

Nos. 11-14532-CC and 11-14674-CC

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

UNITED STATES,
Appellant and Cross-Appellee,
v.
STATE OF ALABAMA, ET AL.,
Appellees and Cross-Appellants.

**On Cross-Appeals from the United States District Court
for the Northern District of Alabama
Case No. 2:11-cv-2746-SLB**

**RESPONSE BRIEF FOR APPELLEES AND
PRINCIPAL BRIEF FOR CROSS-APPELLANTS
ALABAMA AND GOVERNOR BENTLEY**

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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

Although this case is important, the Court should reschedule oral argument. This suit, like similar ones the United States has brought across the country, marks an unprecedented assertion of Executive Branch power against Congress and the States. The Supreme Court has held that States can address the problems illegal immigration creates, and Congress has encouraged States to do so. Thus, many States have passed laws like some of the ones at issue here. But because the current Administration has a narrower view of the States' role, these lawsuits arose. Although the United States convinced the Ninth Circuit to block Arizona's statute, the District Court below declined to follow the Ninth Circuit's lead. And two weeks before this brief was due, the Supreme Court granted certiorari in *Arizona v. United States*, No. 11-182, 2011 WL 3556224 (U.S. Dec. 12, 2011).

This Court should postpone oral argument until after the Supreme Court decides *Arizona*. Several of Alabama's provisions parallel Arizona's, and the Supreme Court will likely determine whether those provisions are preempted. Moreover, in considering the Arizona law, the Supreme Court will likely reject the general theory on which the Administration is asking courts across the nation to invalidate effectively all state laws that deal with these problems. Oral argument will be more productive and efficient after the Supreme Court clarifies the law.

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STATEMENT OF JURISDICTION

This Court has jurisdiction. The District Court issued its order on September 28, 2011. After the United States appealed, Alabama and Governor Bentley filed a cross-appeal on October 7, well before the 60-day deadline under Rule 4(a)(1)(B). *See* Doc 101.

QUESTIONS PRESENTED

Consistent with the sweeping nature of the Administration's preemption theory, the United States maintains that this case presents a single question about Alabama's attempts to deal with illegal immigration. *See* U.S. Br. 1-2. But as the District Court recognized, this case actually presents multiple questions about States' power to address the problems illegal immigration can cause.

The United States' appeal raises five of these questions:

1. *Stop-and-arrest protocols.* A federal statute provides that the Executive Branch "shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law." 8 U.S.C. §1373(c). Accordingly, Sections 12 and 18 establish protocols requiring state and local officers to verify the status of certain persons during stops and arrests. Did the District Court properly hold that Congress has not preempted these protocols?

2. **Registration.** Federal statutes make it a misdemeanor for certain aliens to fail to apply for federal registration or carry their registration papers. Correspondingly, Section 10 makes it a state-law misdemeanor for an unlawfully present alien to violate those federal requirements. Did the District Court properly hold that Congress has not preempted state-law penalties of this sort?

3. **Licenses.** No federal statute requires States to condone aliens' unlawful presence by granting them licenses; and some federal statutes affirmatively recognize that States have the power not to issue them particular kinds of licenses. Section 30 thus prohibits unlawfully present aliens from seeking these licenses. Did the District Court correctly hold that Congress has not preempted each conceivable application of Section 30?

4. **Contracts.** No federal statute makes contracts entered into with unlawfully present aliens enforceable in state court, and several make particular contracts of this sort unlawful. Section 27 therefore specifies that certain contracts are unenforceable under Alabama law when they are knowingly entered into with persons the federal government deems unlawfully present. Did the District Court correctly hold that Congress has not preempted Section 27?

5. **School data.** No federal statute precludes States from gathering data to determine the costs illegal immigration imposes on their schools. Section 28

requires officials to gather data about students' immigration statuses. Did the District Court correctly hold that Congress has not preempted Section 28?

Alabama and Governor Bentley's cross-appeal presents four more questions:

6. *Harboring.* Federal law makes it a crime for persons to harbor unlawfully present aliens. Correspondingly, Section 13 makes it a state-law crime for Alabama residents to knowingly harbor certain persons the federal government determines to be unlawfully present. Did the District Court err in holding that Congress has preempted all conceivable applications of this prohibition?

