doc. 2 at 51 (quoting *Hines*, 312 U.S. at 65-66). 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 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.”).

f. Federal law does not preempt Section 27, which renders certain contracts unenforceable when one of the parties is an illegal alien.

The United States’ preemption arguments also fail as to Section 27, which renders certain private contracts unenforceable if one of the parties is an alien, if the other party knows or should know as much, and the contract requires the illegal alien to remain unlawfully present in the United States for more than 24 hours.[9] *U.S.* Doc. 2 at 57. As was the case with Section 30, the United States’ argument on Section 27 falters on both procedural and substantive grounds.

The United States cannot succeed in its facial challenge to Section 27 because the United States bases its entire argument on hypothetical interactions that *might* happen in the future. For example, the United States imagines that perhaps some people would mistake a contracting party for an illegal alien when in

[9] Section 27 provides as follows:

> 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).

fact the party is an alien lawfully present in the United States, or a United States citizen. This, they reason, "would impair the ability of lawfully present aliens or U.S. citizens to make contracts." *U.S.* Doc. 2 at 52. This is pure speculation. "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." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-50 (2008) (*quoting United States v. Raines*, 362 U.S. 17, 22 (1960)). To defeat a facial challenge to Section 27, the State Defendants need only offer one application of it that is clearly constitution. To that end, one need look no further than the multiple contracts with illegal aliens that are prohibited by federal law. *See, e.g.*, 8 U.S.C. §§ 1324a(a)(1) & (4); *id.* § 1323(a)(2); *id.* §§ 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 that principle with respect to contracts that require an illegal alien to remain unlawfully present in the United States.

There is no colorable argument that the immigration statutes themselves preempt Section 27. *See HICA* Doc. 82 at 84-86. The United States tries to get around that problem by asserting that Section 27 is preempted because "there is no evidence that Congress intended, as a categorical matter, unlawfully present aliens'

contracts to be unenforceable." *U.S.* Doc. 2 at 52. In other words, the United States is saying, Section 27 is impliedly preempted because Congress never expressly told the States that they may, in the course of regulating contracts, pass laws regarding the enforceability of contracts involving aliens unlawfully present. But for reasons already explained, that "preemption by omission" analysis does not work. *See HICA* Doc. 82 at 70-75.

g. Federal law does not preempt Section 28, which requires public elementary and secondary schools to collect data about a child's immigration status at the time of enrollment.

The United States has failed to identify any federal statute that conflicts with Section 28's requirement that school officials "determine" at the "time of enrollment" whether the student "was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States." Act No. 2011-535, § 28(a); *U.S.* Doc. 2 at 53. Instead, once again, the United States relies on an alleged conflict with "federal policy" of the current Administration. *See U.S.* Doc. 2 at 53, 55, 56-57. And once again, what the current Administration deems to be "federal policy" cannot impliedly preempt state law. *See supra* at 4-12, 12-15. That is especially so in the area of education, a traditional state function for which the presumption against preemption is at its apex. *Cf. Wyeth*, 129 S. Ct. at 1194-95.

What the United States is really doing on this front is trying to manufacture a preemption argument by invoking the language of equal-protection jurisprudence. That much is clear from the United States' frequent citation to *Plyler v. Doe*, 457 U.S. 202 (1982), an equal-protection precedent, and the United States' assertion that Section 28 "serves no lawful purpose, as the Constitution guarantees all children an equal right to attend public school irrespective of their immigration status." *U.S.* Doc. 2 at 53. But the United States' attempt to use *Plyler* to create a new type of implied-preemption analysis must fail.

Alabama has already responded, in the course of addressing the equal-protection challenge raised by the *HICA* Plaintiffs, to many of the "preemption" arguments the United States now makes. *See HICA* Doc. 82 at 118-25. Those points included the following:

- Despite the United States' speculation that "parents or guardians may choose to withdraw their children from school to avoid having to choose to possibly perjure themselves" when declaring their child's immigration status, *U.S.* Doc. 2 at 54, Section 28's reporting requirement applies only at "enrollment," which only occurs once – when the child initially enters school – not on an ongoing or yearly basis. *HICA* Doc. 82 at 120-21.

- In response to the United States' assertion that Section 28 would "hinder[] aliens' access to public schools," *U.S.* Doc. 2 at 56, the Superintendent of the Department of Education has made "clear that no child will be denied an education based on unlawful status or on a failure to provide the requested documentation." *HICA* Doc. 82 at 123.

- In response to the United States' concern that "[n]or could aliens have any assurance that any information that they provide, or any determination schools make, would remain with state and local officials," *U.S.* Doc. 2 at

> 54, 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." *HICA* Doc. 82 at 122.

The United States' additional arguments on this front are equally unavailing.

i. Alabama has a legitimate interest in Section 28's data-collection and reporting requirement.

The United States begins by wrongly questioning whether Alabama has any justification for Section 28's requirements. The United States asserts that Section 28 is overbroad because it "inquir[es] about *parental* alien status." *U.S.* Doc. 2 at 57. It also suggests that the data-collection and reporting requirement serves no "legitimate state interest," but is merely a subterfuge for "discourag[ing] unlawful aliens from enrolling their children in school." *Id.* Even if any of this were true, it is hard to see how it would be relevant to the preemption analysis. But none of it is true. The State has numerous legitimate interests in imposing this data-collection and reporting requirement.

