

Nos. 11-14535-CC and 11-14677-CC

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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.

**GOVERNOR ROBERT BENTLEY, ET AL.,**

*Appellees/Cross-Appellants.*

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

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**ALABAMA DEFENDANTS'  
PETITION FOR REHEARING *EN BANC***

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**September 10, 2012**

### **CERTIFICATE OF INTERESTED PERSONS**

The following is a list of all 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:

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Alabama Education Association (AEA), *Amicus Curiae*

Alabama Fair Housing Center, et al., *Amicus Curiae*

Alabama New South Coalition, *Amicus Curiae*

Alabama NOW, *Amicus Curiae*

Alabama State Conference of the National Association for the Advancement of Colored People (NAACP), *Amicus Curiae*

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The National Asian-Pacific American Bar Association, *Amicus Curiae*

The National Association of Latino Elected Appointed Officials, *Amicus Curiae*

The National Fair Housing Alliance, *Amicus Curiae*

The National Immigration Law Project of the National Lawyers Guild, *Amicus Curiae*

The New Orleans Workers' Center for Racial Justice, *Amicus Curiae*

The New York City Bar Association, *Amicus Curiae*

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### STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves two questions of exceptional importance that warrant *en banc* review:

- (1) Does an organization have standing to sue State officials for an injunction against a law based on the mere fact that the organization has redirected some of its resources to educating and counseling the public in response to the law?
- (2) Does a State violate the Equal Protection Clause when it attempts to determine the number of unlawfully present aliens who are students enrolled in the State's primary and secondary schools?

I also express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions: *Nordlinger v. Hahn*, 505 U.S. 1, 112 S. Ct. 2326 (1992); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992); *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114 (1982); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009); and *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008).

s/ John C. Neiman, Jr.

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## PRELIMINARY STATEMENT

Like the companion cases in Nos. 11-13044 & 11-14532, this appeal raises important questions about States' ability to address problems caused by illegal immigration. As Alabama has explained in its petition for *en banc* rehearing in No. 11-14532, the questions there concern whether certain provisions of an Alabama statute, commonly known as HB56, are preempted. Meanwhile, the substantive question in this case concerns whether another HB56 provision, which requires officials to estimate the number of unlawfully present students in the public schools, violates the Equal Protection Clause. But an equally important question here is one of procedure: whether the private organizations that brought this challenge had standing to do so. The District Court held that they did not. But the panel disagreed and, reaching the merits, struck the provision down. Like the two preemption issues on which Alabama has sought rehearing in No. 11-14532, the panel's rulings in this case are important in their own right and because of their impact on other areas of the law. The Court should rehear these issues along with the issues Alabama and Georgia have raised in the two companion cases.

## STATEMENT OF ISSUES

**I. Standing.** Does an organizational plaintiff have standing to seek an injunction of the school-data provision based on the mere fact that it has redirected some of its resources to educating and counseling the public about the provision,

even though the provision did not otherwise impact the organization's ability to accomplish its goals?

**II. School-data collection.** Does Alabama's school-data provision violate the Equal Protection Clause merely because it requires officials to try to determine the citizenship and immigration status of students who enroll in Alabama's primary and secondary schools—even though it does not actually require students to provide information if they choose not to, and no student will be denied an education or treated differently based on the information provided?

## **STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE**

### **I. The school-data provision**

Estimates from public-interest groups suggest that between 75,000 and 160,000 unlawfully present immigrants lived in Alabama in 2010. Doc 69 – Exh A – Pg 23. But the State does not know how many unlawfully present students attend publicly funded primary and secondary schools. The State also does not know whether the proportion of unlawfully present students in any given school affects overall educational outcomes or the use of resources in that school.

Section 28 of HB56, codified at §31-13-27 of the Alabama Code, was the Legislature's way of trying to determine the answers to these questions. The provision's full text is set forth in the statutory appendix to this petition, and the essentials are summarized here.

This provision requires a prospective primary or secondary school student to present a birth certificate or similar document upon enrollment—an event that happens when the student first enters the school system. If the birth certificate is not available or reveals that the student was born in another country, officials are to ask the student’s guardian to notify the school of the “actual citizenship or immigration status of the student under federal law” and provide documents to that effect. ALA. CODE §31-13-27(a)(3). Regardless of whether the student’s guardian notifies the school about this information, the student will be enrolled. The only effect of a guardian’s failure to provide the information is that the student will be presumed to be an unlawfully present alien for the purposes of aggregate statistics the school reports to the State Board of Education.

After the Board of Education gathers these statistics, the provision requires it to prepare a report, “aggregated by public school, regarding the numbers of United States citizens, of lawfully present aliens by immigration classification, and of aliens believed to be unlawfully present in the United States enrolled at all primary and secondary public schools in this state.” *Id.* §31-13-27(d)(2). The statute instructs the Board to use this aggregate data to analyze whether unlawfully present students affect “the standard or quality of education,” “fiscal costs,” and “other educational impacts.” *Id.* §31-13-27(d)(3).

The provision has safeguards that protect students' privacy. It requires students to present birth certificates or similar documents only once, when they "enroll[]" upon moving to the State or otherwise entering public school for the first time. *Id.* §31-13-27(a). The provision does not allow statewide authorities to collect or report individualized data, except as required by federal law and requested by federal officials. *Id.* §31-13-27(e). And the provision creates a cause of action for negligent disclosure of information. *Id.* §31-13-27(f).

## **II. The district-court and panel decisions**

A group of 36 people and associations filed this lawsuit against various state officials, seeking to have HB56 enjoined as unconstitutional. The plaintiffs sought a preliminary injunction, and the District Court consolidated that request with the United States' similar motion, at issue before this Court in the rehearing petition Alabama has filed in No. 11-14532. Of particular importance to the petition in this case, the private plaintiffs sought to enjoin Alabama's school-data provision on Equal Protection grounds.<sup>1</sup>

The District Court denied the plaintiffs' request. The court found that neither the individual nor the associational plaintiffs had standing to challenge the

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<sup>1</sup> A preemption challenge to the school-data provision is foreclosed by the former Fifth Circuit's binding decision in *Doe v. Plyler*, 628 F.2d 448, 453 (5th Cir. 1980), which the Supreme Court affirmed in non-pertinent part. The Court there held that a state law that expressly denied unlawfully present aliens a free public education was not preempted.

provision. The court reasoned that the provision did not affect the individual plaintiffs—who were school-age children and their representatives—because they were already enrolled and thus would not go through the data-collection process. Doc. 137 – Pg 98. Meanwhile, the court reasoned that although the public-interest associations had “spent time discussing Section 28 with [their] members and constituents,” an association’s voluntary diversion of resources to provide advice about a challenged law does not, by itself, create standing. *Id.* at 101.