7. *Employee sanctions.* Congress expressly preempted state laws that impose "sanctions" on "those who employ . . . unauthorized aliens," 8 U.S.C. §1324a(h)(2), but enacted no provision preempting laws that impose sanctions on unauthorized aliens who accept jobs. Section 11(a) therefore makes it a state-law misdemeanor for unauthorized aliens to solicit or accept employment. Did the District Court err in finding that Congress has preempted Section 11(a)?

8. *Tax deductions.* Section 16 imposes no penalty on those who employ unauthorized aliens, but specifies that employers cannot take a state income-tax deduction for unauthorized aliens' wages. Did the District Court err in holding that this provision imposes a preempted "sanction"?

9. ***Compensatory cause of action.*** Section 17 provides authorized workers a compensatory-damages remedy against employers who fire or refuse to hire them in favor of unauthorized workers. Did the District Court err in concluding that this remedy constitutes a preempted “sanction”?

STATEMENT OF THE CASE

I. Nature of the case

In this and other cases across the country, DOJ is asking federal courts to invalidate state laws addressing the problems caused by illegal immigration. DOJ is seeking those injunctions before state executive officials have an opportunity to enforce these laws or state judges have an opportunity to interpret them. For the most part, the United States is not arguing that these laws violate express commands found in federal immigration statutes. Instead, it is arguing that these laws are impliedly preempted because they violate the Administration’s policy choices. And as this case reveals, the Administration’s view of what makes good policy generally involves less, rather than more, enforcement of the laws Congress actually enacted.

The Ninth Circuit accepted the Administration’s theory and enjoined certain parts of Arizona’s law, *see United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 2011 WL 3556224 (U.S. Dec. 12, 2011), but the District Court below disagreed with the Ninth Circuit’s analysis in several respects. It therefore

declined to preliminarily enjoin six Alabama provisions, and that decision is the subject of the United States' interlocutory appeal. At the same time, the Court preliminarily enjoined four other provisions, and Alabama and its Governor are cross-appealing that decision.

II. Statement of the facts

A. Illegal immigration's impact

"We've got an immigration system that's broken right now, where too many folks are breaking the law."¹ With that statement during a recent Twitter town hall, President Obama rightly acknowledged that illegal immigration is a massive problem in our country. The Supreme Court has long recognized that despite the federal government's exclusive control over who will be allowed to enter the United States, the States have ample power to address the problems created within their borders by persons the federal government has not lawfully admitted. *See DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 993 (1976) (upholding California law making it illegal to employ unlawfully present aliens).

These problems have become pronounced in recent years. Whether because of "incapability or lax enforcement," the Executive Branch has long failed to fully enforce Congress's prohibition on illegal immigration. *Plyler v. Doe*, 457 U.S. 202,

¹ <http://www.whitehouse.gov/the-press-office/2011/07/06/remarks-president-twitter-town-hall>.

218, 102 S.Ct. 2382, 2395 (1982). As a result, even three decades ago there was “a substantial ‘shadow population’ of illegal migrants—numbering in the millions.” *Id.* In 2010, Alabama, a State without an international border, had between 75,000 and 160,000. Doc 69-Exh A-Pg 23. Their arrival has caused at least three kinds of problems the State can no longer ignore.

1. *Employment.* First, illegal immigration has exacerbated unemployment problems. As the Supreme Court has recognized, because these workers often operate off-the-books, they provide a source of “cheap labor” that unscrupulous employers may exploit. *Plyler*, 457 U.S. at 219. It can be difficult for authorized workers to compete. *See DeCanas*, 424 U.S. at 356-57.

2. *Government services.* Second, state and local governments have to provide services to their residents. Because of the difficulties States have in collecting taxes from persons who are not lawfully present, many are utilizing these resources without contributing their fair share. *See generally* CONGRESSIONAL BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS (2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>.