First, States have a vital interest in obtaining as much information as possible about its schoolchildren, in order to provide them the best educational opportunities. Section 28(a) itself expressly identifies one reason why the State may have an interest in determining the immigration status of students and their parents: to help determine if the student "qualifies for assignment to an English as Second Language class." Section 28(d)(3) identifies another: to help "analyze and

identify the effects upon the standard or quality of education provided to students who are citizens of the United States residing in Alabama that may have occurred, or are expected to occur in the future, as a consequence of the enrollment of students who are aliens not lawfully present in the United States." The State may need this data to supply courts with evidence in future lawsuits addressing the manner in which Alabama runs its education system. *Plyler* itself offers perhaps the most compelling justification for allowing States to collect this information. There the Court struck down a Texas policy under the Equal Protection Clause because, in part, the State had failed to collect and present evidence regarding the economic effect of illegal aliens attending public schools in the State. *See* 457 U.S. at 229; *HICA* Doc. 82 at 124-25. If the Court could fault a State for failing to collect this information, then it cannot be contrary to federal law to collect it.

Second, Alabama also has an economic interest in the data collection and reporting. The Alabama Legislature is responsible for collecting the revenues necessary to fund state services. To ensure that it meets the State's needs, the Legislature requires accurate data for projecting costs and services. Section 28(d)(4) thus requires the State Board of Education to compile aggregated data on this front to "analyze and itemize the fiscal costs to the state and political subdivisions thereof of providing educational instruction, computers, textbooks and other supplies, free or discounted school meals, and extracurricular activities to

students who are aliens not lawfully present in the United States." And that information might well prove helpful to parties other than the State. It might help inform Congress—or the Administration—about the cost of educating the children of illegal immigrants. The State thus has strong interests in the system established by Section 28.

ii. Section 28 is not a preempted registration scheme.

Nor is the United States correct when it contends that Section 28 creates an impermissible "mandatory alien registration scheme for school children" that is preempted by federal law. *See U.S.* Doc. 2 at 57. The United States relies on *Hines v. Davidowitz*, 312 U.S. 52 (1941), for support, but as with the Plaintiffs' other invocations of *Hines*, that precedent is unavailing here. *See HICA* Doc. 82 at 65. Section 28 bears no resemblance to the Pennsylvania statute examined by the Court in *Hines*, which required *all* aliens over the age of 18—whether or not they were legally present on the United States—to, among other things, register annually and carry an alien registration card. 312 U.S. at 59-60. The Pennsylvania law thus established a mandatory registration scheme, complete with criminal penalties for noncompliance. In contrast, Section 28 imposes no penalty whatsoever, and does not even purport to register children. This is hardly a *Hines*-esque "registration" scheme. Parents are already routinely required to submit

documents to schools upon enrollment, including immunization certificates, medical or religious exemptions, social security numbers or temporary numbers, and proof of age. *See HICA* Doc. 82-3 at 3. Requesting another document—either a birth certificate or declaration—does not establish an entirely new "registration scheme." *U.S.* Doc. 2 at 57. Rather than conflicting with the federal alien-registration scheme, Section 28's data-collection requirement relies on that system by determining a student's immigration status according to "federal law." *See* Act No. 2011-535, § 28(a)(3). And Section 28(e) affirmatively forbids the public disclosure of the gathered information except on grounds authorized by federal law. It thus creates no conflict with federal law.

h. Federal law does not impliedly preempt Sections 12 and 18, which establish arrest protocols and an immigration-status verification scheme.

Nor has the United States established that it is likely to prevail on its implied-preemption arguments as to Sections 12 and 18. *U.S.* Doc. 2 at 58. These sections define stop-and-arrest protocols for law-enforcement officers. They represent a new procedure, but not a new practice. Long before Alabama enacted Act No. 2011-535, state officers "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" have been permitted to make inquiries with the federal government. 8 U.S.C. § 1373(c). And under Congress's direction, the federal

government is required to respond "by providing the requested verification or status information." *Id.*

The only difference between the current system and the one the Act will implement is that currently it is up to each law-enforcement officer's *discretion* to decide whether to act upon reasonable suspicion that a person is an illegal alien by making a telephone call to the federal Law Enforcement Support Center (LESC) via 8 U.S.C. § 1373(c). Such discretion can lead to great variations in law-enforcement protocols and dissimilar treatment of individuals who officers encounter. Accordingly, Sections 12 and 18 will put a uniform protocol into place across Alabama, ensuring that officers treat all persons the same way when reasonable suspicion of their illegal status arises.

Section 12(a) requires state and local officers to make contact with the federal government to inquire into the immigration status of an individual, pursuant to 8 U.S.C. § 1373(c), only when all of the following criteria are met:

1. a person is lawfully stopped, detained, or arrested,
2. by a law enforcement officer in the act of enforcing state or local law,
3. who then acquires reasonable suspicion that the subject may be an illegal alien,
4. and an inquiry to federal immigration authorities will be practicable,
5. and it will not hinder or obstruct the investigation of the suspected crime giving rise to the lawful stop, detention, or arrest.