The private plaintiffs then appealed. After a motions panel enjoined the school-data provision during the appeal, the same merits panel that decided the United States’ case in No. 11-14532 reversed the District Court’s decision declining to enjoin the school-data provision. The panel concluded that one of these public-interest groups, Alabama Appleseed Center for Law & Justice, Inc., had standing because it had provided advice to persons in light of the new provision on how “to enroll children in school, whether children should be enrolled, how schools will use the information collected, and whether parents will suffer immigration consequences as a result of a child’s enrollment.” Exh. A at 12.

“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). But rather than “remand[ing] to give the district court an opportunity to determine” the merits in the first instance, *id.*, the panel concluded that the provision violates the

Equal Protection Clause. The panel applied a “heightened level of scrutiny.” Exh. A at 15, 2320. It analogized Alabama’s information-gathering provision to the Texas statute held unconstitutional in *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382 (1982). That Texas statute required unlawfully present persons to pay tuition to attend public school. *See id.* at 205-07, 102 S. Ct. at 2389. “Compared to the tuition requirement struck down in *Plyler*,” the panel concluded, “section 28 imposes similar obstacles to the ability of an undocumented child to obtain an education.” Exh. A at 20. Without the benefit of fact-findings by the District Court, the panel held as a matter of law that the provision will “deter this population from enrolling in and attending school because, as unlawfully present aliens, ‘these children are subject to deportation,’ and removal proceedings can be instituted upon the federal government being informed of their undocumented status.” *Id.* at 21. Accordingly, the panel directed that the entirety of the provision be preliminarily enjoined.

#### **ARGUMENT AND AUTHORITIES**

The panel’s rulings on standing and equal protection put this Circuit’s jurisprudence on a collision course with the law of the Supreme Court and other Circuits. If the panel is right about standing, then any public-interest organization can sue state officials in this Circuit to invalidate laws just because the organization decides to educate the public about them. If the panel is right about



the Equal Protection Clause, then those same organizations can challenge all manner of state and federal laws that do nothing more than attempt to gather data to inform public policy. This Circuit should reject these conclusions. But at the very least, if these conclusions are going to be the law of the Circuit, they should be the judgment of the entire Court.

### **I. Rehearing is warranted on standing.**

The panel's decision on organizational standing was important and wrong. To establish standing, a plaintiff must show "an invasion of a legally protected interest which is . . . concrete and particularized" and "a causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 2136 (1992). All the identified organizational plaintiff alleged here was that it had "received inquiries" about the school-data provision and had "hosted presentations to convey information about the consequences of the law, including its education provision." Exh. A at 12. To be sure, Appleseed "divert[ed]" resources it could have used in other activities when it decided to conduct this educational campaign. *Id.* But deciding to educate the public about a law in this way is not in and of itself an Article III injury.

The panel's contrary decision misapplies the Supreme Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114 (1982). In *Havens*, the Supreme Court held that an organization has standing to sue if the

defendant's acts impair the organization's ability to engage in its core mission and force the organization to divert resources to counter the defendant's acts. In *Havens*, the defendant engaged in "racial steering," a practice by which "real estate brokers and agents encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups." *Id.* at 366 n.1, 102 S. Ct. at 1118 n.1. In contrast, the mission of the organizational plaintiff in *Havens* was the opposite of racial steering; it was to "assist equal access to housing through counseling and other referral services" regardless of race. *Id.* at 379, 102 S. Ct. at 1124. Defendant's racial steering made it harder for that organizational plaintiff to meet its goals. The Supreme Court held that the plaintiff had not "simply [suffered] a setback to the organization's abstract social interests," but had itself been injured by defendant's conduct. *Id.*

The *Havens* rule is sound, but the panel expanded it far beyond its proper scope. This Circuit has recognized that *Havens* confers standing on a group to challenge state laws that directly interfere with the group's activities by "*forcing* the organization to divert resources to counteract" the law. *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (emphasis added). Organizations that register voters, for example, have standing to challenge

laws that make it more difficult for voters to register because those laws force organizations to educate their volunteers about the law if they are to carry out their preexisting campaigns. *See Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009); *Browning*, 522 F.3d 1153. But this Court used the word “forcing” in these cases for a reason. Neither this Circuit nor any other Circuit had held, before the panel did here, that an organization can create standing simply by deciding to educate the public about a law’s effects when the campaign is not necessary to maintain the organization’s preexisting activities. In these circumstances, the organization’s decision to educate and campaign about the law would simply serve, as the Supreme Court put it in *Havens*, “the organization’s abstract social interests.” 455 U.S. at 379, 102 S. Ct. at 1124.

Every Circuit to have addressed this question has come out the other way. The Ninth Circuit succinctly states the consensus view: 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.* This is also the rule in the Fifth Circuit, the D.C. Circuit, and the Seventh Circuit. *See Ass’n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental*

*Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) (“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.”); *Nat’l Taxpayers Union v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (same); *Plotkin v. Ryan*, 239 F.3d 882, 886 (7th Cir. 2001) (“[O]rdinary expenditures as part of an organization’s purpose do not constitute the necessary injury-in-fact required for standing.”).

The panel’s decision creates a uniquely sweeping rule for this Circuit. Appleseed has chosen to spend its resources on lobbying against, or “educating” about, the school-data provision. But it cannot, by virtue of this choice, confer Article III standing on itself. As the District Court noted, none of the organizational plaintiffs here actually assists children with enrollment in school, which is the only activity that could conceivably be hindered by the provision. Doc. 137 – Pg 101. The panel’s decision effectively grants standing to any advocacy organization that decides to educate the public about a new law it does not like. That ruling will have detrimental effects on standing doctrine in any number of contexts, and it deserves rehearing by the panel or *en banc*.

## **II. The equal-protection issue warrants rehearing.**

The panel’s equal-protection analysis is equally unsound. The panel ruled that this law was facially discriminatory even though “by its terms” it applies to all

students. Exh. A at 16. The panel concluded that the law “significantly interferes” with the exercise of a constitutional “right” to receive a free education, but it cited no actual evidence of interference, and the chief Supreme Court precedent it cited expressly disclaims the existence of such a right. That flawed analysis cannot be the basis for striking down a State’s good-faith effort to assess the costs of illegal immigration, and it is another reason for panel or *en banc* rehearing.