3. *Rule of law.* Third, the public’s confidence in the rule of law erodes when States are forced to let thousands of people in their jurisdiction break the law with impunity. Because “[c]rime is contagious,” *Olmstead v. United States*, 277

U.S. 438, 485, 48 S.Ct. 564, 575 (1928) (Brandeis, J., dissenting), defiance of federal immigration law breeds defiance of other, more serious laws. It is thus no surprise that unlawfully present aliens form a substantial part of the prison populations in States like Alabama. *See* Doc 69-Exh B.

B. Alabama's provisions

The Alabama Legislature passed HB56 to address these problems in a comprehensive way. The Legislature began by finding that “illegal immigration is causing economic hardship and lawlessness in this state.” ALA. CODE §31-13-2. The Legislature therefore declared “that it is a compelling public interest to discourage illegal immigration by requiring all agencies within this state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws.” *Id.*²

² In eight different places, the Act prohibits anyone administering it from unlawfully discriminating on the basis of race, color, or national origin. *See* ALA. CODE §31-13-7(d); §31-13-10(c); §31-13-11(c); §31-13-12(c); §31-13-15(i); §31-13-15(k)(2); §31-13-27(h); §31-13-29(e). Nevertheless, a District Court recently issued a preliminary injunction against Section 30 as applied to mobile-home registrations, reasoning, among other things, that the plaintiffs had a substantial likelihood of showing a Fair Housing Act violation because the statute resulted from racial animus. *See Cent. Ala. Fair Housing Ctr. v. Magee*, No. 2:11cv982-MHT, 2011 WL 6182334, at *14-*22 (M.D. Ala. Dec. 12, 2011). The state defendant there has appealed because that order is erroneous. Nowhere is that clearer than in the order's reliance, as the supposed smoking-gun evidence of the Act's racist origins, on bigoted comments made during floor debates by two legislators *who opposed the bill*. Compare *id.* at *21-*22 (recounting their

The Act's various provisions largely are codified at Sections 31-13-1 *et seq.* of the Alabama Code. Ten are at issue here.

1. *Employment provisions.* Three provisions address the employment of “unauthorized aliens,” ALA. CODE §31-13-16, whom Alabama defines as “alien[s] who [are] not authorized to work in the United States as defined” by federal law, *id.* §31-13-3. First, Section 11(a) makes it a state-law misdemeanor for an unauthorized alien to solicit or accept employment. *Id.* §31-13-11(a). Second, Section 16 provides that employers may not take a tax deduction for wages paid to unauthorized workers. *Id.* §31-13-16. Third, Section 17 provides a private cause of action for compensatory damages for authorized workers who are fired or not hired in favor of unauthorized ones. *Id.* §31-13-17.

2. *Government-services provisions.* Two provisions deal with the government-services problems. First, Section 30 prohibits state and local governments from entering into “business transactions” with persons the federal government determines to be unlawfully present, and makes it a crime for those persons to enter into those transactions. *Id.* §31-13-29. Second, Section 28 requires public school officials to determine students’ immigration status. *Id.* §31-13-27.

3. *Rule-of-law provisions.* Also at issue are five provisions geared toward the rule-of-law problem. First, Section 10(a) makes it a state-law

statements), *with* <http://www.openbama.org/index.php/vote/display/2020> (recording their votes).

misdemeanor for unlawfully present persons to violate federal laws requiring them to register and carry their federal registration papers. *Id.* §31-13-10(a). Second, Section 13(a) makes it a state-law crime for persons to knowingly harbor, conceal, or transport persons the federal government determines to be unlawfully present. *Id.* §31-13-13(a). Third, Sections 12 and 18 establish protocols instructing police officers when to check the immigration status of persons they stop or arrest. *Id.* §31-13-12 & §32-6-9. Fourth, Section 27 provides that Alabama courts will not enforce certain contracts when one party knows or has constructive knowledge that the other is unlawfully present. *Id.* §31-13-26.

Each of these provisions specifies that if a court or agency needs to determine whether someone is lawfully present or authorized to work, they must ask the federal government “pursuant to 8 U.S.C. §1373(c).” *E.g.*, ALA. CODE §31-13-26(d). That statute, in turn, provides that the Department of Homeland Security “shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law.” 8 U.S.C. §1373(c).