Similarly, Section 18 provides that if a person is arrested for driving without a driver's license in violation of § 32-6-9 of the Alabama Code and the person is not

a United States citizen, then the official shall verify the arrestee's immigration status under 8 U.S.C. § 1373(c). Contrary to the United States' claim that "Sections 12 and 18 … convert the Alabama police force into a roving immigration patrol," *U.S.* Doc. 2 at 60, these sections only come into play *after* law-enforcement officers encounter these persons because of their violations of other laws.

The United States' conflict-preemption claim against these sections has no basis. The United States does not present any federal statutory language that can reasonably be construed to conflict with Sections 12 and 18. Instead, the United States ignores the plain text of 8 U.S.C. § 1373, offers theories that federal law will not support, and stretches the word "cooperate" in 8 U.S.C. § 1357(g)(10) beyond the meaning it will bear. As explained below, the United States' arguments fail. (It bears noting at the outset, however, that the United States wisely declines to argue that state and local police officers lack the authority to make immigration arrests at all. Since 2002, the U.S. Department of Justice's Office of Legal Counsel has opined that States possess inherent authority to make such arrests, and Congress has never preempted that authority. *See* Exh. C (2002 OLC Opinion).)

i. <u>Congress mandated federal responses to state inquiries in 8 U.S.C. §1373(c).</u>

The federal immigration statutes preclude the United States' preemption argument. The United States declares that verifications of aliens' immigration

status from Alabama law-enforcement officers "would create a significant risk that the federal government would be forced to shift resources away from its chosen priorities." *U.S.* Doc. 2 at 69-70. But that argument is ignores the text of 8 U.S.C. § 1373(c), which expressly authorizes such requests and establishes *by statute* that responding to all of them is a top priority. In 1996, Congress placed the Executive Branch under a statutory *obligation* to respond to all local inquiries into an alien's immigration status:

> **Obligation to respond to inquiries**
> 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) (emphasis added). In the same section, Congress also recognized the interest of cities and states in "[s]ending" and "[m]aintaining" such "information regarding the immigration status, lawful or unlawful, of any individual," and said that "no person or agency may prohibit, or in any way restrict" those communications. 8 U.S.C. § 1373(b)(1)-(2). Importantly, Congress wanted local law enforcement agencies to be able to *send* and *maintain* information—not just receive it—about an alien's legal status.

The Senate Report accompanying this legislation spelled out Congress's objective of encouraging state and local law enforcement agencies 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 added). Sections 12 and 18 of Alabama's statute were built around 8 U.S.C. § 1373 and the federal assistance to state and local law enforcement agencies that it demands.

The provisions of 8 U.S.C. § 1373 belie the United States' argument that Sections 12 and 18 are preempted because they might "interfere" with the Executive Branch's enforcement of the immigration statutes. Through 8 U.S.C. § 1373, Congress *ordered* the federal government to prioritize its resources in this manner; responding to state and local inquiries would henceforth be one of its highest priorities. The fact that the current Administration might wish to allocate fewer resources to answering inquiries from state and local governments is irrelevant—Congress has established the priority of this task. As the District of Arizona correctly observed in an immigration-preemption case presenting a different question, "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 Ass'n v. Napolitano*, No. CV07-1355-PHX-NVW, 2007 WL 4570303, at *15 (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 v. Whiting*, 131 S. Ct. 1968 (2011).

ii. The Administration's policy concerns cannot impliedly preempt Sections 12 and 18.

The United States speculates that an increase in verification requests from Alabama might conflict with the enforcement priorities of the current Administration, but the United States does not even mention the fact that 8 U.S.C. § 1373(c) removes all discretion from the Executive Branch with respect to answering these sorts of inquiries from the States. *See U.S.* Doc. 2 at 58-72. The United States cannot ignore the statute in this way. When Congress exercises its plenary power to enact laws concerning immigration, the Executive Branch must comply with Congress's direction. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 696-99 (2001). The fact that the executive agency may have its own priorities that conflict with federal statute does not in any way reduce the agency's legal obligation to fully comply with the statute. *See Hillsborough County*, 471 U.S. at 717; *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007). Nor does the agency's displeasure with federal law have any preemptive effect. *See United States v.*

Arizona, 641 F.3d 339, 380 (9th Cir. 2011) (Bea, J., dissenting in part).

Moreover, the factual premise of United States' argument is at odds with the message LESC is proclaiming to the public. The LESC website says it "operates a communications center that provides NCIC Hit Confirmations (within 10 minutes) to law enforcement agencies 24 hours a day, 7 days a week." *See* http://www.ice.gov/lesc/. The website boasts that "[t]he number of requests for information sent to the LESC increased from 4,000 in FY 1996 to 807,106 in FY 2008, to 1,133,130 in FY 2010 setting a new record for assistance to other law enforcement agencies." *Id.* The site gives no indication that the LESC has collapsed under the weight of this increased demand. Instead, it asserts that in 2010, "the LESC received queries from more than 13,000 distinct ORIs (electronic addresses) representing law enforcement agencies in all 50 states, the District of Columbia, two U.S. territories, and Canada." *Id.*

