

No. 11-14535-CC and No. 11-14675

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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**HISPANIC INTEREST COALITION OF ALABAMA, ET AL.**

*Appellants/Cross-Appellees,*

*v.*

**ROBERT BENTLEY, ET AL.,**

*Appellees/Cross-Appellants.*

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

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**RESPONSE BRIEF FOR APPELLEES AND PRINCIPAL BRIEF  
FOR CROSS-APPELLANTS GOVERNOR BENTLEY, ATTORNEY  
GENERAL STRANGE, SUPERINTENDENT CRAVEN, CHANCELLOR  
HILL, AND DISTRICT ATTORNEY BROUSSARD**

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**December 27, 2011**

**CERTIFICATE OF INTERESTED PERSONS**

The following is a list of all additional known judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly held company that owns 10 percent or more of a party's stock, and other identifiable legal entities related to a party:

[no new entries]

## STATEMENT REGARDING ORAL ARGUMENT

This case raises many of the preemption issues presented in the United States' appeal in No. 11-14532. As there, the interests of judicial economy counsel in favor of postponing oral argument pending the Supreme Court's decision in *Arizona v. United States*, No. 11-182 (cert. granted U.S. Dec. 12, 2011). That decision should resolve at least three of the preemption questions in HICA's case and will likely provide guiding precedent on several others. *See* Response Brief of Alabama and Governor Bentley, *United States v. Alabama*, No. 11-14532, at i. The HICA Plaintiffs do raise one additional claim in addition to those asserted by the United States: HICA asserts that the District Court should have enjoined Section 28, HB56's school-data provision, on Equal Protection grounds. As explained below, that claim is meritless. But in any event, there is no need to resolve it before the Supreme Court decides *Arizona* this summer. This Court has enjoined that provision pending appeal at the United States' request. Once the Supreme Court resolves *Arizona*, this Court should hold a single, expedited oral argument to resolve all the issues presented by both appeals.

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## STATEMENT OF JURISDICTION

This Court has jurisdiction for the same reasons it has jurisdiction in the companion case. *See* Response Brief of Alabama and Governor Bentley, *United States v. Alabama*, No. 11-14532, at 1 (hereinafter “*Ala. v. U.S. Red Br.*”). In this case, the HICA Plaintiffs filed a timely appeal of the District Court’s September 28, 2011 order. The Appellees here—Governor Bentley, Attorney General Strange, Superintendent Craven, Chancellor Hill, and District Attorney Broussard—filed a notice of cross-appeal on October 7, which was within the 30-day deadline under Rule 4(a)(1)(A). *See* Doc. 150.

## QUESTIONS PRESENTED

In addition to the preemption questions presented in the companion appeal, *see U.S. v. Ala. Red Br.* 1-3, and the additional Equal Protection question set forth in HICA’s opening brief, this case raises the following two questions on the State Defendants’ cross-appeal:

**1. Postsecondary education.** The District Court found that a single sentence in Section 8 was contrary to federal law because it created classifications of aliens that differed from the federal classifications. Did the District Court err when it enjoined the entirety of Section 8 instead of the single sentence?

**2. Compulsory process.** In order to obtain an injunction, a plaintiff must show a threat of imminent injury. The District Court here enjoined three

sections of the Act on Sixth Amendment grounds, reasoning that, if applied at a criminal trial, they would violate the defendant's right to compulsory process. Did the Court err in preliminarily enjoining these provisions rather than deferring the resolution of those constitutional questions until a subsequent criminal prosecution?

## STATEMENT OF THE CASE

### I. Nature of the Case

The HICA Plaintiffs, to which this brief will refer collectively as HICA, assert a challenge to HB56 much like the one asserted by the United States. But HICA urges an even more sweeping and unprecedented theory of implied preemption than the United States does. HICA also raises several other constitutional claims, including, most notably for present purposes, an Equal Protection challenge to the Act's school-data provision, Section 28. The District Court heard HICA's motion for a preliminary injunction alongside the United States', and this appeal and cross-appeal arise from the separate order the District Court issued in the HICA matter. HICA challenges the District Court's denial of an injunction on the same six provisions at issue in the United States' appeal. In addition to the four provisions enjoined at the United States' request, the District Court enjoined four more provisions at HICA's request. Those are the subject of the State Defendants' limited cross-appeal.

### II. Statement of the Facts

In addition to the various provisions at issue in the United States' appeal, *see Ala. v. U.S.* Red Br. 8-9, this case involves one additional provision of HB56: Section 8, which addresses unlawfully present aliens' eligibility for certain benefits

in public postsecondary educational institutions. ALA. CODE §31-13-8. This provision prohibits an unlawfully present alien from enrolling in any public postsecondary institution in the State. School officials are directed to seek “federal verification of an alien’s immigration status with the federal government pursuant to 8 U.S.C. §1373(c).” Section 8 also limits an unlawfully present alien’s eligibility for other postsecondary benefits, including scholarships, grants, and financial aid.

### **III. Proceedings Below**

The HICA Plaintiffs filed their lawsuit a few days before the United States did. The plaintiff group consists of 36 different private individuals and associations represented by 37 different attorneys of record. Doc. 131-Pg 1, 118-20. They brought a facial challenge to the entirety of HB56 and sought to block the statute before it went into effect. *Id.* at 54, 98. They raised preemption claims to the entire statute, but also challenged particular provisions under other provisions of the Constitution, including the First, Fourth, Sixth, and Fourteenth Amendments. *Id.* at 101-17.

Three differences between the suits are critical. First, unlike the United States, HICA challenged Section 28, the school-data provision, on Equal Protection grounds. Second, also unlike the United States, HICA challenged Section 8, the postsecondary-education provision. Third, also unlike the United

States, HICA challenged three of the Act's criminal provisions, specifically Sections 10(e), 11(e), and 13(h), on Sixth Amendment grounds. The crux of HICA's argument on the latter point was that these provisions made the federal government's determination of unlawful status conclusive in criminal proceedings in violation of criminal defendants' compulsory-process right to raise a defense.

Like the United States, HICA sought a preliminary injunction. Doc. 37. The District Court consolidated the cases and heard the motions at the same hearing, but later vacated its consolidation order for the ease of appellate review. Doc. 128.

As it did with the United States, the District Court issued a lengthy order denying HICA's motion in part and granting it in part. *See* Doc 137. To the extent HICA sought an injunction against the provisions the United States had challenged on preemption grounds—Sections 10, 12, 18, 27, 28, and 30—the District Court summarily denied the motion, simply cross-referencing the grounds it gave in the United States' case. *See* Doc 137-Pg 48, 72, 86, 91, 105; *United States v. Alabama*, No. 2:11-cv-2746-SLB, 2011 WL 4469941 (N.D. Ala. Sept. 28, 2011). To the extent HICA sought a preliminary injunction against provisions on which the United States obtained a preliminary injunction—namely, Sections 11(a) and 13—the District Court denied the request as moot. *See* Doc 137-Pg 61, 82.

As pertinent here, the District Court ruled on HICA's other claims as follows:

**1. Equal protection.** On Section 28, the District Court found that HICA had not established that any plaintiffs had standing to challenge the school-data provision. It therefore did not reach the merits of HICA's Equal Protection claim. Doc. 137-Pg 101.

**2. Postsecondary education.** On Section 8, the District Court found that one of the HICA plaintiffs had standing to challenge the Act's postsecondary-education provision. The District Court found this provision preempted because of a sentence, reading "[a]n alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. §1101, et seq." Doc. 137-Pg 38-39. But rather than preliminarily enjoin the sentence, the District Court preliminarily enjoined Section 8 in its entirety. *Id.* at 44.

**3. Compulsory process.** The District Court found that HICA had established standing to assert the compulsory-process challenge to the Act's various criminal provisions. The Court held that these provisions violated the Sixth Amendment and enjoined the sentences of these provisions stating that "[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." *See* ALA. CODE §§31-13-10(e), 31-13-11(e), 31-13-13(h); Doc 137-Pg 55.

This appeal and cross-appeal followed.<sup>1</sup>

#### **IV. Standards of Review**

HICA is right about the District Court's decision being reviewable only for abuse of discretion. *See* HICA Br. 9. But HICA omits one component of the standard review and gets the other wrong.

First, HICA omits any mention of the *Salerno* test for pre-enforcement facial challenges such as this one. Under that standard, for HICA to have prevailed, it was required to show that every application of the challenged provisions is unconstitutional and otherwise invalid, or, in the very least, that the provisions do not have a plainly legitimate sweep. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 1190 (2008); *accord U.S. v. Ala.* Red Br. 11.

Second and just as important, HICA erroneously asserts that even if it failed to establish that it was likely to succeed on the merits, the District Court still might have been required to grant its request for a preliminary injunction if the equities

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<sup>1</sup> The District Court also enjoined two additional sections (11(f) and (g)) on First Amendment grounds. Although these provisions are valid, further development of the record is appropriate on these issues. The State Defendants therefore are not challenging the District Court's orders on those provisions in this interlocutory appeal and will instead develop the record on these issues before the District Court.

were sufficiently pronounced in its favor. *See* HICA Br. 64. As explained below, *see infra* at 58-60, that reading of the law is wrong.

### **SUMMARY OF ARGUMENT**

This Court should affirm in HICA's appeal. The District Court properly rejected HICA's radical argument that the provisions of HB56 are an impermissible regulation of immigration. Applying the implied-preemption standard from *DeCanas v. Bica*, the District Court correctly concluded that the six provisions challenged here did not conflict with federal law. The District Court thus was on eminently solid ground when it concluded that these sections were not likely preempted.

1. In arguing that Sections 10, 12, and 18 are a constitutionally-impermissible regulation of immigration, HICA ignores the critical language in *DeCanas* that defines such regulations as those that determine who should be admitted to the country and the conditions under which legal entrants may remain. Section 10, which imposes parallel state penalties for federal registration violations, along with Sections 12 and 18 – the stop and arrest protocols – expressly defer to the federal government's determination of immigration status and place no conditions on lawfully present aliens residing within the country.