III. Proceedings below

Following the path it blazed in Arizona, DOJ sued to block these provisions on preemption grounds before they went into effect. Doc 1. The District Court

denied the United States' motion for preliminary injunction in part, concluding that the United States was unlikely to succeed on six of the ten provisions. *See* Doc 94-Pg 1-2. These included four of the rule-of-law provisions (Sections 10, 12, 18, and 27) and both of the government-services provisions (Sections 28 and 30). *See* Doc 93-Pg 16-36, 52-70, 98-114. On the other hand, the Court concluded that the United States was likely to succeed on its claims against the remaining rule-of-law provision (Section 13) and all three employment provisions (Sections 11(a), 16, and 17). *See* Doc 93-Pg 36-52, 70-97. The Court therefore preliminary enjoined these provisions.

This interlocutory appeal and cross-appeal followed. The District Court separately issued an order in a parallel case, filed by private plaintiffs, which raises several overlapping issues. It is the subject of the appeal in Nos. 11-14535 and 11-14675.

IV. Standards of review

The United States is right that this Court reviews the judgment below only for abuse of discretion. And two additional components of the standard of review increase the United States' degree of difficulty even further.

A. Facial-challenge standard

First, the United States faces a high hurdle because it brought this action as a pre-enforcement, facial challenge, rather than an as-applied challenge after the provisions went into effect. Under the Supreme Court’s decision in *United States v. Salerno*, “[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987). The United States thus must show that “the law is unconstitutional in all of its applications” or, in the very least, lacks a “plainly legitimate sweep.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 1190 (2008). In other words, it is not enough for the United States to show that a provision, as it might be applied in a hypothetical set of circumstances, will conflict with federal law. If any potential application of the provision would not be preempted, then the United States cannot prevail.

B. Preliminary-injunction standard

The United States’ task is all the more difficult because “[i]n this Circuit, 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 v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (internal quotation marks omitted). “A district court may grant injunctive relief

only if the moving party shows that: (1) it has a 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.” *Id.*

SUMMARY OF ARGUMENT

In the United States’ appeal, this Court should affirm. The District Court correctly applied the implied-preemption framework set forth in *DeCanas v. Bica*. The central premise of the United States’ theory—namely, that States cannot pass laws placing unique conditions on unlawfully present aliens—is wrong. Because of the presumption against preemption, the United States must show that these provisions stand as clear obstacles to Congress’s goals. Under this test, none of these provisions is preempted.

1. In arguing that Congress preempted Section 12 and 18’s stop-and-arrest protocols, the United States ignores 8 U.S.C. §1373, which requires the federal government to respond to these sorts of status checks. Sections 12 and 18 place no special burden on lawfully present aliens, and the United States cannot assert that these provisions are preempted based on Administration priorities.

2. Section 10 fulfills Congress’s objectives by imposing penalties for failures to follow federal registration requirements. Because these penalties do not create

an independent registration scheme, they are not preempted under *Hines v. Davidowitz*. The Administration's desire not to enforce those requirements has no preemptive effect.

3. Section 30 also reinforces Congress's goals. Multiple 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.

4. Section 27 is consistent with Congress's goals. Congress has not precluded States from defining their contract laws to declare unenforceable certain agreements knowingly entered into with unlawfully present aliens. In fact, federal statutes already make a number of these contracts illegal. The United States' speculation that this provision will burden lawfully present aliens is wrong and no ground for a facial challenge.

5. Nor has Congress preempted Section 28's school-data-gathering mechanism. No federal statute precludes states from garnering data about the costs illegal immigration imposes on schools. This provision imposes no special burdens on illegal-alien students and does not bar them from attending school.

Meanwhile, in the cross-appeal, this Court should reverse.

1. The District Court should not have preliminarily enjoined Section 13. Congress has criminalized harboring of unlawfully present aliens, and Section

13(a) is simply permissible concurrent enforcement. The minor differences between the state and federal provisions are not preempted, but if they were, the right solution would be to sever the differences and allow the remainder to go into effect.

2. The District Court also erred when it held that the Immigration Reform and Control Act preempts Section 11(a)'s sanctions on employees. IRCA expressly preempts only sanctions on employers. Its rejection of federal sanctions on employees is compelling evidence against preemption. If Congress had intended to preempt state employee sanctions, it would have included them within the express-preemption clause.