The declarations that the United States generated for this litigation are based on pure speculation that the LESC will be overwhelmed. They also make mistaken assumptions. For example, William M. Griffen's declaration ignores Section 12's requirement that officers first have reasonable suspicion that the subject is an illegal alien before making a query to LESC. *See U.S.* Doc. 2-7 at 10, ¶ 21 (stating that his understanding is that a query will be made every time if the stop is lawful and it is practicable to do so). He also underestimates the effectiveness and

competence of Alabama law enforcement officers by suggesting a hypothetical scenario in which an individual has his immigration status checked multiple times—even though Alabama officers are already familiar with LESC by virtue of 8 U.S.C. § 1373. *Id.* at 11, ¶ 23. The United States cannot override 8 U.S.C. § 1373(c) through unsupported conjecture of that sort.

iii. The term "cooperate" in 8 U.S.C. § 1357(g)(10) does not override 8 U.S.C. § 1373(c).

Unable to offer any response to § 1373(c)'s mandate, the United States resorts to an argument that stretches a single word in another federal statute beyond any meaning that it will reasonably bear. The United States seizes on the word "cooperate" in 8 U.S.C. § 1357(g)(10)(B), and claims that "a state is not acting 'cooperatively,'" and its actions are therefore preempted "if it … attempts to force the federal government to routinely deploy scarce enforcement resources in accordance with an immigration enforcement regime of a state's choosing." *U.S.* Doc. 2 at 65. But the term "cooperate" in 8 U.S.C. § 1357(g) does not override the federal government's obligations under § 1373(c), particularly in light of the function § 1357(g) plays in the overall statutory scheme.

Section 1357(g) allows a State to enter into a written agreement with the federal government to effectively deputize certain specially-trained state officers to exercise the powers of ICE agents. After laying out the requirements for the

deputizing of such state officers, Congress made clear that no such written agreement was necessary for state officers to exercise their inherent authority to make immigration arrests and transfer such illegal aliens to ICE custody. The full text of 8 U.S.C. § 1357(g)(10) says as follows:

> (10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—
>
> > (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
> >
> > (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10).

The United States rips the word "cooperate" from this context in order to create a set of state-centered obligations that are nowhere mentioned in the statute. The United States claims that this single word establishes "the INA's 'cooperation' requirement." *U.S.* Doc. 2 at 64. It then asserts that this "'cooperation' requirement means that a state may not adopt its own mandatory set of directives to implement the state's own enforcement policies because such a mandate would serve as an obstacle in every instance to the ability of individual state and local officers to cooperate with federal officers administering federal policies and discretion as the circumstances in the particular case require." *Id.* The United States' reading is wrong, for five reasons.

First, the United States takes no notice of the structure of § 1357(g)(10). Section 1357(g)(10) does not say that "*if* a state wishes to make an immigration inquiry, *then* it must cooperate." Rather, the sentence is a simple statement that a written agreement is not required for the State to cooperate with the Attorney General.

Second, the United States ignores the surrounding context of the sentence. 8 U.S.C. § 1357(g)(10) is designed to free the states of any obligation that might be implied by the preceding subsections, not to *impose* an obligation upon them. It would be odd to read into this subsection a vast preemption clause that prohibits states from determining the stop-and-arrest protocols for their own officers.

Third, the United States offers an unduly expansive definition of the word "cooperate," claiming that "cooperation with federal enforcement requires preservation of the federal government's statutorily assured enforcement discretion." *U.S.* Doc. 2 at 65. In other words, to the United States, "cooperate" means "defer entirely to the federal government's preferences and assume a subservient role." Webster's offers a more balanced definition: "to associate with another or others for mutual benefit." WEBSTER'S ONLINE DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/cooperate.

Fourth, the United States fails to explain how an *ad hoc* policy in which state officers exercise their own discretion whenever they feel so moved is more

"cooperative" than a uniform policy applied only when certain factors apply. This weakness is evident in the United States' attempt to explain why *ad hoc* decisions are better than uniform decisions: "a state is not acting 'cooperatively,'" the United States asserts, "if it . . . attempts to deny its officers (who are assisting federal officers in enforcing the INA) the opportunity to exercise their discretion on a case-by-case basis so that they can be responsive to the direction and priorities of the federal officials." *U.S.* Doc. 2 at 65. That analysis does not work. The state officer's "responsive" reaction to the federal official only occurs *after* the state official makes a phone call to ICE. Meanwhile, Sections 12 and 18 come into play *before* the phone call is made. The state officer can be equally responsive afterward, regardless of whether he initiated the call based on an ad hoc decision or based on a uniform policy.

Fifth, the United States ignores § 1357(g)(10)(A), which says a state may "communicate with the Attorney General regarding the immigration status of any individual." 8 U.S.C. § 1357(g)(10)(A). Subsections (g)(10)(A) and (g)(10)(B) are framed in the alternative; so a State may exercise the authority recognized in (g)(10)(A) without ever running into the word "cooperate." That is how Sections 12 and 18 of Act No. 2011-535 operate. When a law-enforcement officer makes contact with ICE under either Section 12 or Section 18, he is doing so to *communicate* with ICE, as described in (g)(10)(A). He is making contact because

the individual has violated a state or local law. Only *after* ICE confirms that the individual in question is an illegal alien, and ICE requests custody from the state officer, does (g)(10)(B) come into play. Only at that point would the state officer "det[ain]" the alien and transfer him to ICE custody to assist in ICE's "removal" of the alien from the United States. 8 U.S.C. § 1357(g)(10)(B).