Alabama’s school-data provision is consistent with equal protection because it does not mandate disparate treatment. “The Equal Protection Clause does not forbid classifications.” *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326, 2331 (1992). “It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.” *Id.* Accordingly, the *sine qua non* of an equal-protection claim is a plaintiff’s showing “that the State will treat him disparately from other similarly situated persons.” *DeYoung v. Owens*, 646 F.3d 1319, 1327 (11th Cir. 2011). Here, the panel conceded that the school-data provision “by its terms” treats every student the same. Exh. A at 16. Every prospective student is required to provide documentation about his or her citizenship or immigration status. There is no disparate treatment based on the documents provided. If a student fails to provide the documentation, nothing happens to the student. If a student says that he is an unlawfully present alien,

nothing happens to the student. Without disparate treatment, there is no equal-protection problem.

A State's attempts to gather data about participants in its programs do not violate the Equal Protection Clause. At the federal government's urging, other courts have held in other contexts that informational questions about race, ethnicity, and medical condition are constitutional: "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)." *Morales v. Daley*, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000). The district court in *Morales* agreed with DOJ. "[R]equiring a person to self-classify racially or ethnically, [even] knowing to what use such classifications have been put in the past," does not violate the Constitution. *Morales*, 116 F. Supp. 2d at 814-815.

The panel did not contest this proposition. Instead, although conceding that "by its terms" the school-data provision applies equally to all prospective students, the panel erroneously concluded that, in practice, the provision "substantially interferes" with "the right to an elementary public education as guaranteed by *Plyler*." Exh. A at 16-17. There are two big problems with that analysis.

*First*, the panel misread the Supreme Court's decision in *Plyler v. Doe*, finding the derogation of a constitutional right where *Plyler* itself says no right

exists. The school-data provision cannot possibly “interfere” with, in the panel’s words, a “right to an elementary public education as guaranteed by *Plyler*.” Exh. A at 18. The Supreme Court in *Plyler* was explicit that “[p]ublic education is not a ‘right’ granted to individuals by the Constitution” and that “[u]ndocumented aliens cannot be treated as a suspect class.” *Plyler*, 457 U.S. at 221, 223, 102 S. Ct. at 2396, 2398. Instead, *Plyler* held only that a State may not “reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools.” *Id.* at 229, 102 S. Ct. at 2401 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633, 89 S. Ct. 1322, 1330 (1969)) (alteration in *Plyler*). The school-data provision does not, on its face, bar anyone from the schools.

*Second*, in asserting that the school-data provision will nonetheless have that practical effect, the panel overlooked the well-established standard for testing a law’s facial constitutionality before it is enforced. The panel said the provision would have this effect because the panel was “of the mind that” the provision would subject unlawfully present persons to “increased likelihood of deportation or harassment.” Exh. A at 21. But in a pre-enforcement facial challenge, the court must confine its analysis to “the statute’s facial requirements,” without any “speculat[ion] about ‘hypothetical’ or ‘imaginary’ cases.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 1190 (2008). And the record refutes the panel’s speculation in any event. Alabama officials have

announced that they intend for schools to remain open to all children regardless of their immigration status and that they do not understand the provision to require them to report a student's status to federal authorities. *See* Doc 82-3 – Pg 2-3. Meanwhile, the panel's assertion that the law will stop children from enrolling is based solely on a combination of intuition and DOJ's announcement that it is investigating whether the provision *might* have that effect. *See* Exh. A at 22 n.9. The results of that investigation are unknown, but it is difficult to imagine how Alabama's law "increase[s] the likelihood of deportation or harassment" any more than other States' laws that similarly require a prospective student to submit a birth certificate or other document at the time of enrollment.<sup>2</sup> Exh. A at 22. If the panel is right about the school-data provision, then groups like Appleseed ought to be suing other States to enjoin those other laws.

Appleseed's concern that the United States might compel Alabama to turn over its data so federal officials can deport unlawfully present students is farfetched and irrelevant. *See* Exh. A at 22-23. There will always be groups that

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<sup>2</sup> *See, e.g.*, ARK. CODE ANN. §6-18-208(b)(1); ARIZ. REV. STAT. §15-828; CAL. EDUC. CODE §48002; FLA. STAT. §1003.21; IDAHO CODE ANN. §18-4511(2); 325 ILL. COMP. STAT. 55/5; IND. CODE §20-33-2-10; KAN. STAT. ANN. §72-53, 106; ME. REV. STAT. ANN. tit. 20-A, §6002; MICH. COMP. LAWS §380.1135; MISS. CODE ANN. §37-15-1; NEB. REV. STAT. §43-2007; NEV. REV. STAT. §392.165; N.J. STAT. ANN. §18A:36-25.1; N.Y. EDUC. LAW §3218; N.C. GEN. STAT. §115C-364(c); N.D. CENT. CODE §12-60-26; OHIO REV. CODE ANN. §3313.672; S.D. CODIFIED LAWS §13-27-3.1; TEX. EDUC. CODE ANN. §25.002; UTAH CODE ANN. §53A-11-503; VA. CODE ANN. §22.1-3.1; W. VA. CODE §18-2-5c.



believe, rightly or wrongly, that the federal government will misuse data. *See, e.g., Morales*, 116 F. Supp. 2d at 811 (plaintiff feared that census data would be used to place him in an internment camp). But the appropriate way for the courts to relieve any such fears in this case would be to enjoin the federal government's potential misuse of the information, not the State's collection of the data itself. As the First Circuit explained under similar circumstances, the federal government's "possible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data." *United States v. State of N.H.*, 539 F.2d 277, 280 (1st Cir. 1976).

At the end of the day, Appleseed's unfounded fears about state or federal officials' good faith cannot transform Alabama's attempts to increase public information about the costs of illegal immigration into an equal-protection violation. Alongside the preemption issues raised by Alabama and Georgia in their petitions in Nos. 11-13044 & 11-14532, this question is worthy of rehearing by the entire Court.

### CONCLUSION

The Court should grant panel rehearing or rehearing *en banc*.

Respectfully submitted,  
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**BY:**

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# Statutory Appendix

**ALA. CODE §31-13-27** - Verification of citizenship and immigration status of students enrolling in public schools; annual reports; disclosure of information.

(a)(1) Every public elementary and secondary school in this state, at the time of enrollment in kindergarten or any grade in such school, shall determine whether the student enrolling in public school was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States and qualifies for assignment to an English as Second Language class or other remedial program.

(2) The public school, when making the determination required by subdivision (1), shall rely upon presentation of the student's original birth certificate, or a certified copy thereof.

(3) If, upon review of the student's birth certificate, it is determined that the student was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States, or where such certificate is not available for any reason, the parent, guardian, or legal custodian of the student shall notify the school within 30 days of the date of the student's enrollment of the actual citizenship or immigration status of the student under federal law.

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

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

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

(5) If no such documentation or declaration is presented, the school official shall presume for the purposes of reporting under this section that the student is an alien unlawfully present in the United States.

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

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

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

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

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

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

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

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



federal law, shall first apply to the Attorney General and receive a waiver of confidentiality from the requirements of this subsection.