3. The District Court also erred when it held that IRCA expressly preempts Section 16's amendment to Alabama tax law. In defining state law so that wages paid to unauthorized aliens will not be deductible, Section 16 is not imposing a "sanction" on employers. It is simply declining to grant them a benefit.

4. The District Court further erred when it held that IRCA preempts Section 17's cause of action for authorized employees who are passed over in favor of unauthorized ones. Under established law, compensatory remedies of this sort are not "sanctions."

ARGUMENT

The District Court was right to break from the Ninth Circuit and reject the Administration's novel implied-preemption theory. Congress has not barred States from taking measures to address the problems illegal immigration creates. Indeed, it has encouraged States to step in. The Supreme Court has made this clear already; and it should reaffirm these principles when it reviews the Ninth Circuit's decision blocking several Arizona provisions that resemble several of those at issue here.

For the same reasons the Supreme Court should reverse in *Arizona*, this Court should affirm in part and reverse in part here. In the United States' appeal, this Court should affirm the District Court's conclusion that Congress has not preempted four of the rule-of-law provisions and both of the government-services provisions. In the cross-appeal, this Court should hold that the District Court erred in preliminarily enjoining the remaining provisions.

I. This Court should affirm in the United States' appeal.

In this case and others like it across the nation, the Administration is trying to expand implied-preemption doctrine far beyond traditional understandings of how democracy, federalism, and the separation of powers ought to work. The United States is asserting that unless Congress specifically says otherwise, States have no power to address any of the problems associated with the unlawful presence of persons within their borders. No authority supports that wide-ranging

proposition, and the United States cannot change this through a flurry of affidavits signed by current Administration officials. The Supreme Court made clear in *DeCanas v. Bica* that States have authority to operate in these areas, particularly when they do so in a manner consistent with Congress’s goal of preventing illegal immigration. The District Court thus was on solid ground when it held that the United States could not prevail on its challenges to the six provisions in its appeal.

A. *DeCanas* establishes the framework.

DeCanas upheld a California statute prohibiting the employment of unauthorized aliens, and the Court’s analysis in that case sets the ground rules here. There the Court set out a three-part test—based on concepts of constitutional preemption, field preemption, and conflict preemption—for determining whether federal law impliedly preempts state laws addressing illegal immigration. Laws are constitutionally preempted if they amount to a “regulation of immigration,” over which the Constitution gives Congress exclusive power. 424 U.S. at 355. Laws are field preempted if “the nature of the regulated subject matter permits no other conclusion, or . . . the Congress has unmistakably so ordained.” *Id.* at 356 (internal quotation marks omitted). And laws are conflict preempted if simultaneous compliance with federal and state law is impossible, or if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 363.

In determining that the California statute was not constitutionally preempted, *DeCanas* eliminated any argument that Alabama’s provisions fail under the first part of the test. “[T]he fact that aliens are the subject of a state statute,” the Court explained, “does not render it a regulation of immigration.” *Id.* at 355. That is so, the Court explained, because a “regulation of immigration” is “essentially a determination of who should or should not be *admitted* into the country, and the conditions under which a *legal* entrant may remain.” *Id.* (emphasis added). Rather than regulating immigration, California merely “sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who *have no federal right to employment within the country.*” *Id.* (emphasis added).

As the District Court recognized, that analysis applies here. Alabama’s provisions do “not determine ‘who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.’” *Hispanic Interest Coalition v. Bentley*, No. 5:11-CV-2484-SLB, 2011 WL 5516953, at *17 (N.D. Ala. Sept. 28, 2011) (quoting *DeCanas*, 424 U.S. at 355). They do “not create standards for determining who is and is not in this country legally.” *Id.*; *cf. Chy Lung v. Freeman*, 92 U.S. (2 Otto) 275, 280 (1875) (declaring unconstitutional a California law regulating “the admission of citizens and subjects of foreign nations to our shores”). Instead, HB56 “repeatedly defers to federal verification of an

alien's lawful presence.” *HICA*, 2011 WL 5516953, at *17. Even if “anti-illegal immigrant sentiment and frustration with federal immigration policies has driven the enactment” of HB56, the language of the provisions is what matters, and it does not amount to a “regulation of immigration.” *Id.*; cf. *United States v. O’Brien*, 391 U.S. 367, 384, 88 S.Ct. 1673, 1683 (1968) (“It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it.”).