2. HICA is equally incorrect when it suggests that Section 10 is both field- and conflict-preempted. Congress has repeatedly encouraged cooperation



between States and the federal government in the enforcement of federal immigration laws. And Section 10 simply provides for state and federal penalties against the same conduct. Because these penalties – which are premised on the failure to follow federal immigration registration laws – do not create an independent registration scheme, they are not preempted under *Hines v. Davidowitz*.

3. In arguing that Congress preempted Section 12 and 18's stop-and-arrest protocols, HICA ignores 8 U.S.C. §1373, which requires the federal government to respond to these sorts of status checks. HICA cannot rely on misinterpretations of Sections 12 and 18 to create a conflict where none exists. These provisions are consistent with Congress's intent and are not preempted.

4. Section 27 is not an impermissible regulation on immigration. Contrary to HICA's misreading of the statute, Section 27 renders contracts unenforceable only if the contracting party knows that the person is an unlawfully present alien. It does not determine the conditions under which a legal entrant can remain in the country. Section 27 also is consistent with Congress's goals. Congress has not precluded States from defining their contract laws to declare contracts knowingly entered into with unlawfully present aliens unenforceable. In fact, federal statutes already make numerous such contracts illegal. HICA's

speculation that this provision will burden lawfully present aliens is wrong and no ground for a facial challenge.

5. Section 30 also reinforces Congress's goals. Numerous federal statutes show that Congress understands that States can prohibit the issuance of licenses to unlawfully present aliens. Section 30's criminal penalties reasonably enforce the prohibition.

6. The Court lacks jurisdiction to consider HICA's challenge to Section 28 because none of the 36 plaintiffs have established the necessary Article III standing. But even if HICA had standing, its claims would fail on the merits. Section 28's school-data-collection provision imposes no special burdens on unlawfully-present students and does not bar or deter them from attending school. Because it involves data collection on the costs illegal immigration imposes on schools, not disparate treatment, Section 28 does not violate equal protection.

\*\*\*

In the cross-appeal, this Court should reverse.

1. The District Court should not have preliminarily enjoined Sections 10(e), 11(e), and 13(h) on compulsory-process grounds. Any potential infringement that the plaintiffs may suffer at some undefined point in the future would be best addressed by the state courts when the situation arises in the course of a criminal prosecution.

2. The District Court also should not have preliminarily enjoined Section 8 in its entirety. The District Court was correct that a single sentence in Section 8 attempted to classify aliens in conflict with federal classifications. But that conclusion should have led the District Court to enjoin only that sentence, not the Section in its entirety.

### **ARGUMENT**

As was the case in the United States' appeal, the District Court's rulings on the six provisions at issue in HICA's appeal were eminently sound. In arguing otherwise, HICA is asking this Court to adopt an even more radical approach to implied preemption than that advanced by the United States. The District Court also prudently declined to rule on HICA's Equal Protection claim on standing grounds, and this Court should affirm that conclusion.

But the District Court erred when it preliminarily enjoined the entirety of Section 8 based on a single offending sentence and three identical evidentiary provisions (Sections 10(e), 11(e), and 13(h)) on Sixth Amendment grounds long before any prosecution arose. The Alabama Defendants have cross-appealed this ruling, and this Court should reverse the District Court's injunction on these grounds.

**I. This Court should affirm in the HICA Plaintiffs’ appeal.**

As Alabama and Governor Bentley’s brief in *United States v. Alabama* notes, the District Court correctly held that none of the six provisions at issue in HICA’s appeal is preempted. *See U.S. v. Ala.* Red Br. 15-55. HICA says nothing that calls that conclusion into question.

**A. The District Court properly declined to enjoin Sections 10, 12, and 18.**

HICA sees Sections 10, 12, and 18 as traveling together, *see* HICA Br. 13-38, and the Supreme Court should resolve the preemption issues on all these provisions when it decides *Arizona* later this summer. *See United States v. Arizona*, 641 F.3d 339, 354, 357 (9th Cir. 2011), *cert. granted*, No. 11-182, 2011 WL 3556224 (U.S. Dec. 12, 2011) (preliminarily enjoining Arizona’s versions of Sections 10, 12, and 18); *see* HICA Br. 13 (noting that Ninth Circuit “consider[ed] a virtually identical provision” to Section 10); *id.* at 25 (noting that Ninth Circuit upheld injunction against Arizona law “similar” to Section 12). In any event, each of these provisions is valid, and the arguments HICA sets forth do not change the calculus.

Unlike the United States, HICA tries to fit its arguments within the framework the Supreme Court established in *DeCanas v. Bica*, under which a law

may be either constitutionally preempted, field preempted, or conflict preempted. *See DeCanas v. Bica*, 424 U.S. 351, 355-56, 363, 96 S.Ct. 933, 936-37, 940 (1976). But HICA’s analysis may reveal why the United States did not take this route. HICA has a sufficiently difficult time deciding which kind of preemption applies that, at least as to Sections 10, 12, and 18, HICA does not even try to choose between the three. Instead, HICA takes a scattershot approach, asserting that these provisions are preempted under *each* part of the test. None of those arguments persuades.

***1. Congress has not preempted Section 10.***

As an initial matter, Section 10 is fully consistent with Congress’s intent in this area. HICA says otherwise, contending that Section 10 is constitutionally, field, *and* conflict preempted. But the District Court rightly concluded that HICA is not likely to prevail on any of these arguments.

***a. Section 10 is not a preempted regulation of immigration.***

HICA’s regulation-of-immigration theory simply cannot get off the ground. *See U.S. v. Ala.* Red Br. 17-18. As the District Court held and the United States’ silence appears to concede, none of HB56’s provisions is a prescribed “regulation of immigration” because *DeCanas* held that this term applies only to “essentially a determination of who should or should not be *admitted* into the country, and the

conditions under which a *legal* entrant may remain.” Doc. 137-Pg 29 (quoting *DeCanas*, 424 U.S. at 355 (emphasis added)); *see also Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 602 (E.D. Va. 2004) (holding that “it is the creation of standards for determining who is and is not in this country legally that constitutes a regulation of immigration in these circumstances”). Not even the Ninth Circuit majority in *Arizona* went so far as to suggest that Arizona’s versions of Sections 10, 12, and 18 are constitutionally preempted. Indeed, the district court in that case held that the United States was not likely to show that Arizona’s harboring provision is a prohibited regulation of immigration, and the United States did not appeal. *United States v. Arizona*, 703 F. Supp. 2d 980, 1003 (D. Ariz. 2010). Because Alabama’s laws do not determine who will be admitted or the conditions under which legal entrants may remain, there is no colorable argument that any of these provisions, including Section 10, is constitutionally preempted.

HICA cites no controlling precedent suggesting that any of these provisions is constitutionally preempted. It does cite a now-vacated Third Circuit decision and a yet-to-be-reviewed district court decision from Texas enjoining, on constitutional regulation-of-immigration grounds, certain state laws that effectively precluded unlawfully present persons from residing in a particular city. HICA Br. 14; *see Lozano v. City of Hazelton*, 620 F.3d 170, 220 (3d Cir. 2010), *vacated and remanded*, 131 S.Ct. 2958 (2011); *Villas at Parkside Partners v. City of Farmers*

*Branch*, 701 F. Supp. 2d 835, 855 (N.D. Tex. 2010), *appeal pending*, No. 10-10751 (5th Cir.); *accord Cent. Ala. Fair Housing Ctr. v. Magee*, No. 2:11cv982-MHT, 2011 WL 6182334, at \*7-\*10 (M.D. Ala. Dec. 12, 2011) (preliminarily enjoining Section 30’s application to mobile-home registrations on regulation-of-immigration theory), *appeal pending* (11th Cir.). None of these decisions is binding precedent in any jurisdiction, and none was correct in light of *DeCanas*. But in any event, each turned on the narrow principle that a state law “limiting access to *housing*” may count as a regulation of immigration if it effectively renders it impossible for an unlawfully present person not to live within a jurisdiction. *Cent. Ala. Fair Housing*, 2011 WL 6182334, at \*8 (emphasis added); *accord Villas at Parkside Partners*, 701 F. Supp. 2d at 855 (“Local regulation that conditions the ability to enter private contract for shelter on federal immigration status is of a fundamentally different nature than the sorts of restrictions on employment or public benefits that have been found not to be preempted regulations of immigration.”).

That reasoning does not apply to Section 10 or any of the provisions at issue in HICA’s appeal. Unlike a housing restriction, Section 10 does not make it impossible for an unlawfully present person to live in Alabama. It simply imposes a penalty upon unlawfully present persons who fail to comply with their federal registration requirements. It does so while deferring to the federal government’s

determination of an individual's immigration status. *See* ALA. CODE §31-13-10(b). The District Court thus did not abuse its discretion when it concluded that HICA was not likely to show that this is a “regulation of immigration” under *DeCanas*.

*b. Section 10 is not field preempted.*

HICA also ventures into territory where neither the United States nor the Ninth Circuit has dared to tread when it asserts that Section 10 is field preempted. A district court in South Carolina did recently enjoin South Carolina's version of Section 10 on field-preemption grounds. *See United States v. South Carolina*, No. 2:11-cv-2958 (D.S.C. Dec. 22, 2011) (slip op. 25-26). But the authority HICA and the South Carolina court offer in support of that proposition—*Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941)—cannot carry the weight they seek to give to it. *Hines* dealt with conflict preemption, not field preemption. “Our primary function,” the *Hines* 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. The *Hines* 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.



Post-*Hines* precedent makes clear that federal immigration law is not so comprehensive that it leaves no room for States to act. In *DeCanas*, the Court found no “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.” *DeCanas*, 424 U.S. at 358 (footnote omitted). It did so despite acknowledging the “comprehensiveness of the INA scheme for regulation of immigration and naturalization.” *Id.* at 359. 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.*

Any assertion of field preemption in this context is belied by Congress’s repeated encouragement of States to take a role in this area. 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 statutes are particularly noteworthy for present purposes. First, 8 U.S.C. §1373 requires the Executive Branch 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 certain unlawfully present aliens. *Vasquez-Alvarez*, 176 F.3d at 1298. Far from “unmistakably . . . ordain[ing] exclusivity of federal regulation in this field,” *DeCanas*, 424 U.S. at 361, Congress unmistakably ordained the need and desire for state participation.