The United States is really using the word "cooperate" as a vehicle to once again argue that the current Administration's "priorities" have preemptive effect. The United States argues, "These priorities animate DHS's internal enforcement decisions, and … these priorities communicate to states how the federal government is attempting to balance resource constraints and competing immigration objectives." *U.S.* Doc. 2 at 68. The United States offered the same abstractions in the *Arizona* case, but as Judge Bea cogently noted in dissent, all those abstractions revealed was that the Administration did not wish to enforce the law as written:

> 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 379-380 (Bea, J., dissenting in part). Implied preemption cannot be based on such a slender reed.

iv. The presumption against preemption is particularly strong here in light of the State's interests in its arrest protocols.

The infirmities described above are enough to render the United States' preemption claim invalid, but it bears noting that the presumption against preemption is particularly strong in this context. *See HICA* Doc. 82 at 37-39. Determining stop-and-arrest protocols is a fundamental attribute of internal law enforcement operations within a State. These protocols come into play *before* any phone call is made to the federal government, and the arrest is an exercise of state authority to enforce *state and local laws*. "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). Provided that such arrest protocols are consistent with the Constitution and are not prohibited by federal statutes, there is no basis for the United States to interfere with or attempt to stop them, as this lawsuit attempts to do. As a Tenth Amendment matter, the federal government lacks the power to "direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty." *Printz*, 521 U.S. at 902-03, 932. The presumption against preemption is thus particularly heightened here.

v. Inquiring into the immigration status of lawfully present aliens is not preempted.

The United States cannot get around these problems by speculating that "[a]lthough Alabama's verification scheme may intend to ultimately target unlawfully present aliens, the system would inevitably subject lawfully present aliens to the type of 'indiscriminate and repeated interception and interrogation by public officials'" that concerned the Supreme Court in *Hines. U.S.* Doc. 2 at 73. This speculative argument is based on faulty factual premises and offers no legal basis for preemption.

First, the United States incorrectly equates Sections 12 and 18 with the state registration system struck down in *Hines*. That system involved police accosting individuals solely to determine whether or not they were carrying the state-issued registration documents. *See Hines*, 312 U.S. at 59. Sections 12 and 18 of Act No. 2011-535 do no such thing. They only come into play *after* an individual has been stopped, detained, or arrested for breaking a law unrelated to his or her immigration status.

Second, the United States fails to account for subsections 12(d)(1)-(6), which create a presumption that a person is *not* unlawfully present in the U.S. if he or she presents one of many forms of identification. For that reason alone, the vast majority of lawfully present aliens stopped by law enforcement officers will not

have their immigration status checked because the presumption will prevent the officer from forming the necessary reasonable suspicion.

Third, the United States is wrong to surmise that if a lawfully present alien is arrested for driving without a license and says he is not a U.S. citizen, Section 18 will entail longer detention than would otherwise occur. *See U.S.* Doc. 2 at 75. They ignore the fact that Alabama Code § 32-6-9 already authorizes police officers to arrest and detain individuals lawfully stopped for a traffic violation who are then found to be driving without a license. Once the individual is already arrested and in custody, the immigration status verification pursuant to 8 U.S.C. § 1373(c) will not prolong his time of detention. It is pure speculation for the United States to suggest otherwise—and such speculative pleading cannot sustain a facial challenge, in which a plaintiff must establish that the law is unconstitutional in *all* of its applications. *See HICA* Doc. 82 at 13-18.

Fourth and perhaps most important, the law fully allows a police officer to make an immigration inquiry after a lawful stop or detention of any person has occurred. The Supreme Court has held that during a lawful detention, an officer can inquire into the person's immigration status *without any prior reasonable suspicion* that the person is unlawfully present in the United States. *Muehler v. Mena*, 544 U.S. 93, 101 (2005). In addition, the Eleventh Circuit has recognized that law-enforcement officers have the authority to do exactly what Section 12

entails: during a lawful stop, an officer can contact ICE after reasonable suspicion arises that the person is an alien unlawfully present in the United States. *See United States v. Cantu*, 227 Fed. App'x 783, 785 (11th Cir. 2007). Other Circuits that have addressed the issue have recognized the authority of state and local officers to contact federal immigration authorities when reasonable suspicion arises that a person who has been stopped is an illegal alien. *Cf. United States v. Soriano-Jarquin*, 492 F.3d 495, 497, 501 (4th Cir. 2007); *United States v. Rodriguez-Arreola*, 270 F.3d 611,614, 619 (8th Cir. 2001); *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999); *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1300-02 (10th Cir. 1984); *United States v. Contreras-Diaz*, 575 F.2d 740, 743-45 (9th Cir. 1978).

There is thus simply no basis for concluding, as a matter of statutory text or policy, that Section 12 and 18's stop-and-arrest protocols are impliedly preempted.