(f) A student whose personal identity has been negligently or intentionally disclosed in violation of this section shall be deemed to have suffered an invasion of the student's right to privacy. The student shall have a civil remedy for such violation against the agency or person that has made the unauthorized disclosure.

(g) The State Board of Education shall construe all provisions of this section in conformity with federal law.

(h) This section shall be enforced without regard to race, religion, gender, ethnicity, or national origin.

# Exhibit A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 11-14535; 11-14675

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D.C. Docket No. 5:11-cv-02484-SLB

HISPANIC INTEREST COALITION OF ALABAMA,  
AIDS ACTION COALITION,  
HUNTSVILLE INTERNATIONAL HELP CENTER,  
INTERPRETERS AND TRANSLATORS ASSOCIATION OF ALABAMA,  
ALABAMA APPLESEED CENTER FOR LAW & JUSTICE, INC.,  
SERVICE EMPLOYEES INTERNATIONAL UNION,  
SOUTHERN REGIONAL JOINT BOARD OF WORKERS UNITED,  
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION,  
LOCAL 1657 UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION,  
DREAMACTIVIST.ORG,  
GREATER BIRMINGHAM MINISTRIES,  
BOAT PEOPLE SOS,  
MATT WEBSTER,  
MARIA D. CEJA ZAMORA,  
PAMELA LONG,  
JUAN PABLO BLACK ROMERO,  
CHRISTOPHER BARTON THAU,  
ELLIN JIMMERSON,  
ROBERT BARBER,  
DANIEL UPTON,  
JEFFREY ALLEN BECK,  
MICHELLE CUMMINGS,  
ESAYAS HAILE,

FISEHA TESFAMARIAM,  
JANE DOE,  
#1, allowed by order [103],  
JANE DOE,  
#2, allowed by order [103],  
JANE DOE,  
#3, allowed by order [103],  
JANE DOE,  
#4, allowed by order [103],  
JANE DOE,  
#5, allowed by order [103],  
JANE DOE,  
#6, allowed by order [103],  
JOHN DOE,  
#1, a minor, by his legal guardian Matt Webster,  
allowed by order [103],  
JOHN DOE,  
#2, allowed by order [103],  
JOHN DOE,  
#3, allowed by order [103],  
JOHN DOE,  
#4, allowed by order [103],  
JOHN DOE,  
#5, allowed by order [103],  
JOHN DOE,  
#6, allowed by order [103]

Plaintiffs - Appellants  
Cross Appellees,

versus

GOVERNOR OF ALABAMA,  
ATTORNEY GENERAL, STATE OF ALABAMA,  
ALABAMA STATE SUPERINTENDENT OF EDUCATION,  
ALABAMA CHANCELLOR OF POSTSECONDARY EDUCATION,  
DISTRICT ATTORNEY FOR MADISON COUNTY,

Defendants - Appellees

Cross Appellants,

SUPERINTENDENT OF HUNTSVILLE CITY SCHOOL SYSTEM, et al.,

Defendants - Appellees,

CENTRAL ALABAMA FAIR HOUSING CENTER,  
FAIR HOUSING CENTER OF NORTHERN ALABAMA, et al.,

Amicus Curiae.

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Appeals from the United States District Court  
for the Northern District of Alabama

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(August 20, 2012)

Before WILSON and MARTIN, Circuit Judges, and VOORHEES,\* District Judge.

WILSON, Circuit Judge:

This appeal presents the challenges of private plaintiffs to various provisions of Alabama’s House Bill 56, the “Beason–Hammon Alabama Taxpayer and Citizen Protection Act” (H.B. 56). Relevant to this appeal, the plaintiffs here (the HICA Plaintiffs) brought suit against defendants (the State Officials) contending that sections 8, 10, 11(a), 12(a), 13, 18, 27, 28, and 30<sup>1</sup> are preempted

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\* Honorable Richard L. Voorhees, United States District Judge for the Western District of North Carolina, sitting by designation.

<sup>1</sup> Consistent with how this case has been presented, we reference the originally designated sections of H.B. 56 rather than the Alabama Code section where the provisions are currently

by federal law; that section 28 violates the Equal Protection Clause; and that the last sentence of sections 10(e), 11(e), and 13(h) violates the Compulsory Process Clause.<sup>2</sup> In the companion case brought by the United States, we have concluded that preliminary injunction of sections 10, 11(a), 13(a), and 27 is appropriate, and that injunction of sections 12, 18, and 30 is not supportable at this stage of litigation.<sup>3</sup> *See United States v. Alabama*, Nos. 11-14532, 11-14674. The operation of those sections and rationale for our disposition are set forth fully in the companion case, and herein we address the HICA Plaintiffs' challenges not already covered in that opinion.<sup>4</sup>

Section 8 provides that an unlawfully present alien “shall not be permitted

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housed.

<sup>2</sup> Additional provisions that were unsuccessfully challenged in the district court are not contested here. Furthermore, the district court's ruling concerning section 13 is not contested in this appeal.

<sup>3</sup> In briefing filed after the decision in *Arizona v. United States*, 567 U.S. \_\_\_, 132 S. Ct. 2492 (2012), the HICA Plaintiffs maintain that sections 12 and 18 are preempted as requiring extended detention to conduct immigration status checks. As we stated in the United States's companion case, however, *Arizona* instructs that a facial challenge is premature insofar as the statutes could be construed not to require unlawful detention. We therefore reject the HICA Plaintiffs' arguments to the contrary and affirm the district court's decision regarding sections 12 and 18. Additionally, to the extent that the HICA Plaintiffs now challenge a portion of section 19, we do not consider that argument, which was raised for the first time in the post-*Arizona* supplemental briefing. Finally, for the reasons stated in the United States's companion case, we do not find at this time that section 30 is facially invalid.

<sup>4</sup> Insofar as the HICA Plaintiffs argue that sections 10 and 27 are preempted, we dismiss the appeal as moot in light of our ruling in the companion case.

to enroll in or attend any public postsecondary education institution” in Alabama. Ala. Code § 31-13-8. In order to execute this prohibition, officers of those institutions may “seek federal verification of an alien’s immigration status with the federal government” pursuant to 8 U.S.C. § 1373(c) but cannot independently make a final determination about the immigration status of an alien. *Id.* Section 8 also renders unlawfully present aliens ineligible for “any postsecondary education benefit, including, but not limited to, scholarships, grants, or financial aid” not otherwise required by law. *Id.*

Sections 10(e), 11(e), and 13(h) each prescribe the means by which a conviction for the corresponding criminal provision may be attained. Each section ends in a common sentence mandating that the Alabama courts “shall consider only the federal government’s [§ 1373(c)] verification in determining whether an alien is” lawfully present in the United States, Ala. Code §§ 31-13-10(e), -13(h), or authorized to work, *id.* § 31-13-11(e).