Nor does the comprehensive nature of the federal alien-registration system show that Congress intended to exclude state assistance in this particular area. Section 10 does not create a new state-specific registration standard or establish a new registration system. *See U.S. v. Ala. Red Br.* 37-38. Section 10 simply provides for state and federal penalties against the same conduct, and neither *Hines* nor the statute indicates that Congress intended to preclude States from doing so. “[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 Cnty. v. Automated Med. Labs.*, 471 U.S. 707, 717, 105 S.Ct. 2371, 2377 (1985).

*c. Section 10 is not conflict preempted.*

HICA also falls back on the United States’ and Ninth Circuit’s theory that provisions like Section 10 are conflict preempted. Alabama and Governor Bentley have explained why this argument is wrong, *see U.S. v. Ala.* Red Br. 35-41, and the new points HICA offers on this issue do not change that conclusion.

First, HICA is wrong to suggest that *Crosby v. National Foreign Trade Council* stands for the proposition that “‘conflict is imminent’” whenever “‘two separate remedies are brought to bear on the same activity.’” HICA Br. 18 (quoting 530 U.S. 363, 379-80, 120 S.Ct. 2288, 2298 (2000)). Conflict was imminent in *Crosby* because the federal government had imposed specific, intentionally limited sanctions on Burma, and Massachusetts had enacted its own set of sanctions. Massachusetts’s law “conflict[ed] with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions.” 530 U.S. at 378. Section 10 does no such thing. It simply imposes concurrent penalties, no more substantial than the corresponding

federal penalties, for conduct Congress prohibited. Because Congress wants all aliens to register, imposing these penalties will not “undermine[] the congressional calibration of force,” *id.* at 380.

Second, in asserting that Section 10 “conflicts with Congress’s enforcement scheme,” HICA Br. 21, HICA is really just repeating the Administration’s argument that it can use its own sense of “priorities,” and corresponding decisions not to enforce the law, to trump Congress’s own purposes and objectives in this area. *See Ala. v. U.S.* Red Br. 22-33. If HICA is correct that the Administration is “rarely prosecut[ing]” federal violations and has even stopped “updat[ing]” the “regulatory list of registration documents” on which the federal statutes “rely,” HICA Br. 22 & n.4, then Section 10 actually will have the effect of reinstating, rather than undermining, the level of punishment and deterrence Congress chose when it enacted these statutes. If any calibration of force is different from Congress’s here, it is the Administration’s. And to the extent that the Administration’s decision not to enforce these provisions is based on its assessment that it does not have the resources to do so, the concurrent enforcement provided by Section 10 can only help.

Third, HICA’s assertions of “conflict” ignore, again and again, that Section 10 defers to the federal government’s determination of unlawful presence rather than requiring state officials to engage in the inquiry on their own. HICA asserts

that “Section 10 conflicts with federal laws that permit an undocumented person to acquire lawful status or temporary permission to remain,” and adds that “many foreign nationals who reside in the United States with the permission or knowledge of the United States do not possess or have readily available documentation that is acceptable under HB56.” HICA Br. 20, 23. But Section 10 does not apply to “a person who maintains authorization from the federal government to be present in the United States,” ALA. CODE §31-13-10(d), so those persons, if they are lawfully present, will not be in violation of Section 10. And 8 U.S.C. §1306(a), on which Section 10 predicates any finding of liability for failing to register, criminalizes only the “willful” failure to register. So if for some reason these persons’ status renders their failure non-willful, they will not be held in violation of Section 10.

And HICA cannot ground a preemption argument on the speculative assertion that some persons who might be convicted of violating Section 10 might, at some later point, be granted lawful status by the federal government. HICA Br. 20-21. The statutes Congress enacted require federal registration and the carrying of registration papers by certain aliens, even if they are later granted lawful status. Regardless, even if Section 10 were conflict-preempted as applied to that very small subset of persons, it has a plainly legitimate sweep as to other persons, and HICA’s speculation would be no grounds for its facial invalidation. *See Wash. State Grange*, 552 U.S. at 449.

## ***2. Congress has not preempted Section 12.***

In asserting that Congress has preempted provisions like Section 12, HICA, like the United States and the Ninth Circuit, looks past 8 U.S.C. §1373. That statute stands as direct evidence that Congress intended for States to make, and for the federal government to respond to, immigration-status inquiries. HICA nevertheless claims that Section 12 fails under all three steps of the *DeCanas* test. None of HICA's arguments is correct.

### ***a. Section 12 is not conflict preempted.***

HICA's conflict-preemption argument is even broader, and thus even weaker, than the United States'. The United States has conceded that Congress has not preempted state and local officers from making immigration-status inquiries with the federal government, as a general matter. Instead, the United States asserts, it is the *mandatory* nature of Section 12's protocols that renders them preempted. In what is perhaps a tacit acknowledgement of the shakiness of that middle ground, HICA is not willing to make the same concession. It instead asserts that state and local officers can never make these calls because their "participation in the enforcement of federal immigration laws" is "limit[ed]" to four "specific and

narrow circumstances” set forth in the U.S. Code. HICA Br. 25-26 (citing 8 U.S.C. §§ 1103(a)(10), 1252c, 1324(c), & 1357(g)).

HICA’s argument cannot be squared with §1373’s language, and it certainly cannot be squared with what became a common discretionary practice among state and local law enforcement long before States began enacting provisions like Section 12. The Senate Report accompanying §1373 spelled out the objective of encouraging state law-enforcement agencies to make their own efforts to assist in 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). Section 1373(b) therefore specifically said the Executive Branch could not “prohibit, or in any way restrict, a . . . State, or local government entity from . . . [s]ending” information regarding immigration status to, or “receiving” it from, DHS. HICA’s conflict-preemption argument is incompatible with that command.

The provisions HICA cites as establishing a “conflict” here only confirm that Section 12 is consistent with Congress’s intent. One of these provisions, Section 1357(g), requires an agreement between a State and the federal government before state agents can be deputized as ICE agents. *See U.S. v. Ala.*

Red Br. 23. But a proviso to that statute specifically says that nothing in that provision “require[s] an agreement” before state and local officers “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.” 8 U.S.C. §1357(g)(10)(A). So Congress specifically envisioned that state officers would have the ability to make these inquiries.

Nothing about this interpretation of §§ 1357 and 1373 renders the other provisions cited by HICA “surplusage.” HICA Br. 28. Those provisions address state and local officers’ ability not to *communicate* with the federal government about a person’s status, but rather to *arrest* persons for federal immigration crimes. But Section 12 does not, on its face, even purport to authorize state officers to make arrests for immigration offenses. It simply requires state officers, during routine stops and arrests, to uniformly make the sort of inquiries, “when practicable,” ALA. CODE §31-13-12(a), that by DHS’s own admission happen every day throughout the country, *see* <http://www.ice.gov/lesc/> (last visited Dec. 21, 2011). Section 12 provides for a person’s detention on immigration charges only “if the federal government so requests.” ALA. CODE §31-13-12(e). Far from preempting detention in that circumstance, Congress has recognized that state officers can and should “cooperate with the Attorney General in the . . .



apprehension, detention, or removal of aliens not lawfully present in the United States.” 8 U.S.C. §1357(g)(10)(B).

In asserting that Section 12 is nonetheless preempted, HICA spends considerable time painting these statutory provisions as doing things they decidedly do not do. Section 12 does not, for example, authorize indefinite detention “pending the outcome of an investigation into immigration status.” HICA Br. 29. *See* ALA. CODE §31-13-12(a) (requiring officers only to make a “reasonable attempt, . . . when practicable,” to determine someone’s status under §1373(c)). Nor does Section 12 turn Alabama’s police officers into “a roving immigration patrol.” HICA Br. 38. Section 12 simply requires officers, when in the course of an otherwise “lawful stop” or “arrest[,]” to take the common-sense step of contacting the federal government to confirm a person’s immigration status in appropriate circumstances. ALA. CODE §31-13-12(a)&(b). This is something officers already do, and there is no indication Congress wanted to preclude States from adopting uniform protocols to ensure that everyone who encounters their law-enforcement officers is treated equally.

*b. Section 12 is not field- or constitutionally preempted.*

The field- and constitutional-preemption arguments HICA makes against Section 12 in passing stand on even shakier ground. *See* HICA Br. 32-34. In light

of §§1357(g)(10)(A) and 1373, HICA cannot seriously maintain that Congress has preempted States from acting in this field. And provisions designed to help the federal government identify unlawfully present aliens, at the federal government's invitation and request, can hardly amount to a prohibited regulation of immigration under *DeCanas*.

### ***3. Congress has not preempted Section 18.***

HICA's Section 18 argument suffers from many of the same defects. HICA once again conjures up an untenable reading of the statute, asserting that Section 18 will require "detention of indeterminate length" even when the person arrested for driving without a license is not "prosecuted criminally" or requested for transfer by "the federal government." HICA Br. 35; *see also id.* at 36 (asserting that a "county is required under Section 18 of HB56 to continue custody, even after the person's charges have been dropped, or after she has completed service of her sentence"). That is not what the statute says. Section 18(d) provides for a person arrested for this state-law crime to be detained only "until prosecution or until handed over to federal immigration authorities." ALA. CODE §32-6-9(d). So if authorities decline to prosecute the defendant and the federal government does not request the person's detention, Section 18 envisions that person's immediate release. And even if HICA's speculation that the statute might be misapplied in this way were to come to fruition, the right way to challenge that development

would be through a post-enforcement, as-applied challenge, not the pre-enforcement facial challenge that the District Court properly rejected. *See Wash. State Grange*, 552 U.S. at 449.

***4. Sections 10, 12, and 18 taken together are not a regulation of immigration.***

Finally, having failed to establish that any one of these provisions amounts to a regulation of immigration standing alone, HICA asserts that perhaps Sections 10, 12, and 18, taken together, might fit the bill. Because *DeCanas* limits constitutional preemption to laws regulating the admission and lives of lawfully present aliens, *see supra* at 13-14, HICA's argument is wrong in any event. But three points HICA makes on this front illustrate how, in trying to trot out a parade of horrors about HB56, HICA is routinely describing a statute that does not exist.