Likewise, *DeCanas*'s determination that the California law was not field preempted eliminates any meaningful argument that the Alabama provisions fail under the second prong of the test. The *DeCanas* Court noted that “States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.” 424 U.S. at 356. The Court could not “presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by [the California statute] in a manner consistent with pertinent federal laws.” *Id.* at 357. “Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was the clear and manifest purpose of Congress would justify that conclusion.” *Id.* (internal quotation marks omitted). The plaintiffs “fail[ed] to point out, and an independent review does not reveal, any specific

indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular.” *Id.* at 358. Moreover, the “comprehensiveness of the INA scheme for regulation of immigration and naturalization, without more,” could not justify any finding that Congress had occupied the field. *Id.* at 359.

DeCanas had no occasion to apply the third, conflict-preemption prong of its test; and the United States does not specify whether it is that kind of preemption, or some unspecified mix of all three categories, that should lead to the conclusions it asserts. Regardless, as explained below, *see infra* at 26-55, the District Court was correct to find that none of those theories renders any of these six provisions facially invalid. But three overarching flaws permeate the United States’ analysis generally, and these bear emphasis at the start.

1. The Administration’s premise is unsound.

As an initial matter, much of the United States’ analysis rises and falls on an unsupported *ipse dixit*. The United States’ central premise is that “determinations about the conditions under which aliens may live in the United States, *including unlawfully present aliens*, based specifically on their status as such, are reserved for the National Government.” U.S. Br. 30 (emphasis added). But where the United States is getting that premise from is anyone’s guess. It is certainly not coming

from *DeCanas*, which blessed California’s decision to place immense burdens on unlawfully present aliens. And the United States cannot maintain that States need congressional authorization before they place other, hugely life-altering conditions on unlawfully present aliens, such as barring them from voting or driving. *See Foley v. Connelie*, 435 U.S. 291, 296, 98 S.Ct. 1067, 1071 (1978); *Doe v. Ga. Dept. of Pub. Safety*, 147 F.Supp.2d 1369, 1376 (N.D.Ga. 2001).

The Administration is mistaken if it believes that the Supreme Court’s decision in *Hines v. Davidowitz* establishes this premise. It is true *Hines* said our country has a ““traditional policy of not treating aliens as a thing apart.”” U.S. Br. 44, 49 (quoting *Hines*, 312 U.S. 52, 73, 61 S.Ct. 399, 407 (1941)). But *Hines* was referring to “aliens lawfully within the United States.” *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419, 68 S.Ct. 1138, 1142 (1948) (discussing *Hines*). *Hines* held preempted a state scheme requiring registration of aliens the federal government deemed lawfully present. *Hines* did not hold, and could not have held, that States cannot impose conditions on “unlawfully present aliens, based specifically on their status as such.” U.S. Br. 30. If it had, *DeCanas* would have come out the other way. As the Supreme Court would later explain in *Plyler v. Doe*, “undocumented status is not irrelevant to any proper legislative goal.” 457 U.S. at 220.

The United States cannot distinguish *DeCanas* on the ground that the California law amounted only to a ““local regulation[.]”” with a ““purely speculative

and indirect impact on immigration.” U.S. Br. 30 (quoting *DeCanas*, 424 U.S. at 355). *DeCanas* did not purport to limit its holding to laws matching that precise description, and in any event, Alabama’s law addresses local issues in the same way the California statute did. Like that law, Alabama’s provisions “protect” the State’s “fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens.” *DeCanas*, 424 U.S. at 357. Other purposes undergirding Alabama’s law—such as limiting government services to those who have fully paid for them and promoting the rule of law within the State—are just as “local.” The fact that a State intends for a law of this sort also to deter illegal immigration does not mean *DeCanas* does not apply. As the Supreme Court has explained, “Despite the exclusive federal control of this Nation’s borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.” *Plyler*, 457 U.S. at 228 n.23 (citing *DeCanas*).