Section 28 provides a process for schools to collect data about the immigration status of students who enroll in public school. Schools are required to determine whether an enrolling child “was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States.” *Id.* § 31-13-27(a)(1). That determination is made based on the birth certificate of

the child. *Id.* § 31-13-27(a)(2). If none is available, or if the certificate reflects that “the student was born outside . . . the United States or is the child of an alien not lawfully present in the United States,” then the enrolling child’s parent or guardian must notify the school of the “actual citizenship or immigration status of the student under federal law.” *Id.* § 31-13-27(a)(3). This notification consists of (a) official citizenship or immigration documentation and (b) an attestation under penalty of perjury that the document identifies the child. *Id.* § 31-13-27(a)(4). If the statutory notification is not provided, then the student is presumed to be “an alien unlawfully present in the United States.” *Id.* § 31-13-27(a)(5).

Before H.B. 56 became effective, the HICA Plaintiffs, along with the United States, filed suit to invalidate certain provisions of the law. The HICA Plaintiffs moved to preliminarily enjoin the operation of numerous provisions of the law, and the district court consolidated its case with the related suit brought by the United States for purposes of deciding the injunction. Relevant here, the district court enjoined sections 8, 11(a), and 13 as preempted by federal law and sections 10(e), 11(e), and 13(h) as violative of the Compulsory Process Clause. It also found that none of the HICA Plaintiffs had standing to challenge section 28.

Both sides appealed. The United States and HICA Plaintiffs contested the district court’s denial of a preliminary injunction, and Alabama cross-appealed the



district court's grant of preliminary injunctive relief. After filing its notice of appeal, the United States and HICA Plaintiffs sought from this court an injunction pending appeal to prevent enforcement of the sections for which the district court denied an injunction. A panel of this court granted in part the motion for injunction pending appeal, enjoining enforcement of sections 10 and 28. Later, after briefing and oral argument, we modified the injunction pending ultimate disposition of this appeal and enjoined enforcement of sections 27 and 30.

Having closely considered the positions and new briefing of the parties in light of the recent decision in *Arizona v. United States*, 567 U.S. \_\_\_, 132 S. Ct. 2492 (2012), we affirm in part, reverse in part, and vacate in part the order of the district court, and we dismiss parts of the HICA Plaintiffs' appeal as moot. Specifically, we affirm the district court with respect to the challenges to sections 12, 18, and 30. We further conclude that at least one organization has standing to challenge section 28 and that the HICA Plaintiffs are likely to succeed on the claim that section 28 violates the Equal Protection Clause. Therefore, we reverse the district court's decision regarding this section and remand for the entry of a preliminary injunction. Because the Alabama legislature has eliminated the challenged language from section 8, we vacate as moot the district court's injunction of that provision and remand for the dismissal of the challenge to that

section.<sup>5</sup> In light of our decision regarding the substantive provisions of sections 10, 11, and 13, we vacate as moot the district court's injunction of the last sentence of sections 10(e), 11(e), and 13(h). Finally, because we find sections 10 and 27 preempted in the companion case brought by the United States, we dismiss as moot the HICA Plaintiffs' appeal as to these sections.

### I. Standard of Review

We review a district court's grant of a preliminary injunction for abuse of discretion. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Legal determinations underlying the grant of an injunction are reviewed *de novo*, and factual determinations are reviewed for clear error. *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1171–72 (11th Cir. 2002).

### II. Discussion

A preliminary injunction may be granted to a moving party who establishes “(1) substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.”

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<sup>5</sup> In the United States's companion case, we found a likelihood of success on the preemption claims made against sections 10, 11(a), 13(a), 16, 17, and 27.

*Robertson*, 147 F.3d at 1306. We address these factors in turn, focusing in particular on the most contested determination—whether the HICA Plaintiffs are likely to succeed on their claims.

A. Likelihood of Success on the Merits

1. Section 8

As originally enacted, section 8 prohibited a wide array of aliens from attending public postsecondary educational institutions in Alabama. The first sentence of that section prohibited enrollment of “[a]n alien who is not lawfully present in the United States.” Ala. Code § 31-13-8. The second sentence, however, expressly limited enrollment to aliens who “possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, et seq.” *Id.* The district court enjoined section 8 in its entirety on the ground that it constituted an unconstitutional classification of aliens. Since that ruling, the Alabama legislature has amended section 8 to remove the second sentence entirely, which was understood to define lawful presence as requiring lawful permanent residence or a nonimmigrant visa.

There is no doubt that “[t]he States enjoy no power with respect to the classification of aliens.” *Plyler v. Doe*, 457 U.S. 202, 225, 102 S. Ct. 2382, 2399 (1982) (citing *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399 (1941)). In its

complaint and briefs, HICA challenges the classification of—not the underlying prohibition on—unlawfully present aliens who seek to attend an educational postsecondary institution. Complaint at ¶¶ 217–220 (charging that section 8 “impermissibly discriminates between citizens and lawfully residing noncitizens, and among groups of lawfully residing noncitizens”); Appellants’ Cross-Appellees’ Reply/Response Br. at 48 (urging correctness of the district court’s ruling on the merits that section 8 “creates an unlawful state classification of aliens”). The complained-of sentence, which the district court concluded ran afoul of federal law and Supreme Court precedent, *see Plyler*, 457 U.S. at 225, 102 S. Ct. at 2399, has been removed by the state legislature. Because section 8 has been “amended so as to remove its challenged feature[],” the HICA Plaintiffs’ claim for injunctive relief has no basis in the present statute. *Naturist Soc’y, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992). We therefore vacate the district court’s injunction of section 8 as moot and remand for the dismissal of the challenge.

## 2. Sections 10(e), 11(e), and 13(h)

The HICA Plaintiffs claim that the final sentences of sections 10(e), 11(e), and 13(h) violate the Compulsory Process Clause of the Sixth Amendment. We need not reach the merits of this contention in light of our ruling in the United States’s companion case that sections 10, 11(a), and 13(a) are preempted. The

challenged provisions limiting the evidentiary presentation for violations of those provisions will not be applied because the underlying criminal prohibitions are unenforceable. We therefore vacate the district court's injunction of these specific sentences as moot.

### 3. Section 28

The HICA Plaintiffs challenge the district court's threshold finding that none of the individuals or organizations had standing to challenge section 28. We agree with Plaintiffs that at least one organization has standing to challenge this provision. We further conclude that the HICA Plaintiffs are likely to succeed on their claim that section 28 violates the Equal Protection Clause.