First, much of the rhetoric HICA employs rests upon the assertion that Sections 5 and 6 of HB56 will “require[] state and local officers to enforce these criminal provisions to the fullest extent of the law, or else face criminal prosecution and civil lawsuits.” HICA Br. 37-38 (discussing ALA. CODE §31-13-5 & -6). Sovereign immunity takes almost all the air out of those tires. Section 14 of the Alabama Constitution broadly declares “[t]hat the State of Alabama shall never be made a defendant in any court of law or equity,” and the Alabama Supreme Court has broadly construed this provision to preclude all suits for money damages

against state officers. *See, e.g., Ex parte Town of Lowndesboro*, 950 So. 2d 1203, 1206 (Ala. 2006). The state constitution also imposes substantial limits on a party's standing to sue. *See, e.g., Muhammad v. Ford*, 986 So. 2d 1158, 1164-65 (Ala. 2007); *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So. 2d 1253, 1257 (Ala. 2004). Accordingly, Sections 5 and 6 notwithstanding, no private plaintiff can sue state officers in their official capacity for money damages in an attempt to enforce HB56.

Second, HICA is overstating matters when it says Sections 10, 12, and 18 turn Alabama's police officers into a "roving immigration patrol." HICA Br. 38. The notion that state officers will go around stopping persons solely on suspected Section 10 violations is just as implausible as the notion that federal officers are going around stopping people on suspected violations of §1304(e) and §1306(a). An officer generally will not have any reason to think someone has violated Section 10 until that person has been stopped or arrested for some other, legitimate reason. It will only be then that the person will fail to produce valid federal registration papers that can give rise to a prosecution under Section 10. *Cf. Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995).

Third, HICA's portrayal of what conduct Section 10 prohibits is overblown. HICA suggests that Section 10 would mean a criminal conviction even for "a person who has overstayed a student visa" but "is pursuing an asylum application."

HICA Br. 38. There is no reason such a person would be subject to penalties under Section 10. When a student applies and receives his visa, he registers with the federal government at that time and receives the necessary federal documentation. *See* 8 U.S.C. §1301. Thus, the student overstaying his visa generally will not have willfully failed to register in violation of 8 U.S.C. §1306(a). And so long as he keeps that documentation with him during his asylum-application process, he will not fail to carry his registration papers with him in violation of 8 U.S.C. §1304(e).

On this point and elsewhere, HICA is dreaming up hypothetical situations that may never, and indeed should never, occur. The District Court acted well within its discretion when it held that this speculation was no grounds for HICA's pre-enforcement, facial challenge to every conceivable application of Section 10.

### **B. Congress has not preempted Section 27.**

Between the presumption against preemption, Congress's express statements making certain contracts with unlawfully present aliens illegal, and the States' primacy in defining their own contract laws, the District Court rightly concluded that there was no basis for a preliminary injunction against Section 27. *See U.S. v. Ala.* Red Br. 46-51. On this point, HICA again opts for a more radical approach than the United States, asserting only that Section 27 amounts to an unconstitutional regulation of immigration. HICA Br. 38-40. The District Court

properly held that this assertion cannot be squared with *DeCanas*. Doc 137-Pg 31. But even if HICA’s premises about what amounts to a “regulation of immigration” were not contrary to *DeCanas*, its argument that Section 27 is a regulation of immigration would fail because it is based on a misreading of the statute.

HICA’s argument proceeds on the mistaken assumption that Section 27 makes it impossible for an unlawfully present person to enter into a contract or enforce it in Alabama court. That is not what Section 27 says. The statute focuses not on the unlawfully present alien, but rather on the party on the other side of the transaction. Section 27 renders contracts unenforceable only if that party knows, or has constructive knowledge, that the other person is an unlawfully present alien. *See* ALA. CODE §31-13-26(a). It thus operates much like the prohibitions on employment at issue in *DeCanas*, discouraging lawfully present persons from knowingly doing business with unlawfully present aliens to the detriment of persons who are lawfully present. *See U.S. v. Ala.* Red Br. 48. Thus, Section 27 does not strip an unlawfully present person of all ability to enter into and enforce contracts. So long as the other party does not know or have constructive knowledge that the person is not lawfully present, Section 27 does not render it unenforceable. Thus, Section 27 cannot be a “regulation of immigration” even if HICA were right to suggest that it would be if it “reach[ed] virtually all contracts” involving unlawfully present aliens. HICA Br. 40.

There is thus no basis for HICA's challenge. HICA's speculation that Section 27 will place undue burdens on "U.S. citizens and lawful immigrants" is unfounded and no basis for a facial challenge. *See U.S. v. Ala.* Red Br. 49-51. And to the extent HICA is suggesting that Section 27 might be preempted as applied to "rental agreements," HICA Br. 40, that argument would be grounds, at most, for an as-applied challenge. The District Court acted well within its discretion when it declined to grant HICA's request for a declaration of Section 27's facial invalidity here.

### **C. Congress has not preempted Section 30.**

HICA limits its analysis of Section 30 to a regulation-of-immigration challenge, but that challenge fails for similar reasons. The District Court rightly concluded that Section 30, like all of the other provisions in HB56, is not a regulation of immigration as *DeCanas* defined that term. Doc 137-Pg 31. HICA's assertions otherwise are based not only in the misreading of *DeCanas* that permeates its entire brief, but also in yet another misinterpretation of HB56.

As was the case on Section 27, HICA proceeds on a mistaken reading of Section 30. HICA asserts that "Section 30 reaches into every aspect of everyday life for" persons who are unlawfully present, including "sanitation, garbage, and recycling services." HICA Br. 42. But both the District Court and the Alabama

Attorney General have rejected that reading of the statute. Instead, as the Attorney General has explained in recent guidance, Section 30 encompasses only ““a transaction between a person and the state or a political subdivision of the state that involves the issuance of official government documents or like items of similar formality granting authorization to the person to engage in some activity.”” ALA. ATT’Y GEN. GUIDANCE 2011-02, at 1 (Dec. 2, 2011), *available at* <http://www.ago.state.al.us/Page-Immigration> (last visited Dec. 27, 2011); *see also* *U.S. v. Ala.* Red Br. 41-43. That interpretation, binding on all Alabama state executive officers, means that HICA is wrong about Section 30’s scope.

It also means that HICA has no foundation for its preemption arguments. As Alabama and Governor Bentley have explained, there is no colorable argument that Section 30’s prohibition on the issuance of licenses is facially preempted. Through numerous enactments, Congress has recognized that States need not condone the presence of those who are here in violation of immigration laws by issuing them licenses. *See, e.g.*, 8 U.S.C. §1324a(h)(2); *id.* §1621(a)&(c); Pub. L. 109-13, § 202(a)(1) & (c)(2)(B), 119 Stat. 231 (2005). HICA’s assertion that States cannot prohibit unlawfully present aliens from obtaining a “business license” simply ignores these provisions.

It is no response for HICA to say that Section 30 must be preempted because States, in the course of making their licensing decisions, will “make mistakes in



determining whether an individual is lawfully present in the United States.” HICA Br. 43. Congress has recognized that States may engage in this process regardless of whether there is a risk that they will make mistakes. And like the statute the Supreme Court considered in *Chamber of Commerce v. Whiting*, Section 30 goes the extra mile by having the federal government make the unlawful-presence determination “through the Systematic Alien Verification for Entitlements [a/k/a “SAVE”] program operated by the Department of Homeland Security, or by other verification with the Department of Homeland Security pursuant to 8 U.S.C. §1373(c).” ALA. CODE §31-13-29(c); *cf. Whiting*, 131 S.Ct. 1968, 1981 (2010) (plurality opinion). HICA provides no basis for its assertion that these programs cannot be used for these purposes, and federal statutes say the opposite. *See* Pub. L. 109-13, §202(c)(3)(C), 119 Stat. 231 (2005) (providing that States can utilize SAVE “to verify the legal presence status of a person, other than a United States citizen, applying for a driver's license or identification card”); 8 U.S.C. §1644 (providing that States cannot be prohibited, in the process of verifying eligibility for professional and commercial licenses under 8 U.S.C. §1621(a) & (c), from “receiving” information from DHS regarding “the immigration status, lawful or unlawful, of an alien in the United States”).

Nor can HICA base a claim of facial preemption on alleged mistakes officials may have made in implementing Section 30 when it first went into effect.

*See* HICA Br. 42-43 n.10 & 12. Any time a statute goes into effect, executive officials will face challenges in determining how to apply the statute to whatever circumstances confront them. Section 30 was no exception to that rule. But as these circumstances have arisen, Alabama officials have conferred and implemented Section 30 in a reasonable, principled, uniform way. *See* ALA. ATT'Y GEN. GUIDANCE 2011-02, at 1 (Dec. 2, 2011)). The District Court acted well within its discretion when it allowed this process of implementation to proceed.

**D. The District Court correctly declined to enjoin Section 28.**

The District Court was right when it refused to enjoin Section 28. Because none of the individual or organizational HICA Plaintiffs had standing to challenge Section 28, the Court's analysis of Section 28 largely appears in its decision in the United States' case. *U.S. v. Alabama*, 2011 WL 4469941, at \*57-58. There it concluded that Section 28 was not preempted – a conclusion that neither the United States nor HICA has shown to be wrong. *See U.S. v. Ala.* Red Br. 51-55.

Beyond asserting that it has standing and repeating the United States' mistaken preemption argument, HICA attempts to advance a meritless equal-protection challenge to Section 28. As discussed below, HICA is wrong on all these fronts.

***1. The HICA Plaintiffs lack standing.***

As the District Court correctly held, both the organizational HICA Plaintiffs and individual HICA Plaintiffs lack standing to challenge Section 28. Doc. 137 at 98-101. The “irreducible constitutional minimum of standing” requires HICA to establish (1) an actual, concrete, and imminent injury; (2) caused by the conduct complained of; (3) that is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992). Because “[s]tanding is not dispensed in gross,” HICA “must demonstrate standing for each claim [it] seeks to press and for each form of relief that is sought.” *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734, 128 S.Ct. 2759, 2769 (2008) (internal quotation marks and citations omitted). HICA’s challenge to Section 28 cannot clear that jurisdictional hurdle.