The dispositive question thus is not whether Alabama’s provisions make distinctions based on unlawfully present aliens’ status or whether the Legislature intended to discourage illegal immigration. It is instead whether these laws fall within a field Congress has completely occupied or stand as obstacles to the accomplishment and execution of Congress’s purposes and objectives.

2. *Preemption in this area turns on Congress’s intent, not an Administration’s policy or foreign-relations goals.*

When the United States does try to fit its arguments within the traditional implied-preemption framework, it raises pronounced separation-of-powers concerns. The United States repeatedly pitches the question presented as whether Alabama’s provisions clash not with choices Congress has made, but with the Administration’s own priorities. *See* U.S. Br. 29-34. The United States even goes so far as to assert that some provisions stand as obstacles to the Administration’s choice *not* to enforce or follow statutes Congress has enacted. *See* U.S. Br. 39, 50-51. But that is not how preemption works. “It is Congress—not the [Executive Branch]—that has the power to pre-empt otherwise valid state laws.” *North Dakota v. United States*, 495 U.S. 423, 442, 110 S.Ct. 1986, 1998 (1990). To be sure, the Executive can take formal action to preempt laws when Congress expressly gives it power to do so. But the Executive has no power to summarily declare laws preempted merely because an Administration does not want to enforce the congressional enactments that were on the books when it arrived. As Judge Bea explained in his dissent from the Ninth Circuit’s decision in *Arizona*, if things were otherwise, “evolving changes in federal ‘priorities and strategies’ from year to year and from administration to administration would have the power to preempt state law, despite there being no new Congressional action.” 641 F.3d at 380 (opinion dissenting in part).

The word “cooperate,” which makes an appearance in 8 U.S.C. §1357(g)(10)(B), cannot serve as the Administration’s textual hook on this point. Section 1357(g) is directed to a limited issue. It allows States to enter into written agreements with the federal government to effectively deputize state officers to exercise the same functions as federal Immigration and Customs Enforcement agents. Subsection (g)(10)(B) is simply a savings clause, establishing that nothing in the provision means States also need agreements to check a person’s immigration status or “otherwise to cooperate” with the Attorney General “in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” Not even the Ninth Circuit majority in *Arizona* went so far as to suggest that this isolated reference to the term “cooperate” gives an Administration a free-flowing mandate to declare preempted any state law dealing with unlawfully present aliens that is contrary to that Administration’s policy views. That reading would be inconsistent not only with the statutory text and structure, but also with the background assumptions of dual sovereignty that underlie the constitutional system. States have inherent authority to enforce their own laws and federal law. *Cf. United States v. Di Re*, 332 U.S. 581, 589-90, 68 S.Ct. 222, 226-27 (1948). Congress can change that baseline assumption through a clear statement, but this clause’s reference to the word “cooperate” does not fit that bill.

Nor can the United States rest its implied-preemption assertions on the current Administration's opinion that laws like Alabama's and Arizona's are bad for foreign relations. The Ninth Circuit judges in *Arizona* vigorously debated whether these concerns are relevant in this context; and as the District Court noted below, Judge Bea's dissent had it right. The Supreme Court has found laws preempted based on foreign-relations concerns in contexts that, unlike this one, do not involve matters of substantial state-and-local consequence. And as Judge Bea observed, when the Supreme Court has found laws preempted in those contexts, it has done so because "the state law's effect on foreign relations conflict[ed] with federally *established* foreign relations goals." 641 F.3d at 381. The Court in *Crosby v. National Foreign Trade Council*, for example, found foreign-relations concerns relevant as to preemption of a state statute dealing with Burma because a federal statute had imposed a set of mandatory and conditional sanctions on that country. 530 U.S. 363, 368-69, 373-86, 120 S.Ct. 2288, 2291-92, 2294-2301 (2000). Likewise, *American Insurance Association v. Garamendi* found a law preempted because it conflicted with specific objectives concerning Holocaust-related insurance claims that had been "addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century." 539 U.S. 396, 421, 123 S.Ct. 2374, 2390 (2003).