#### a. Standing

“‘[A]n organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.’” *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (quoting *Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008)). In *Common Cause*, we found that an organizational plaintiff suffered cognizable injury when it was forced to “divert resources from its regular activities to educate and assist [affected individuals] in complying with the [challenged] statute.” *Id.* *Browning* presented

an injury similar to that in *Common Cause*, and we found organizational standing proper in that case on the ground that the organizations “reasonably anticipate[d] that they [would] have to divert personnel and time to educating volunteers and [affected individuals] on compliance” with the statute’s requirements. 522 F.3d at 1165–66.

Here, Plaintiff Alabama Appleseed Center for Law & Justice, Inc. has claimed injuries analogous to those present in *Common Cause* and *Browning*. John A. Pickens, the Executive Director of Alabama Appleseed, submitted declarations to explain the manner in which H.B. 56, and particularly section 28, has affected and will continue to affect his organization. Pickens declared that many of the inquiries received by the organization were prompted by the passage of H.B. 56 and related to the education provision at issue, including questions about how to enroll children in school, whether children should be enrolled, how schools will use the information collected, and whether parents will suffer immigration consequences as a result of a child’s enrollment. In response to the passage of H.B. 56, Alabama Appleseed has hosted presentations to convey information about the consequences of the law, including its education provision. Furthermore, the time and money expended on the planning and execution of these events has forced the organization to divert resources from other immigration

policy work. According to Pickens, these endeavors “will continue to be detrimentally impacted” as they will have to be “substantially curtail[ed] or stop[ped].” These alleged injuries are sufficient under our precedent to confer standing on Alabama Appleseed.<sup>6</sup> *See Common Cause*, 554 F.3d at 1350; *Browning*, 522 F.3d at 1165–66.

b. Merits

Section 28 requires every public elementary and secondary school within Alabama to determine upon enrollment whether the enrolling child “was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States.” Ala. Code § 31-13-27(a)(1). The school must make this determination by examining the birth certificate the student has presented. *Id.* § 31-13-27(a)(2). If the birth certificate reveals “that the student was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States,” or if the birth certificate is unavailable, then the child’s guardian must within thirty days notify the school of the “actual citizenship or immigration status of the student under federal law.” *Id.* § 31-13-27(a)(3); *see*

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<sup>6</sup> Because one plaintiff with standing is sufficient to permit our review of the constitutionality of section 28, we proceed to address the merits without regard to the standing of other individuals or organizations. *See Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1243–44 (11th Cir. 2011), *rev’d in part on other grounds*, 567 U.S. \_\_\_, 132 S. Ct. 2566 (2012).

*also id.* § 31-13-27(a)(4) (setting forth the notification procedure). If the notification procedure laid out in the statute is not satisfied, then “the school official shall presume for the purposes of reporting under this section that the student is an alien unlawfully present in the United States.” *Id.* § 31-13-27(a)(5). Public disclosure of information that identifies a student is prohibited “except for purposes permitted pursuant to 8 U.S.C. §§ 1373 and 1644.” *Id.* § 31-13-27(e).

The Equal Protection Clause of the Fourteenth Amendment “direct[s] that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254 (1985). Practically, though, “most legislation classifies for one purpose of another, with resulting disadvantage to various groups or persons.” *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620, 1627 (1996). In light of this reality, certain statutory classifications require more exacting scrutiny when the court reviews their compatibility with the mandate of the Equal Protection Clause. *See Cleburne Living Ctr.*, 473 U.S. at 440–42, 105 S. Ct. at 3254–55 (summarizing constitutionally protected classifications and providing the character of judicial scrutiny to be applied on review).

Apart from certain classifications, the Supreme Court has recognized that where a statute significantly interferes with the exercise of a protected right, it



must also be reviewed under a similarly heightened level of scrutiny. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 682 (1978) (addressing equal protection in the context of the right to marry); *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 262 n.21, 94 S. Ct. 1076, 1084 (1974) (context of the right to interstate travel); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626–28, 630, 89 S. Ct. 1886, 1889–90, 1891 (1969) (context of the right to vote); *see also Vacco v. Quill*, 521 U.S. 793, 799, 117 S. Ct. 2293, 2298 (1997) (utilizing the rational basis standard to review New York statutes governing the right to physician-assisted suicide because they involved neither a protected right nor a suspect classification).

Together, the specific interplay between the types of individuals affected by the statute and the deprivation at issue may justify requiring a heightened level of scrutiny to uphold the statute's categorization. *See Plyler*, 457 U.S. at 223–24, 102 S. Ct. at 2398 (explaining that Texas's law preventing unlawfully present children from obtaining a free public education “can hardly be considered rational unless it furthers some substantial goal of the State”); *id.* at 235, 102 S. Ct. at 2404 (Blackmun, J., concurring); *id.* at 238, 102 S. Ct. at 2406 (Powell, J., concurring); *cf. Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 881, 110 S. Ct. 1595, 1601 (1990) (collecting cases to illustrate that statutes implicating a

combination of protected rights are comparatively less likely to survive review); *Wisconsin v. Yoder*, 406 U.S. 205, 223, 92 S. Ct. 1526, 1542 (1972) (“[W]hen the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement . . .”).

The State Officials assert that heightened scrutiny is not warranted because section 28 is only a means to collect data, which does not implicate any right protected by the Equal Protection Clause.<sup>7</sup> *See, e.g., Morales v. Daley*, 116 F. Supp. 2d 801, 814–15 (S.D. Tex. 2000) (upholding the national census against a Fifth Amendment equal protection challenge). This argument, though, does not conclusively resolve the whole of the equal protection inquiry before us. Nor is it enough to argue that, unlike the statute at issue in *Plyler*, section 28 does not by its terms purport to deny an education to any child. Our duty, instead, is to analyze whether section 28 operates in such a way that it “significantly interferes with the

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<sup>7</sup> We reject the argument that the Equal Protection Clause is not triggered by section 28’s reporting requirement. “A violation of the equal protection clause may occur when a legislative body enacts a law which ‘has a special impact on less than all the persons subject to its jurisdiction.’” *Price v. Tanner*, 855 F.2d 820, 822 (11th Cir. 1988) (quoting *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587–88, 99 S. Ct. 1355, 1367 (1979) (ellipsis omitted)). A statute requiring children and their parents to reveal their immigration status upon enrollment in school certainly has a “special impact” on a subset of Alabama’s population seeking to so enroll.

exercise of” the right to an elementary public education as guaranteed by *Plyler*. *Zablocki*, 434 U.S. at 383, 98 S. Ct. at 679. We conclude that it does and, further, find that no substantial state interest justifies the interference.