***a. The organizational HICA Plaintiffs lack standing.***

The organizational HICA Plaintiffs lack standing. These organizations have not identified a single member with standing to challenge Section 28. *Cf.* Doc. 137-Pg 100. They therefore stake their entire claim of standing with respect to Section 28 on the fact that they have spent their own resources providing information to interested persons about this provision. *See* HICA Br. 48-49. As they did below, they cite *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350-51

(11th Cir. 2009) (organization engaged in mobilizing voters can challenge statute that raises the cost of voting), and *Florida State Conference of NAACP v. Browning*, 522 F.3d 1153, 1164-66 (11th Cir. 2008) (same), for the proposition that an organization’s expenditure of resources can amount to an “injury” for Article III purposes.

But “[n]ot every diversion of resources to counteract the defendant[s]’ conduct . . . establishes an injury in fact.” *N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 238 (5th Cir. 2010). And these two cases—and the Supreme Court decision on which they are based, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114 (1982)—cannot be extended so far. In each of these decisions, the challenged statute or action effectively *required* organizational plaintiffs to expend additional resources if they desired to continue engaging in established, pre-conduct activities. In *Billups* – a challenge to a Georgia voting statute – the organization was “actively involved in voting activities” prior to passage of the challenged statute and “would have to divert volunteers and resources from ‘getting [voters] to the polls’ to helping them obtain acceptable photo identification.” 554 F.3d at 1350 (alteration in original). Likewise, in *Browning*, another challenge to a state voter-registration statute, the organizations had “to divert scarce time and resources from registering additional voters to helping

applicants correct the anticipated myriad of false mismatches due to errors either by the Department of State or by the applicant.” 522 F.3d at 1164-65.

As the Fifth Circuit has explained, “an organization may establish injury in fact by showing that it had diverted *significant* resources to counteract the defendant’s conduct; hence, the defendant’s conduct significantly and ‘perceptibly impaired’ the organization’s ability to provide its ‘activities—with the consequent drain on the organization’s resources.’” *N.A.A.C.P.*, 626 F.3d at 238 (quoting *Havens*, 455 U.S. at 379) (emphasis added). The diversion must not only be significant, it must be necessary. An organization “cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all.” *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). “It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem.” *Id.*

In other words, there must be a very close connection between the challenged conduct, the established activities of the organization that would be frustrated by that conduct, and the expenditure of the additional resources on concrete activities and efforts. The District Court did not abuse its discretion in finding that the HICA Plaintiffs had established no such connection here. Unlike the organizations in *Billups* and *Browning* that were actively registering

individuals to vote and taking them to the polls, none of the organizational HICA Plaintiffs have alleged that they are engaged in enrolling unlawfully present aliens in school, let alone that they have been doing so on an established basis. Doc. 137-Pg 101. As the District Court found, instead of identifying a “diversion of resources” aimed at “activities designed to counteract or compensate for the effects of the challenged law,” here all the organizational HICA Plaintiffs have alleged is that they have spent time “*discussing* Section 28.” *Id.* For example, the Executive Director of HICA averred that “[m]any of the drop-in visitors seek information about the new law’s provisions regarding K-12 education.” Doc. 37-2 – Pg 7; Doc. 109-3 – Pg 3 (“Parents of children . . . are asking what will happen to their children and themselves . . .”).) Likewise, the Executive Director of Alabama Appleseed contends that his organization has had to respond to “concerns related to the law,” including inquiries “relate[d] to the education provision.” Doc. 109-2 – Pg 1; *id.* at 3 (“parents of both documented and undocumented children have asked us for information about how to enroll their children in school . . .”).).

“The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.” *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994); *see also Ass’n of Cmty.*

*Organizations for Reform Now v. Fowler*, 178 F.3d 350, 358-59 (5th Cir. 1999). In fact, the efforts identified by HICA fall within the “normal, day-to-day operations of the group[s],” which is an insufficient injury for standing. *See id.* at 359. HICA already provides “legal immigration services,” “advocacy,” “community education,” and “training to the host community.” Doc. 37-2 – Pg 1. Likewise, Alabama Appleseed, a “public interest advocacy organization,” focuses on “network/coalition organizing and development, research, education, advocacy and policy development.” Doc. 37-6 – Pg 1. Section 28, and Alabama’s immigration law generally, may have given these organizations another opportunity for advocacy and “community education,” but it did not require the significant diversion of resources and efforts that justified standing in *Billups* and *Browning*. That the organizations’ staffers have “seen their work expand to include giving information on the impact of HB56 [generally] and listening to and responding to community members’ fears about the new law” (Doc. 109-3 – Pg 4) is “not a concrete and real injury fairly traceable to Section 28.” Doc. 137 – Pg 101; *N.A.A.C.P.*, 626 F.3d at 238 (“Plaintiffs have not explained how the activities described above, which basically boil down to examining and communicating about developments in local zoning and subdivision ordinances, differ from the [organization’s] routine lobbying activities.”).

To hold otherwise would be effectively to allow any organization to manufacture Article III standing on demand. For instance, under HICA’s expansive theory of standing, any organization displeased with a recently-enacted state or federal law could challenge officials in federal court under the guise that it will now have to expend resources educating the community. And if expending resources to educate the community is sufficient, then direct associational standing could extend to newspapers, bloggers, or any advocacy organization with a penchant for litigation. The District Court did not abuse its discretion when it held that the organizational HICA Plaintiffs would be required to make a more substantial showing at the preliminary-injunction stage.

*b. The individual HICA Plaintiffs lack standing.*

The individual HICA Plaintiffs also lack the actual and imminent injury necessary for standing. That is so because the individual Plaintiffs in question will not be subject to the data-collection requirements of Section 28. As the district court found, Section 28’s status inquiry is triggered upon a child’s “enrollment,” which occurs only when a student *first* enters the school system. *See* Doc. 137-Pg 98. Citing *Lee v. Eufaula City Board of Education*, 573 F.2d 229, 234 n.12 (5th Cir. 1978), HICA suggests that enrollment occurs annually. HICA Br. 50. But based on “the record” in *Lee*, the Court could “only presume that all students



attending the Eufaula schools are required to enroll annually.” 573 F.2d at 234 n.12. Neither the District Court nor this Court is required to make such a presumption here. The record is undisputed that enrollment occurs only once when the student first enters the state school system. Doc. 82-3 (stating that data collection processes under Section 28 “will only apply to the initial enrollment of a student in the public schools of Alabama”). Once a child enrolls in an Alabama elementary or secondary school, that child remains enrolled even if he or she moves elsewhere within the State or advances from elementary to secondary school. Only if a child withdraws from the Alabama public school system entirely—*e.g.*, by moving to another State or switching to a private school—can enrollment a second time become necessary. For most children, enrollment will happen only once. The individual Plaintiffs identified in HICA’s brief—which includes John Doe #1 and the school-aged children of Jane Doe #1-6 and John Doe #2—are already enrolled in Alabama public schools. Section 28 thus simply will not apply to them.

The individual HICA Plaintiffs now speculate that Alabama school officials might “retract” this understanding of “enrollment” and begin requiring annual inquiries into students’ immigration status. HICA Br. 50. But this unfounded speculation cannot trump the undisputed evidence that “‘enrollment’ only occurs when a child enters the Alabama school system.” Doc. 137-Pg 98; Doc. 82-3. To

support their speculation that at some unspecified future point in time the State might change implementation of Section 28, HICA cites *National Advertising Co. v. City of Fort Lauderdale*, 934 F.2d 283 (11th Cir. 1991). But that case simply applies the mootness doctrine’s voluntary-cessation exception and thus hardly speaks to what constitutes a cognizable “injury” in the first instance.

In fact, HICA admits that “the current policy would not immediately affect them.” HICA Br. 50. The individual plaintiffs’ bare assertion that they “remain at risk” – wholly unsupported by the record – is neither “concrete” nor “imminent.” Unless any of these currently-enrolled students leave the school system and then later attempt to *re-enroll*—a scenario entirely too speculative to constitute “imminent harm” for standing purposes—they will never be asked for the information required by Section 28 and thus cannot plausibly be injured by it.

HICA also cannot premise its standing on an abstract stigmatic injury it now asserts is created by Section 28. HICA Br. 51. HICA offers no support for the assertion that Section 28 – which occurs at enrollment – “creates a threatening and hostile learning environment” other than unsubstantiated “fears” of some unnamed plaintiffs. *Id.* Critically, HICA cannot identify a stigmatic injury that is concrete and personal to one of the Plaintiffs. As the Supreme Court has made clear, a stigmatic “injury accords a basis for standing only to ‘those persons who are

*personally* denied equal treatment’ by the challenged discriminatory conduct.” *Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 3326 (1984) (emphasis added).

The Sixth Circuit case on which HICA relies does not support the individual plaintiffs’ standing. In *Smith v. City of Cleveland Heights*, the “direct and concrete connections” imposed by a local ordinance on a small and defined community “demonstrate[d] that Smith’s injury [wa]s ‘peculiar to himself or to a distinct group of which he is a part,’ and that he is ‘personally subject to the challenged discrimination.’” 760 F.2d 720, 723 (6th Cir. 1985) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608 (1979); *Allen*, 468 U.S. at 755). Here, the individual HICA Plaintiffs challenge a broad statewide provision that is not linked to any particular school their child attends. If such attenuated injury were enough to establish standing, any child, parent, or community member across the entire State would have standing to challenge Section 28. This is the type of broad standing analysis that the Supreme Court rejected in *Allen*.

Nor can HICA create standing by suggesting – with no support – that “school officials are effectively required to report students’ information . . . to federal immigration authorities and state officials for enforcement purposes” under Sections 5 and 6. HICA Br. 51-52. Section 5(f) and Section 6(f) do not require school employees to report any students or parents whom they ascertain are here

illegally to anybody. Instead, Section 5(f) and Section 6(f) merely require that Section 28 be enforced as written: the public elementary and secondary schools are to request the data, they are to report the data to the State Board of Education, and the State Board of Education is to analyze the data and report back to the Legislature. ALA. CODE §31-13-27. Nowhere does Section 28 compel school employees to turn in unlawfully present aliens, and, hence, Section 5(f) and Section 6(f) do not ramp up any compulsion to do. In fact, the evidence established that school officials were instructed that, aside from the data collection, “[t]here will be no additional reporting requirements for the local school system.” Doc. 82-3-Pg 3. The District Court did not abuse its discretion in crediting that evidence at the preliminary-injunction stage.