B. Federal law does not expressly preempt any of the Act's provisions.

The United States raises equally erroneous express-preemption challenges to two of the Act's employment-related provisions. *See U.S.* Doc 2 at 36-42. The first of these, Section 16, prohibits employers from deducting on their state income-tax return, as a business expense, any wages paid to illegal aliens. The second challenged provision, Section 17, makes it a discriminatory employment practice

for an employer to fire an employee who is legally present in the United States while retaining an unauthorized alien worker. It also gives discriminated-against employees a cause of action against employers who violate these provisions. As explained below, federal law does not expressly preempt either of these provisions.

The United States erroneously contends that 8 U.S.C. § 1324a(h)(2) expressly preempts Sections 16 and 17. Section 1324a(h)(2) reads as follows:

> **Preemption**. The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C. § 1324a(h)(2). In this provision, Congress utilized its power of express preemption to deny States the authority to impose criminal penalties or civil fines on the employers of unauthorized aliens. But through this language, Congress left open three windows for state and local legislation on the subject that are relevant here:

(1) legislation that discourages the employment of unauthorized aliens through mechanisms other than "civil or criminal sanctions";
(2) legislation that imposes "sanctions … through licensing and similar laws"; and
(3) legislation that discourages the employment of unauthorized aliens through penalties divorced from the act of "employ[ing], or recruit[ing] or refer[ring] for a fee for employment, unauthorized aliens."

As explained below, the Alabama Legislature carefully drafted Sections 16 and 17 to fit within these three windows.

1. The IRCA does not preempt Section 16.

The presumption against preemption has particular weight in the context of the tax rules set by Section 16. The Supreme Court has long recognized that "[t]he States have a very wide discretion in the laying of their taxes." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973) (internal quotation marks omitted). For "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1870).

Section 16 simply modifies Alabama's tax structure, and that legislative act is well within the State's traditional taxing authority. Section 16(a) clarifies that money paid to unauthorized aliens cannot be deemed deductible expenses for state income-tax purposes:

> No wage, compensation, whether in money or in kind or in services, or remuneration of any kind for the performance of services paid to an unauthorized alien shall be allowed as a deductible business expense for any state income or business tax purposes in this state. This subsection shall apply whether or not an Internal Revenue Service Form 1099 is issued in conjunction with the wages or remuneration.

Section 16(b) then imposes a tax penalty, amounting to ten times the amount deducted, on any business that illegally claims these wages as a tax deduction. For

two reasons, neither of these provisions is a preempted imposition of a "civil or criminal sanction[]" upon "those who employ … unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

a. Section 1324a(h)(2) does not expressly preempt Section 16(a).

As an initial matter, Section 16(a) is not preempted because a State's decision to define deductible business expenses as not including moneys paid to unauthorized aliens does not constitute a "civil or criminal sanction[]" for the employment of those persons. 8 U.S.C. § 1324a(h)(2). A "sanction" is a fixed penalty that is imposed by law. *Cf.* BLACK'S LAW DICTIONARY 1077 (7th ed.) (defining "sanction" as "[a] penalty or coercive measure that results from failure to comply with a law, rule, or order"). And a State's definition of what expenses may be deducted does not fit within that definition. The "creation of tax deductions is an exercise of legislative grace under which no substantive rights may vest." *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1085 (11th Cir. 2004). A State's decision not to make certain items deductible through this sort of "legislative grace" imposes no "sanction" on the taxpayer; it simply declines to award the taxpayer for the conduct at issue. If the United States' reasoning were correct, then any federal taxpayer who owns his home free and clear, or who lives in an apartment, is being

"sanctioned" by the Internal Revenue Code because he or she is not eligible for the home-mortgage deduction. That is not the law.

Section 16(a) is far better viewed as a revenue-raising provision than it is a penalty or sanction. In passing the Act, the Alabama Legislature expressly decried the drain on public resources posed by the presence of illegal aliens (specifically, in the education context), and asserted its interest in "ensur[ing] the integrity"—including the *economic* integrity—"of various governmental programs and services." Act No. 2011-535, §2. Accordingly, §1324a(h)(2) cannot preempt Section 16's valid taxing measures absent a clearer statement from Congress. *See generally Hines*, 312 U.S. at 68 (contrasting preempted state laws mandating alien registration as being "in an entirely different category from state tax statutes" where the state's power is "bottomed" on the "broad base" of "its power to tax").

b. Section 1324a(h)(2) does not preempt Section 16(b), but if it did, Section 16(b) would be severable.

Nor does the IRCA preempt Section 16(b). That provision imposes a penalty on any employer that claims, as a business-expense deduction, wages paid to an unauthorized alien. But § 1324a(h)(2) does not preempt that provision because it does not impose that penalty on an employer *for the act of* "employ[ing], or recruit[ing] or refer[ring] for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).

Section 1324a(h)(2) can only be read as preempting sanctions that States impose on employers for the actual acts of employing or recruiting unauthorized aliens, or referring them for employment. Someone reading § 1324a(h)(2)'s language in a cramped, hypertechnical way might assert that it preempts *any* sanction imposed on employers of unauthorized aliens. *See* 8 U.S.C. § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."). But in light of the purposes underlying § 1324a(h)(2), this language is far more naturally read as preempting sanctions on employers for the *act of* employing, recruiting, or referring these unauthorized aliens. The case on which the United States relies most heavily for its preemption argument recognizes this reality. *See Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 766 (10th Cir. 2010) ("Even assuming that Sections 7(B) and 9 impose 'sanctions' as that term is used in § 1324a(h)(2), imposition of such sanctions is divorced from the employment of unauthorized aliens."). The Supreme Court's jurisprudence, which requires a "narrow interpretation" of express-preemption clauses, demands this reading of § 1324a(h)(2) as well. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 523 (1992)).