In *Plyler* the Supreme Court held that a Texas statute denying free public education to undocumented children violated the Equal Protection Clause. 457 U.S. at 230, 102 S. Ct. at 2401–02. The Court addressed the constitutional infirmities of the state’s refusal to reimburse local school boards for the educational expenses of unlawfully present children as well as the requirement of local school boards that those children pay a tuition fee in order to attend public school. *See id.* at 215–16, 102 S. Ct. at 2394. In finding an equal protection violation, the Court emphasized the blamelessness of the children who were subject to the burden, *see id.* at 219–20, 102 S. Ct. at 2396, and underscored the importance of providing education free of “unreasonable obstacles to advancement on the basis of individual merit,” *id.* at 222, 102 S. Ct. at 2397. In light of the “fundamental role” of education “in maintaining the fabric of our society,” *id.* at 221, 102 S. Ct. at 2397, the Court required a heightened justification—a substantial interest of the state—in order to sustain the debilitating effects that a lack of education can have on the specific community of individuals affected by the law and the country as a whole, *id.* at 224, 102 S. Ct. at 2398.

The Court analyzed four goals that could arguably legitimize the statute, finding each insufficient to uphold the Texas law. First, the Court quickly dismissed an interest in preservation of resources for the state's lawful residents as no more than "a concise expression of an intention to discriminate." *Id.* at 227, 102 S. Ct. at 2400. The Court next explained that the goal of deterring illegal immigration was not a sufficient goal to justify the law, recognizing that other means would be much more effective at accomplishing that objective. *Id.* at 228–29, 102 S. Ct. at 2400–01 ("Charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration, at least when compared with the alternative of prohibiting the employment of illegal aliens." (quotation marks and alteration omitted)). Third, the Court clarified that undocumented children did not so burden the provision of educational resources as to require the statutory distinction from legally resident alien children. *See id.* at 229, 102 S. Ct. at 2401. Finally, it dismissed any distinction between documented and undocumented children in the context of which students might put their education to productive use within the state's territorial boundaries, *see id.* at 229–30, 102 S. Ct. at 2401. The Court concluded by questioning the use of a law that works to promote "the creation and perpetuation of a subclass of illiterates," which would "surely add[] to the

problems and costs of unemployment, welfare, and crime.” *Id.* at 230, 102 S. Ct. at 2402.

The State Officials differentiate *Plyler* on the ground that, by its terms, section 28 affects *every* child who enrolls in school. It is true that the preliminary requirement of showing a birth certificate applies equally to each child, but that does not fully describe the operation of section 28. The “special impact” challenged here is not an inability to show a birth certificate but the state-mandated disclosure of the immigration status of the child (and possibly his or her parents) upon enrollment. Other sections of H.B. 56 compel the conclusion that, despite the characterization of the State Officials, section 28 targets the population of undocumented school children in Alabama. For example, section 2 states that one of the goals of the bill is “to accurately measure and assess the population of *students who are aliens not lawfully present in the United States.*” Ala. Code § 31-13-2 (emphasis added). Clearly, the law contemplates no interest in the birthplace of any child who is lawfully present, and the blanket requirement that all students show a birth certificate is simply a necessary means by which section 28 forces unlawfully present aliens to divulge their unlawful status.

Under the terms of section 28, the parent or guardian of any student who (1) is not lawfully present, (2) was born outside of the United States, or (3) cannot

produce a birth certificate “*shall* notify the school . . . of the actual citizenship or immigration status of the student under federal law.” Ala. Code § 31-13-27(a)(3) (emphasis added). The form of this notification is also governed by statute and requires official documentation (or a notarized recognition of the documentation) in addition to a parental attestation under penalty of perjury verifying the identity of the child in order to satisfy school officials of a student’s legal status. *Id.* § 31-13-27(a)(4). Undocumented children, obviously, cannot produce the requisite documentation to satisfy these criteria; likewise the failure to submit any required notification documents means that the school “shall presume . . . that the student is an alien unlawfully present in the United States.” *Id.* § 31-13-27(a)(5).

Consequently, section 28 operates to place undocumented children, and their families, in an impossible dilemma: either admit your unlawful status outright or concede it through silence. In either scenario, the relevant state database will identify the student as an unlawfully present alien, even though that individual may be a “child enjoying an inchoate federal permission to remain.” *Plyler*, 457 U.S. at 226, 102 S. Ct. at 2399.

Compared to the tuition requirement struck down in *Plyler*, section 28 imposes similar obstacles to the ability of an undocumented child to obtain an education—it mandates disclosure of the child’s unlawful status as a prerequisite

to enrollment in public school. This hurdle will understandably deter this population from enrolling in and attending school because, as unlawfully present aliens, “these children are subject to deportation,” and removal proceedings can be instituted upon the federal government being informed of their undocumented status. *Id.* Alabama learns of this status upon enrollment in school, and as fully explained below, federal statutes prohibit Alabama from restricting the disclosure of this information. *See* 8 U.S.C. §§ 1373, 1644. Moreover, revealing the illegal status of children could lead to criminal prosecution, harassment, and intimidation.<sup>8</sup> *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064–65 (9th Cir. 2004) (concluding that revealing the immigration status of the plaintiffs could lead to legal consequences and would likely deter them from exercising legal rights); *Liu v. Donna Karan Int’l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002). We are of the mind that an increased likelihood of deportation or harassment upon

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<sup>8</sup> It is this reality that has led federal courts—including the district court here—to permit the plaintiffs to proceed anonymously in immigration-related cases. *See, e.g., Lozano v. City of Hazelton*, 620 F.3d 170, 194–95 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011) (vacating for further consideration in light of *Chamber of Commerce of the United States v. Whiting*, 563 U.S. \_\_\_, 131 S. Ct. 1968 (2011)); *Does I thru XXIII v. Advanced Tile Corp.*, 214 F.3d 1058, 1069 & n.11 (9th Cir. 2000); *Ga. Latino Alliance for Human Rights v. Deal*, No. 11-1804 (N.D. Ga. July 8, 2011) (order granting motion to proceed under pseudonyms); *see also Doe v. Frank*, 951 F.2d 320, 323–24 (11th Cir. 1992) (per curiam) (setting forth relevant factors to consideration of a motion to proceed under a pseudonym). It is also relevant that the Supreme Court case to address the rights of undocumented children in education, *Plyler v. Doe*, involved plaintiffs who were allowed to proceed anonymously.

enrollment in school significantly deters undocumented children from enrolling in and attending school, in contravention of their rights under *Plyler*.<sup>9</sup>

The State Officials understandably counter that section 28 restricts the dissemination of the private information of these children and their families, which presumably would eliminate the risk of adverse immigration consequences. These privacy restrictions, however, are wholly ineffectual in themselves. Section 28 limits the public disclosure of information “except for purposes permitted pursuant to 8 U.S.C. §§ 1373 and 1644.” Ala. Code. § 31-13-27(e). Sections 1373 and 1644, in turn, require Alabama to provide immigration-related information to the federal government and other states upon request and prohibit Alabama from restricting this transfer of information.<sup>10</sup> Any textual prohibition on revealing the

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<sup>9</sup> Nor are we alone in arriving at this conclusion. Indeed, the Civil Rights Division of the Department of Justice has been conducting an investigation into the increased absentee rate of undocumented children that occurred immediately after the passage of H.B. 56—a rate that tripled. *See* Mary Orndorff, *DOJ Looks at State School Records*, Birmingham News, Nov. 5, 2011, at A1; Letter from Thomas E. Perez, Assistant Attorney General, to Dr. Thomas R. Bice, State Superintendent of Education (May 1, 2012).