Two plaintiffs’ fears that school officials may voluntarily report a child or parent’s immigration status—information which, again, they are highly unlikely to obtain—to federal authorities is too speculative to give Jane Doe #3, Jane Doe #6, or any other plaintiff standing.

## ***2. HICA cannot prevail on its challenge to Section 28.***

Because the District Court concluded that HICA lacked standing to challenge Section 28, it did not reach its substantive arguments that Section 28 should be enjoined. *See* Doc. 137 – Pg 101. “As a general rule, [this Court] will not consider issues which the district court did not decide.” *McKissick v. Busby*,

936 F.2d 520, 522 (11th Cir. 1991). This Court thus should not now consider HICA's arguments that Section 28 should be enjoined on preemption and equal protection grounds. Instead, if this Court concludes that HICA has standing, the Court should remand to the District Court to decide whether HICA is entitled to a preliminary injunction in their facial challenge to Section 28.

But even if this Court were to reach the merits of HICA's challenge to Section 28, the extraordinary remedy of a preliminary injunction still would not be appropriate. As discussed below, HICA has not established that it is likely to prevail on either of its challenges to Section 28.

*a. Section 28 is not preempted.*

Although the District Court did not directly reach HICA's arguments that Section 28 was likely preempted, it considered and rejected the United States' similar challenge to the statute. And in doing so, the District Court did not abuse its discretion when it concluded that the United States had not established a substantial likelihood that Section 28 is preempted. *U.S. v. Alabama*, 2011 WL 4469941, at \*57-58. Alabama and Governor Bentley have explained why that conclusion was eminently sound. *See U.S. v. Ala.* Red Br. 51-55.

The District Court also considered and rejected one of the general preemption arguments HICA again advances before this Court. With little support,

HICA summarily suggests that Section 28 is an impermissible state regulation of immigration. But this argument cannot withstand review. The District Court concluded that the Act's provisions, including Section 28, were not an impermissible regulation of immigration. Doc. 137 – Pg 31. And a review of the statutory language of Section 28 confirms this conclusion. Section 28 does not require schools to verify student and parent immigration statuses. *Cf. U.S. v. Alabama*, 2011 WL 4469941, at \*56-57 (noting that “it is possible that children will be presumed unlawfully-present aliens who are neither aliens nor unlawfully-present”); *U.S. v. Ala.* Red Br. 52. Nor does it “effectively guarantee[] the reporting of such information to federal immigration and state authorities.” HICA Br. 53; *see supra* at 43-44, 27-28. But even if it did, HICA has still failed to explain how collecting, or even reporting, information about an individual's immigration status to federal officials conflicts with federal law. *See* 8 U.S.C. §1644 (“Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [DHS] information regarding the immigration status, lawful or unlawful, of an alien in the United States.”). Critically, Section 28 does not impermissibly determine “who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.” *DeCanas*, 424 U.S. at 355 (defining a regulation of immigration). As the Supreme Court has

explained, “the fact that aliens are the subject of a state statute does not render it a regulation of immigration.” *Id.*

Although HICA gave its Section 28 preemption argument short shrift before the District Court (Doc. 37-Pg 11, 19), HICA attempts to revive it with a novel argument advanced for the first time before this Court. It now argues that Section 28 is preempted by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), which prohibits unlawfully present aliens from receiving federal, state, and local public benefits. HICA Br. 53-54; *see* Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified at 8 U.S.C. §1621). This argument is “fatally flawed,” however, because HICA failed to raise it before the District Court. *F.D.I.C. v. Verex Assur., Inc.*, 3 F.3d 391, 395 (11th Cir. 1993). It cannot claim that the district court abused its discretion by failing to consider an argument never placed before it. And HICA has offered no sound reason for this Court to consider this “late-breaking” theory now. *See id.*

Even if the Court were to consider this argument, it would afford HICA no relief. In a congressional attempt to limit unlawfully-present-alien eligibility for public benefits, the PRWORA restricts state and local public benefits to certain qualified aliens and non-immigrants. *See* 8 U.S.C. §1621(a). States remain free to provide benefits to other aliens, to restrict benefits to qualified aliens in certain circumstances, and to require verification of eligibility. *See, e.g.*, 8 U.S.C. §§1622,

1624, 1625. Nothing in the statute suggests that States are not free to parallel their own restrictions based on the federal alien classifications.

Instead, HICA hinges its argument on 8 U.S.C. § 1643(a)(2), a clause that says nothing about preemption or the ability of States to collect data about the immigration status of children in their public-school system. Section 1643(a)(2) simply states that “[n]othing in this chapter may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler v. Doe*,” 457 U.S. 202, 102 S.Ct. 2382 (1982). From this sentence – which says that the statute is inapplicable to public education – HICA leaps to the illogical conclusion that the statute “preempts any state regulations that would deter children’s access to a public education based on immigration status.” HICA Br. 54. Putting aside for the moment that *Plyler* (and the California district court decision cited by HICA) was a case about denial of public education, not deterrence, HICA still fails to explain how Section 28 is a statute designed to deter children from a public education. *See infra* at 54-55. Section 28 simply involves data collection and does not affect a child’s ability to enroll in public school. There is no basis to infer that 8 U.S.C. §1643 – or any other federal law – preempts the data-collection directive in Section 28.



*b. Section 28 does not violate the Equal Protection Clause.*

HICA does raise a single, non-preemption argument not asserted in the United States’ appeal. But this equal-protection argument fares no better than the preemption claims. As discussed below, Section 28 does not violate the Equal Protection Clause.

*i. Section 28 does not trigger the Equal Protection Clause.*

HICA suggests that Section 28 creates three “classifications” of students, HICA Br. 54, but as the Supreme Court has held, “[t]he Equal Protection Clause does not forbid classifications.” *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331 (1992). Instead, “[i]t simply keeps governmental decisionmakers from *treating differently* persons who are in all relevant respects alike.” *Id.* (emphasis added.)

And Section 28 does not create disparate treatment. On the contrary, as HICA admits, Section 28 is clear and the evidence is undisputed that the same questions are asked with respect to all children at the time of their enrollment. HICA Br. 54 (“Under Section 28, all students must show a birth certificate to school officials at enrollment.”); Doc. 82-3. Critically, there is no requirement of an answer. *Cf. U.S. v. Alabama*, 2011 WL 4469941, at \*57. Section 28 imposes *no* consequences on any student or parent for failing to comply with it—let alone

consequences based on immigration status or any other status. And the record is undisputed that Alabama schools remain open under Section 28 to all children regardless of their immigration status (or their parents' status). At bottom, Section 28 is about data collection, not disparate treatment, and data collection does not trigger the Equal Protection Clause.

Local, state, and federal governments often collect and compile statistical data, including data that relate to gender, race, and ethnicity. *Cf.* HICA Br. 57 n.15 (citing citizenship statistics from a Pew Hispanic Center report). Doing so does not violate the Equal Protection clause when persons are treated the same in the gathering of the data. As the United States has argued in an Equal Protection challenge to census questions about race and medical conditions:

The government's position is that case law is clear that it is differential treatment, not classification, that implicates equal protection, and cites the opinion *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L. Ed. 2d 1 (1992): "The equal protection clause does not forbid classification. It simply keeps decision makers from treating differently persons who are in all relevant respects alike."

The government also cites *Caulfield v. Board of Educ. of the City of N.Y.*, 583 F.2d 605 (2nd Cir.1978), which held "the Constitution itself does not condemn the collection of this data," referring to a local census of the racial and ethnic breakdown of public school employees. *Id.* at 611. *Adarand [Constructors, Inc. v. Pena]*, 515 U.S. 200 (1995)] held that equal protection guards against government actions based on race, but does not deal with government collection of data on race.

*See Morales v. Daley*, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000). That district court correctly agreed with the United States, and granted the federal defendants summary judgment on all claims, including the Equal Protection claim.

The same reasoning applies with even more force here. *Morales* involved collecting data on race, the quintessential protected class under the Equal Protection Clause. Moreover, *Morales* involved *criminal sanctions* for failure to provide the requested data, but Section 28 imposes no penalty for refusal to provide the information. As courts have held, it is disparate treatment by the government that warrants Equal Protection scrutiny, not simple information-gathering. *See, e.g., Nordlinger*, 505 U.S. at 10.

HICA cannot evade this conclusion by suggesting that information-gathering under Section 28 will deter or “chill” students from gaining access to the classroom – a result that it asserts would be unconstitutional under *Plyler v. Doe*. HICA Br. 58-59. As an initial matter, constitutional concerns over chilling effects have arisen primarily in the First Amendment context, where the fundamental right of freedom of speech is in jeopardy. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 871-72, 117 S.Ct. 2329, 2344-45 (1997). And there, “the existence of a ‘chilling effect[.]’ ... has never been considered a sufficient basis, in and of itself, for prohibiting state action.” *Younger v. Harris*, 401 U.S. 37, 51, 91 S.Ct. 746, 754 (1971). But more importantly, even if HICA could assert a deterrence or chilling-effect claim, it has

offered no support for this argument, other than the “Dear Colleague” letter and fact sheets from the United States Departments of Justice and Education. HICA Br. at 59 n.16.

In fact, the evidence introduced before the District Court established that no child would be deterred or prevented from enrolling in school based on Section 28. The State Superintendent instructed school officials expressly that “[n]o student shall be denied enrollment or admission to the school due to a failure to provide the birth certificate or other supplemental documentation described in this section.” Doc. 82-3. The State Superintendent also emphasized that “[t]here will be no additional reporting requirements for the local school system.” *Id.* The State Superintendent has made clear that Section 28 will not deter or deny any child the opportunity to enroll in school, even without providing the requested information.