In light of what §1324a(h)(2) means, Section 16(b) is not preempted. An employer may do all three of the things mentioned in §1324a(h)(2)—employing, recruiting, or referring—without ever triggering Section 16(b). Section 16(b) only comes into play if that employer files his state income taxes and then fraudulently claims those employees' wages as deductible business expenses. A business that employs unauthorized aliens can avoid this penalty entirely by not taking the deduction. The penalty is thus assessed on the act of tax fraud, not on the act of employing unauthorized aliens. It is therefore not a "sanction[]" imposed "upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens" for the purposes of 8 U.S.C. § 1324a (h)(2).

Even if that were not the case and Section 16(b) were preempted, Section 16(a) would remain on the books. That is so because Section 16(b) would be severable from the rest of the statute. The United States asserts otherwise, claiming that Section 16(b) is not severable because "Section 16(a) cannot stand apart from Section 16(b)." *U.S.* Doc. 2 at 39. But the severability of an invalid state statutory provision turns on state law. *See Artistic Entertainment, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1204 (11th Cir. 2003). Under Alabama law, the "inclusion of a severability clause" in a statute, like the one present in Section 33 of the Act at hand, "is a clear statement of legislative intent" that any invalid provision should be severed. *King v. Campbell*, 988 So. 2d 969, 981 (Ala. 2007) (internal quotation

marks and emphasis omitted)); *accord State v. Montgomery*, 59 So. 294, 303 (Ala. 1912). Moreover, although the Act's severability clause should end the analysis, the United States is also wrong to assert that "Section 16(a) cannot stand apart from Section 16(b)." *U.S.* Doc. 2 at 39. Even without the penalty provision, Alabama employers would comply with Section 16(a). That would happen in part because of those employers' good faith, and in part because other state-tax-law provisions that would facilitate Section 16(a)'s enforcement. *See, e.g.*, ALA. CODE §40-29-110 (establishing the criminal offense of attempting to "evade or defeat" the State's tax laws). Thus, even if Section 16(b) were preempted, Section 16(a) would stand.

2. The IRCA does not expressly preempt Section 17.

Nor does § 1324a(h)(2) preempt Section 17. *See U.S.* Doc. 2 at 41-42. Section 17(a) makes it a discriminatory employment practice for an employer to retain unlawful alien employees while firing U.S. citizen or authorized alien employees, and Section 17(b) gives employees a private right of action against employers who engage in that practice. Section 1324a(h)(2) does not preempt those provisions for two reasons.

First, the United States itself defines "sanctions" as measures with a punitive or deterrent component. *See U.S.* Doc. 2 at 38 (quoting *Edmondson*, 594 F.3d at

765). And Section 17 expressly disclaims any intent to punish or deter conduct. It expressly seeks only to "compensat[e]" victims of a newly defined discriminatory practice for their losses. *See* Act No. 2011-535 §17(b) ("Any recovery under this subsection shall be limited to compensatory relief and shall not include any civil or criminal sanctions against the employer."). Moreover, § 1324a(h)(2) envisions that state or local law will actually "impos[e]" the sanction at issue. Damages assessed in a private lawsuit do not fit that bill.

To be sure, the Tenth Circuit found a similar Oklahoma statute preempted in *Edmondson*, but the court there misinterpreted § 1324a(h)(2) and misapplied the presumption against preemption. 594 F.3d at 765. In the Tenth Circuit's view, the statute's "context" did "not evince an intent to narrowly define 'sanction' as requiring a punitive component." *Id.* The problem with this reasoning is that it stands the Supreme Court's clear-statement rule on its head. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (state law will not "be superseded by [a] Federal Act unless that [is] the clear and manifest purpose of Congress" (internal quotation marks omitted). Under the clear-statement rule, ambiguities in an express-preemption clause should be read *against* displacement of state law, and preempting Section 17 because "sanction" might conceivably mean something broader than "penalty," as the Tenth Circuit did, is a bridge too far.

Second, § 1324a(h)(2) does not preempt Section 17 because merely establishing a private right of action does not *guarantee* success at litigation. It does not stipulate—or, to use the statute's words, "impos[e]" —any specific dollar amount that an employer has to pay, and it does not guarantee that any action will be taken against the employer at all. Rather, it only becomes operative if an employee who has been wrongfully terminated chooses to exercise his private rights. As the California Court of Appeal explained in examining 8 U.S.C. § 1324a(h)(2), "[s]anctions are not the same as damages; a statutory reference to sanctions does not equal a reference to damages." *Jie v. Liang Tai Knitwear Co.*, 107 Cal. Rptr. 2d 682, 690 n.7 (Cal. Ct. App. 2001).