<sup>10</sup> *See* 8 U.S.C. § 1373(a) (“Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”); *id.* § 1373(b)(3) (“Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from . . . [e]xchanging such information with any other Federal, State, or local government entity.”); *id.* § 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 the Immigration and Naturalization Service information regarding



immigration status of the children and their families is of little comfort when federal law requires that disclosure upon request. Consequently, the risks that accompany revealing the illegal status of the school children is not mitigated by the ineffectual privacy restrictions of section 28.

Having concluded that section 28 substantially burdens the rights secured by *Plyler*, we may only uphold it if the provision “furthers some substantial state interest.” 457 U.S. at 230, 102 S. Ct. at 2402. We note initially that, as the HICA Plaintiffs point out, the State Officials have only attempted to defend section 28 under the rational basis standard. This alone is sufficient to allow us to conclude that section 28 cannot be upheld because under heightened scrutiny, it is the state that bears the burden of demonstrating that the measure is constitutional. *See, e.g., Mem’l Hosp.*, 415 U.S. at 262–63, 94 S. Ct. at 1084.

Even assuming that the various justifications offered by the State Officials are advanced in an attempt to survive heightened scrutiny, we find none to be convincing. First, the State Officials justify section 28 with the school-related legislative findings of H.B. 56. *See* Ala. Code § 31-13-2. The State Officials cite to the desire to collect data about “the costs incurred by school districts” to educate unlawfully present children in order “to accurately measure and assess”

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the immigration status, lawful or unlawful, of an alien in the United States.”).

the undocumented student population and “to forecast and plan for any impact” that their presence may have on the state’s public-education program. *Id.* The briefing of the State Officials in the companion case, No. 11-14532, concedes that section 28 “is . . . unlikely to yield particularly precise data,” thereby recognizing that the stated legislative purpose will probably not be effectuated by the data-collection provision.<sup>11</sup> Corrected Response Brief for Appellees at 53. Along those lines, it is difficult to fathom how admittedly inaccurate data would be used to forecast the needs and plan for impact of populations of undocumented school children, especially given that the population of interest cannot be denied a free public elementary or secondary education in the first place. *See Plyler*, 457 U.S. at 228–29, 102 S. Ct. at 2401. Aside from that, the State Officials have not suggested that the relevant data could not be obtained in any other way. The conclusion that Section 28 “unnecessarily impinge[s]” upon the children’s rights

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<sup>11</sup> The State Officials also argue that, “[t]o the extent that the count [s]ection 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.” *Hispanic Interest Coal. of Ala.*, Nos. 11-14535, 11-14675, Response Brief for Appellees at 58. We find this humanitarian justification implausible, given the mandatory language of section 28 that each school *shall* determine the immigration status of each student, that each parent *shall* inform the school of the child’s status, and that each school *shall* label the student as unlawfully present in the event no paperwork is provided. The position of the State Officials is further undermined by section 6, which requires maximum enforcement of H.B. 56. Specifically, section 6 forbids state actors from restricting the enforcement of H.B. 56 “to less than the full extent permitted” therein, Ala. Code § 31-13-6(a), and provides for civil penalties in the event the law is not enforced to the maximum extent, *id.* § 31-13-6(d). *See also id.* § 31-13-6(f) (imposing a duty on all public employees to report violations of H.B. 56).

under *Plyler* is thus inescapable. *Zablocki*, 434 U.S. at 388, 98 S. Ct. at 682.

The State Officials posit additional justifications at a general level, supposing that the data could be used to defend “litigation in which the costs of illegal immigration are at issue” or to “enlighten the public about the impacts of illegal immigration.” Although those might be legitimate state interests, the means chosen by Alabama “unnecessarily burden[s]” the children’s right to a basic education. *Mem’l Hosp.*, 415 U.S. at 263, 94 S. Ct. at 1084. Again, the State Officials concede that the data collected through section 28 is inaccurate, and they have not otherwise suggested that the relevant data cannot be obtained in other ways. In short, we do not find these justifications, which fit into the general category of “because we want to know,” substantial enough to justify the significant interference with the children’s right to education under *Plyler*. We therefore conclude that section 28 violates the Equal Protection Clause.

#### B. Equitable Factors

The equities favor enjoining the operation of section 28. As explained above, that provision imposes a substantial burden on the right of undocumented school children to receive an education. Alabama has no interest in enforcing a state law that is unconstitutional, and the interference with the educational rights of undocumented children is not a harm that can be compensated by monetary

damages. *See Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (“An injury is irreparable ‘if it cannot be undone through monetary remedies.’” (quoting *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987))). In *Plyler*, the Supreme Court distinguished education as essential to maintaining “the fabric of our society” and noted “the lasting impact of its deprivation on the life of the child.” 457 U.S. at 221, 102 S. Ct. at 2396, 2397. Given the important role of education in our society, and the injuries that would arise from deterring unlawfully present children from seeking the benefit of education, we conclude that the equities favor enjoining this provision.

### III. Conclusion

Because we have found that the United States is likely to succeed on its claims that sections 10 and 27 are preempted, we dismiss the HICA Plaintiffs’ appeal as to those sections as moot. We vacate as moot the district court’s injunction of section 8 and remand for the dismissal of the challenge to that section, as the statutory amendment has removed the challenged language. In light of our decision on the substantive provisions of sections 10, 11, and 13, we vacate as moot the district court’s order insofar as it preliminarily enjoins the last sentence of sections 10(e), 11(e), and 13(h). We find that at least one of the HICA Plaintiffs has standing to challenge section 28 and that section 28 violates the

Equal Protection Clause. We therefore reverse the district court's decision and remand for the entry of a preliminary injunction. Finally, we conclude, for the reasons stated in the United States's companion case, Nos. 11-14532, 11-14674, that the HICA Plaintiffs cannot succeed on the merits of their facial challenge to sections 12, 18, and 30 at this time.

**AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART,  
DISMISSED IN PART, AND REMANDED.**