In the very least, HICA’s speculation that children will be chilled or deterred from enrolling in school is a question of fact that requires a remand. “Where, as here, the district court did not make a specific finding as to an essential fact, it is appropriate to remand for further findings so that [this Court] may then exercise a meaningful review.” *Smith v. State of Ga.*, 684 F.2d 729, 735 (11th Cir. 1982).

ii. *At most, Section 28 need survive only rational-basis review.*

Even if Equal Protection analysis were warranted here, no more than a rational explanation for Section 28 should be demanded of the State. “[T]he Equal Protection Clause requires only that the classification[s] rationally further a legitimate state interest.” *Nordlinger*, 505 U.S. at 10; *accord Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367, 121 S.Ct. 955, 964 (2001) (“Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” (internal quotation marks omitted)). That is so because none of the classifications HICA has identified “jeopardize[] exercise of a fundamental right or categorize[] on the basis of an inherently suspect characteristic,” thus requiring heightened scrutiny. *Nordlinger*, 505 U.S. at 10.

HICA is wrong to suggest that “Section 28 creates a classification” that serves as a “proxy for alienage.” HICA Br. 54. At most, Section 28 directs schools to request additional documentation of some students’ status beyond a birth certificate. *Cf.* Doc. 82-3. It is incorrect to say, as HICA has suggested, that this group consists only of “children born outside the United States” and constitutes an “alienage classification.” HICA Br. 54-55. This group is broader and in fact consists of *all* students for whom a request for a birth certificate proves

inconclusive in determining citizenship, including U.S. citizens whose parents or guardians cannot or will not produce such a document.

HICA is also wrong to suggest that Section 28 is subject to intermediate scrutiny because it requires classification of “children who are presumed to be unlawfully present.” HICA Br. 55-56. As the Supreme Court has recognized, “[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’” *Plyler*, 457 U.S. at 223. Nor can HICA elevate this Court’s scrutiny by invoking the field of education: “Public education is not a ‘right’ granted to individuals by the Constitution.” *Id.* at 221. HICA has identified neither a fundamental right nor an inherently suspect characteristic that would warrant heightened scrutiny.

Citing *Plyler*, HICA erroneously suggests that “[a]ny state law that serves as a barrier to a public education based on immigration status must be ‘justified by a showing that it furthers some substantial state interest.’” HICA Br. 56 (quoting *Plyler*, 457 U.S. at 230 (emphasis added)). That is not what *Plyler* held. The Court’s holding was that Texas failed to demonstrate that its policy of outright denying an education to unlawfully present aliens “further[ed] some substantial goal of the State” such that it could “be considered rational.” 457 U.S. at 224. HICA cannot equate Alabama’s data-collection-and-reporting requirements to Texas’s policy of outright denial. HICA’s allegations that Section 28 will deter

children—lawful and unlawful, alike—from enrolling in school are not only highly speculative and unsupported by the record, but incorrect as a matter of fact. *See supra* 52. Regardless of whether the parent or guardian refuses to provide any documentation or how the child is coded in the statewide student management system, the child experiences no real-world impact or disparate treatment: the child is still enrolled in school.

HICA’s third attempt to invoke heightened scrutiny also fails. Contrary to its assertions, Section 28 does not create “a classification of children based on their parents’ immigration status.” HICA Br. 56. As the District Court found, “school officials must rely on the birth certificate to determine ‘whether the student . . . is the child of an alien not lawfully present in the United States.’” Doc. 137 – Pg 96. The District Court found as a factual matter that “[i]nformation about the immigration status of a parent is not reflected on Alabama birth certificates,” so Section 28 “does not compel school officials to determine the immigration status of a parent of a student.” *Id.* at 96-97. It is thus effectively impossible under the text of Section 28 for the State to make any classification based on a parent’s immigration status. Moreover, the authority HICA cites to support its argument that the immigration status of parents invokes intermediate scrutiny involves discriminatory *treatment*. Here it has identified no classification imposed by Section 28, much less any differential treatment based on such a classification.

HICA has failed to identify any disparate treatment based on a classification that warrants heightened scrutiny. To the extent that that Equal Protection Clause is triggered, Section 28 is subject to the deferential standard of rational-basis review.

*iii. Section 28 serves a legitimate government purpose.*

Because Section 28 is subject to rational-basis review, it must be upheld if it is justified by a rational reason. “The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Deen v. Egleston*, 597 F.3d 1223, 1230 (11th Cir. 2010) (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254 (1985)). This review “affords states wide latitude when crafting social or economic legislation.” *Id.* at 1230 (internal quotation marks omitted).

The Alabama Legislature has expressly identified at least two rational bases for Section 28: (1) the desire to collect data about “the costs incurred by school districts” to educate “children who are aliens not lawfully present in the United States”; and (2) “to forecast and plan for any impact that the presence [of unlawfully present aliens] may have on publicly funded education in this state.” ALA. CODE §31-13-2. The data could help the Legislature budget and plan by highlighting districts that, because they have an unusually high number of



unlawfully present students, have an insufficient tax base to support the school's needs. *Id.* §31-13-27(d)(4) (requesting information on 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”).

The data could also help the State defend litigation in which the costs of illegal immigration are at issue. And in the very least, the data could help enlighten the public about the impacts of illegal immigration. By enhancing the public debate, lawmakers and voters will be better informed about the need for particular types of legislation and state and local programs.

Contrary to HICA's assertions, the State need not support these rational justifications with “factual support.” HICA Br. 59-60. As the Supreme Court has held, under rational basis review, a State “has no obligation to produce evidence to sustain the rationality of a statutory classification.” *Heller v. Doe by Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 2643 (1993). “Rather, a statute is presumed constitutional, and the burden is on the one attacking the law to negate every conceivable basis that might support it, even if that basis has no foundation in the record.” *Leib v. Hillsborough County Pub. Transp. Comm'n*, 558 F.3d 1301, 1306 (11th Cir. 2009). This is a heavy burden that HICA cannot bear: it cannot rightly contend that a state legislature does not have an interest in forecasting the student

population entering its public schools in an effort to plan for the future and determine the costs borne by the system.

Nor can HICA escape this legitimate basis for Section 28 with its arguments that the data sought will not give a completely precise picture of the number of unlawfully present aliens attending public schools. HICA Br. 62. As this Court has explained, “[u]nder rational basis review, a court must accept a legislature’s generalizations even when there is an imperfect fit between means and ends.” *Leib*, 558 F.3d at 1306. To the extent that the count Section 28 generates is not precise, that is only because the statute goes out of its way not to force parents or their students to release immigration-status information if they choose not to do so.

HICA cannot overcome Section 28’s presumed validity when the State has proffered a valid legitimate basis for the statute. Therefore, the District Court did not abuse its discretion when it declined to enjoin Section 28.

#### **E. HICA failed to meet its burden for a preliminary injunction.**

Contrary to HICA’s protestations, the District Court did not err when it declined to address the other three prongs of the preliminary injunction standard. As this Court has held, if the movant is “unable to show a substantial likelihood of success on the merits, [the Court] need not consider the other requirements.” *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). Because the District

Court concluded that neither the United States nor HICA could meet the threshold requirement for a preliminary injunction on Sections 10, 12, 18, 27, 28, and 30, it did not need to further consider the remaining equitable factors.

HICA also is wrong when it asserts that the District Court applied the incorrect standard. It suggests that when the “balance of equities weighs heavily in favor of the movants,” it need show only a “substantial case on the merits.” HICA Br. 64. HICA is mistaken. The well-settled standard for a preliminary injunction requires that the plaintiff show “a substantial likelihood of success on the merits.” *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 374 (2008). As this Court has explained, “[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant *clearly established* the burden of persuasion as to *each* of the four prerequisites.” *Siegel*, 234 F.3d at 1176 (internal quotation marks omitted and emphasis added).

HICA cannot skirt this rule by citing the standard for a “stay [of] the trial court’s mandate.” *United States v. Hamilton*, 963 F.2d 322, 323 (11th Cir. 1992); HICA Br. 64. A decision whether to stay a mandate involves a fundamentally different inquiry, under which the trial court may rightly determine that equity requires that it stay the effect of its decision even if the appellant can only show a “substantial case on the merits.” *See Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.

Unit A June 26, 1981). A preliminary injunction is an entirely different matter. It requires the court to take action, and to alter the currently existing set of legal relations between the parties. This Court's jurisprudence thus rightly requires a plaintiff seeking a preliminary injunction to always show, in the very least, that it is likely to succeed on the merits. (That said, even if HICA were right that the standard for stays applies in the preliminary-injunction context, it has not shown even a substantial case on the merits.)

The District Court applied the correct standard and, in a detailed and well-reasoned decision, concluded that the United States and HICA were not likely to prevail on merits of their claims against Sections 10, 12, 18, 27, 28, and 30. HICA cannot overcome this failure to establish the likelihood-of-success prong by raising the specter of irreparable harm.

## **II. In the Alabama Defendants' cross-appeal, this Court should reverse.**

The District Court did erroneously enjoin four provisions of the Act—three on compulsory-process grounds, and one on preemption grounds. As discussed below, the District Court should not have enjoined those four provisions, and in those limited respects this Court should reverse.

**A. The District Court abused its discretion in enjoining Sections 10(e), 11(e), and 13(h) on compulsory-process grounds.**

The District Court abused its discretion when it sustained HICA’s pre-enforcement, facial challenge to Sections 10(e), 11(e), and 13(h). Sections 10, 11, and 13 each create State-law offenses under which an alien’s unlawful presence in the United States—as determined by the federal government—acts as a predicate for criminal liability. The substantive prohibitions embodied by each of these provisions are the subject of preemption challenges by the United States and HICA: Section 10 is HB56’s prohibition on the failure to register or carry registration documents; Section 11 contains the Act’s prohibition on the solicitation of employment by unauthorized aliens; and Section 13 criminalizes, among other things, the harboring of persons not lawfully present. ALA. CODE §§31-13-10, 31-13-11, 31-13-13. *See U.S. v. Ala.* Red Br. 35-41, 55-59, 61-66 (discussing the United States’ challenge to each of those substantive prohibitions). But at issue in this cross-appeal is not those substantive prohibitions but the mechanisms they provide for determining whether the alien at issue is unlawfully present or not authorized to work. Under subsections 10(e), 11(e), and 13(h), the unlawful-presence element of each of these new offenses is to be determined solely by the federal government. *See, e.g.,* ALA. CODE §31-13-10(e) (“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.”). In facially enjoining these sections, the District Court concluded that Sections 10(e), 11(e), and 13(h) “violate[] the Compulsory Process Clause of the Sixth Amendment by denying the accused the right to present evidence in his or her defense” as to lawful presence in the United States. Doc. 137 – Pg 53-54.