That result does not change simply because the Act also allows the "prevailing party" to recover "reasonable attorney fees" in the actions contemplated by Section 17(b). The attorney fees authorized by Section 17 do not constitute a civil "sanction" any more than the possibility of compensatory damages does. Attorney fees are borne by the "losing party," whoever that party is. Section 17 thus imposes attorneys' fees not because of an employer's employment of unauthorized aliens, but rather simply as an adjunct to the *non-preempted* private right of action. And whatever attorney fees might be awarded to an employee would, like the compensatory damages, simply compensate the victim of the discriminatory employment practice for his or her costs. Those fees are not

preempted, and the possibility that they will be awarded in some future case is no reason to hold that Section 17 is preempted in a facial challenge.

* * *

For all of these reasons, the United States has failed to establish that it is likely to succeed on the merits of its preemption arguments. On that basis alone, this Court should decline to preliminarily enjoin the Act before it goes into effect.

II. The equities weigh against a preliminary injunction.

Just as the United States cannot establish that it will likely succeed on the merits, it cannot establish that other equitable considerations warrant a preliminary injunction.

A. The United States will not suffer irreparable harm if the Act is allowed to go into effect.

As an initial matter, the United States cannot show that it will suffer irreparable harm if the injunction does not issue. The harms it claims it will suffer—from a potential reduction in resources to fears of international rebuke—are wholly speculative. And "[i]ssuing 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." *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 22 (2008) (emphasis added). An injunction "issues to prevent existing or presently threatened injuries. One will not be granted

against something merely feared as liable to occur at some indefinite time in the future." *State of Connecticut v. Com. of Mass.*, 282 U.S. 660, 674 (1931).

The United States is wrong when it contends that Act No. 2011-535 will "alter[]" "the federal government's administration of the immigration laws" and "seriously damage[]" "the federal government's ability to achieve its chosen balance of the multiple and competing goals underlying the federal immigration system." *U.S.* Doc. 2 at 77-78. Act No. 2011-535 marks the State's effort to work *with* the federal government, not against it. *See supra* at 1-3. This policy of cooperative and concurrent enforcement is consistent with the federal policies delineated in 8 U.S.C. § 1373 and 8 U.S.C. § 1644, and is indeed mandated by them. Congress has established this cooperative system between the federal government and States. The Department of Homeland Security thus will not suffer "irreparable harm" by complying with congressional directives. Moreover, the Act does not command the federal government to make any changes to the way it enforces its own laws. The federal government remains free to make its own decisions, under the controlling directives of federal law, about whom to "initiate enforcement proceedings against." *U.S.* Doc. 2 at 77.

Nor will the Act "alter the conditions of residence for lawfully present aliens." *U.S.* Doc. 2 at 78. Act No. 2011-535 parallels federal law aimed at aliens unlawfully present in the United States and will have no more effect on lawfully

present aliens than federal law already exerts. Equally misplaced are the United States' concerns that the Act will interfere with ICE's "measured exercise of discretion." *U.S.* Doc. 2 at 79. The Act expressly relies on the federal government's determination of an alien's immigration status. ICE remains free to exercise its discretion, and Alabama will abide by that determination of status.

The United States' final alleged harm is neither irreparable nor a "harm" caused by Act No. 2011-535. The United States asserts that Act No. 2011-535 will "inflict irreparable injury" on its "ability to manage foreign policy." *U.S.* Doc. 2 at 81. But, again, this forecasted harm is merely speculative. Act No. 2011-535 closely parallels the United States' own statutes and directives about immigration. Thus, any potential international effects are attributable to Congress's policy decisions on immigration, not Alabama's. The United States simply cannot establish a substantial likelihood that it will suffer an "irreparable harm" at the hands of Act No. 2011-535.

B. The balance of equities tips in Alabama's favor.

Nor has the United States made a compelling showing that the public interest favors an injunction. "When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted

the widest latitude in the dispatch of its own internal affairs." *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976) (internal quotation marks omitted). The United States has not overcome that presumption. The public consequences to Alabama from enjoining Act No. 2011-535 are significant. The Act represents a good-faith attempt to help stem the tide of illegal immigration in the State, and no one can know how efficacious that attempt will be until the law is allowed to go into effect. Federalism concerns thus counsel heavily against an injunction here. Alabama is currently suffering serious consequences from illegal immigration. *See supra* at 1-2. Alabama has sought to dispatch its own internal affairs by addressing the serious public consequences from the increased influx of illegal aliens. The equities favor that valid state exercise.

* * *

At the end of the day, despite the various policy-laden criticisms that the United States and other Plaintiffs have levied toward Alabama here, the fact remains that *federal law* prohibits illegal immigration in this country. The current Administration may believe that the system should be reformed,[10] and that States such as Alabama should be precluded from doing what they can to help Congress achieve the goals that the current system embodies. But if the current Administration wishes to attain that result, it should do so by going to Congress

[10] *See* http://www.whitehouse.gov/the-press-office/2011/07/06/remarks-president-twitter-town-hall.

itself, and asking Congress to change the law. It should not seek a judicial declaration that a state statute designed to uphold this federal prohibition is somehow preempted. This Court should reject the United States' attempt to circumvent the democratic processes.

CONCLUSION

This Court should deny the United States' motion for a preliminary injunction.

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I hereby certify that on August 15, 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:

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