To be clear, these provisions were designed to protect the defendants in these cases, not to limit their ability to mount a defense. These sections are designed to require the state courts to respect the federal government’s authority to determine immigration status rather than having the state courts reach their own conclusion. They prevent the prosecution from introducing evidence in an attempt to circumvent the federal government’s determination of a defendant’s status.

That said, the District Court may have been justified in determining that these provisions, by their plain language, would unconstitutionally preclude a defendant from “hav[ing] compulsory process for obtaining witnesses in his favor.” U.S. CONST. AMEND. VI. These provisions do not, on their face, allow a defendant to offer evidence disputing the federal government’s determination of their unlawful status. So although the provisions were intended to help defendants, they may, by their plain terms, actually bar defendants from putting on this evidence. While it is possible that the Alabama Supreme Court would interpret that problem out of these statutes by reading them to allow the defense to put on

additional evidence on this score—and thus, perhaps, the District Court should have certified this question to the Alabama Supreme Court—the District Court had reasonable grounds for concluding that the language of the provisions does not, by its terms, contemplate a defendant’s ability to put on this additional evidence.

The District Court still abused its discretion by actually enjoining these provisions. No injunction was necessary or appropriate here because any asserted Sixth Amendment violation could have been addressed by the state courts when the situation arose in the course of a criminal prosecution. To obtain an injunction, a plaintiff needs to show actual and imminent injury. But here, all that was afforded the District Court was layers of speculation. First, the District Court speculated that some of the plaintiffs will be arrested, charged, and prosecuted. Add to that speculation the prediction that the state courts, during their prosecution, will improperly reject the individual HICA Plaintiffs’ Sixth Amendment arguments and prohibit the defendants from offering witnesses in their favor. Only then – when all of these speculative circumstances converge – are the individual HICA Plaintiffs positioned to suffer an infringement of their Sixth Amendment rights.

Because it takes layers of speculation to arrive at the asserted constitutional violation, the District Court erred in preliminarily enjoining Sections 10(e), 11(e), and 13(h). “Issuing a preliminary injunction based only on a possibility of

irreparable harm is inconsistent with [the Supreme Court’s] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22. HICA has not yet made that showing, and the District Court abused its discretion in holding otherwise. The proper means for redressing this Sixth Amendment concern was through adjudication in the state courts during a prosecution, not through a preliminary injunction issued by a federal court.

**B. The District Court abused its discretion in enjoining the entirety of Section 8.**

The District Court also erred in enjoining Section 8. Although the District Court was right that Section 8 may contain a sentence that conflicts with federal law, it abused its discretion when it enjoined the provision in its entirety. Section 8 prohibits an “alien who is not lawfully present” from attending any public postsecondary institution in Alabama. ALA. CODE §31-13-8. As a general matter, there is nothing problematic about such a prohibition. As the District Court recognized, a State is entitled to “exclude unlawfully-present aliens, as determined by federal law, from enrolling in and attending its public postsecondary educational institutions.” Doc. 137 – Pg 44 n.13; *see, e.g., Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 603 (E.D. Va. 2004) (noting that States may deny



admission to unlawfully present aliens); 8 U.S.C. §1621(c)(1)(B) (defining a “State or local public benefit,” for which an unlawfully present alien is not eligible, to include “postsecondary education”); *id.* §1623 (limiting eligibility for preferential treatment of aliens not lawfully present on basis of residence for higher education benefits).

The problem identified by the District Court, however, was in a single sentence found in Section 8. That sentence provides that an alien attending a postsecondary institution must possess “lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. §1101, et seq.” ALA. CODE §31-13-8. Unlike the remainder of the law, this sentence does not defer to the federal definition of lawfully-present alien, but instead appears to create a more limited definition that reaches only lawfully-present aliens who possess a particular status under federal law. Based on this apparent limitation, the District Court concluded that this sentence evidenced an impermissible attempt to create a state classification of aliens that departed from federal classifications. Doc. 137 – Pg 38. Because ““States enjoy no power with respect to the classification of aliens[,]”” the District Court concluded that the provision was preempted. Doc. 137 – Pg 38 (quoting *Plyler*, 457 U.S. at 225), 44.

Although that reasoning may have been sound, it neither compelled nor allowed the District Court to enjoin the entire provision. The Court should have

instead done one of two things, either of which would have resulted in that sentence being declared inoperative, and the rest of the provision going into effect.

First, the District Court could have read the sentence as a clear scrivener's error that, as a matter of statutory interpretation, had no effect. Section 8 is replete with references to and reliance on federal law. The first sentence of the statute evidences an intent to deny admission to "[a]n alien who is not lawfully present." ALA. CODE §31-13-8. The section then authorizes an institution official to "seek federal verification of an alien's immigration status with the federal government pursuant to 8 U.S.C. §1373(c)." *Id.* Critically, the section provides that the official "shall not attempt to independently make a final determination of whether an alien is lawfully present in the United States." *Id.* When Section 8 is read in its entirety, it evidences a legislative intent to prohibit admission of unlawfully present aliens as determined by federal law. The second sentence – which the District Court read as drawing distinctions not found in federal law – was in clear tension with the overall intent of the section.

Section 8, therefore, should be read to advance the overall intent of the Legislature "to prohibit a person not lawfully present from being eligible on the basis of residence for education benefits." Act No. 2011-535 (Doc. 131-1), title. Under principles of statutory construction, when a statute contains an obvious mistake or error, a court may correct the error based on the context of the statutory

language. *See Guy H. James Constr. Co. v. Boswell*, 366 So.2d 271, 273 (Ala. 1979) (“An obvious error in the language of a statute is self-correcting. In such an instance, the Court may substitute the correct word when it can be ascertained from the context of the act.” (citation omitted)); *Ex parte Welch*, 519 So.2d 517, 519 (Ala.1987) (““A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.”” (quoting 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION §46.06 (4th ed. 1984))). The District Court should have accepted that limiting construction here.

Second, even if it had not been possible to read the problem out of the statute through statutory construction, the right result was not an injunction against Section 8 in its entirety. Instead, the appropriate remedy would have been to sever the second sentence by enjoining it, and to let the rest of the provision go into effect. *See* Act No. 2011-535 (Doc. 131-1), §33 (“The provisions of this act are severable.”). As this Court has recognized, “[i]t is well-settled that a district court abuses its discretion when it drafts an injunction that is unnecessarily broad in scope.” *Alley v. U.S. Dept. of Health & Human Services*, 590 F.3d 1195, 1205 (11th Cir. 2009). That is so because “[i]njunctive relief should be limited in scope to the extent necessary to protect the interests of the parties.” *Keener v. Convergys*

*Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003) (citations omitted); *see also U.S. v. Ala. Red Br.* 55-59 (arguing that the District Court should have taken a similar approach with respect to Section 13).

The Alabama Defendants offered evidence that its officers planned to implement Section 8 in conjunction with the limiting construction. The Chancellor of Postsecondary Education issued a letter instructing state institutions to accept “any document issued by the United States government authorizing an alien’s continued presence in the United States.” Doc. 82-4. The letter was explicit that “[w]hether . . . an alien is ‘lawfully present in the United States’ is a matter of federal law.” *Id.* Despite the conflicting second sentence of Section 8, the Chancellor’s letter expressly affirmed that “there are some categories of aliens who are lawfully present in the United States who are not lawful permanent residents and who are not in possession of a non-immigrant visa. Aliens in these categories are also eligible to enroll in Alabama’s postsecondary educational institutions.” *Id.* The Chancellor’s letter makes clear that Section 8 would be implemented in full accordance with federal law.

At most, then, the District Court should have enjoined the second sentence of Section 8. By instead enjoining the entire section, the District Court abused its discretion.

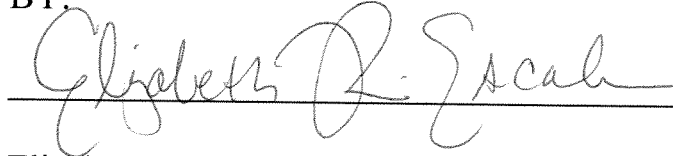
## **CONCLUSION**

In HICA's appeal, No. 11-14535, this Court should affirm the District Court's decision declining to preliminarily enjoin Sections 10, 12, 18, 27, 28, and 30. In the State Defendants' cross-appeal, No. 11-14675, this Court should reverse the District Court's decision preliminarily enjoining Sections 8, 10(e), 11(e), and 13(h) .

Respectfully submitted,

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BY:

A handwritten signature in cursive script, appearing to read "Elizabeth Prim Escalona", written over a horizontal line.

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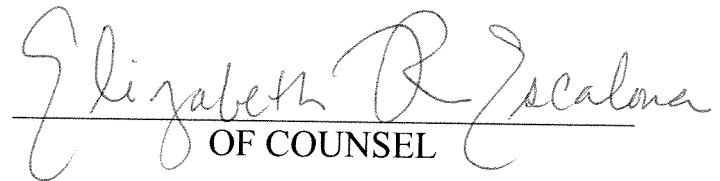
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I certify this brief complies with the applicable type-volume limitation under Rule 32(a)(7) of the Federal Rules of Appellate Procedure and 11th Circuit Rule 32-4. According to the word count in Microsoft Word 2007, there are 15,501 words in this brief. I also certify this brief complies with the applicable type-style requirements limitation under Rule 32(a)(5) and (6). I prepared this brief in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point, Times New Roman font.

  
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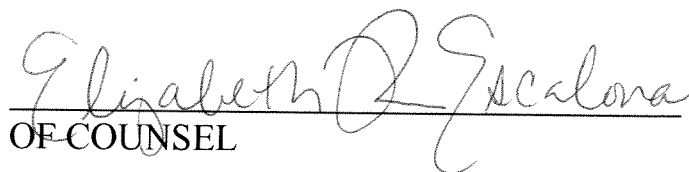
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