On the other hand, absent any conflict with any established foreign-affairs policy and when the laws at issue have implicated matters that are of a more traditionally domestic character, the Supreme Court has declined to declare laws preempted based on assertions that they are “likely to provoke retaliatory action by foreign governments.” *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. 298, 328, 114 S.Ct. 2268, 2285 (1994). *Barclays* held that protests from foreign governments “deploring” a corporate-tax statute “in diplomatic notes, *amicus* briefs, and even retaliatory legislation” were not relevant. *Id.* Without a contrary statute or treaty, the contention that a law “is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum.” *Id.* at 327-28.

The District Court correctly reasoned that *Barclays* applies with full force here. *See* Doc 93-Pg 33-36. Particularly in this area, where the subject matter raises pronounced concerns at the local level, courts “do not grant other nations’ foreign ministries a ‘heckler’s veto.’” 641 F.3d at 383 (Bea, J., dissenting in part).

3. *The United States ignores the presumption against preemption.*

The United States also proceeds as if there were no such thing as the presumption against preemption. The Supreme Court has held that “[i]n all pre-emption cases, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct.

1187, 1194-95 (2009) (internal quotation marks omitted). The presumption “applies with particular force” when challenged provisions are in “a field traditionally occupied by the States.” *Altria Group v. Good*, 555 U.S. 70, 77, 129 S.Ct. 538, 543 (2008). And all but one of the provisions the District Court upheld address obvious areas of State primacy: stop-and-arrest protocols (Sections 12 and 18); contract law (Section 27); public education (Section 28); and government transactions (Section 30). (The lone exception may be Section 10, which deals with violations of federal registration laws.)

At various points the United States tries to flip this presumption by asserting that the provisions must be deemed preempted unless Alabama can identify an “independent state interest” they advance. U.S. Br. 43; *accord id.* at 47. That is not how preemption works. On at least five of the provisions in the United States’ appeal, the analysis starts by presuming that the law is valid unless it is contrary to “the clear and manifest purpose of Congress.” *Wyeth*, 555 U.S. at 565.

B. The District Court correctly declined to preliminarily enjoin these provisions.

With those principles in mind, this Court should affirm the District Court on all six provisions. Because the Act contains a severability clause, these provisions’ validity must be assessed on a section-by-section basis. *See* Act No. 2011-535,

§33. The District Court correctly found that the United States cannot establish that Congress has preempted any of these provisions.

1. Congress has not preempted Sections 12 and 18.

Nowhere is the Administration's attempt to override Congress's choices more stark than its challenge to Sections 12 and 18. These provisions define protocols for police officers, requiring them to contact the federal government to verify the immigration status of certain persons they stop or arrest. The Supreme Court in *Arizona* will consider the Administration's argument that protocols like these are impliedly preempted, for the Ninth Circuit majority upheld the preliminary injunction the United States obtained against Arizona's similar regime. *See* 641 F.3d at 346-54. For the reasons given by Judge Bea's dissent and the District Court below, the Supreme Court should reverse the Ninth Circuit. *See id.* at 371-82 (opinion dissenting in part); Doc 93-Pg 52-70, 98-100. Far from standing as an obstacle to the accomplishment of Congress's objectives, these protocols help fulfill them.

Sections 12 and 18 represent a new statewide system, but not a new practice. Long before States adopted provisions like these, state law-enforcement officers were exercising their discretion to make these inquiries. Recognizing the value of this assistance, Congress in 1996 enacted a statute, 8 U.S.C. §1373, that required the federal government to respond to queries from state officers "seeking to verify or ascertain the citizenship or immigration status of any individual within the

jurisdiction of the agency for any purpose authorized by law.” *Id.* §1373(c). These communications have helped enforce the federal prohibition on illegal immigration. *Cf. United States v. Guijon-Ortiz*, 660 F.3d 757, 758-62 (4th Cir. 2011) (local officer’s call to ICE leads to federal immigration convictions). The only difference between the old system and the new one is that previously it was up to each officer to decide whether to verify a person’s status. Because that system could lead to disparate treatment, Sections 12 and 18 established protocols that ensured that officers would treat all suspects and arrestees the same way.

Congress has not preempted that sensible move. Setting stop-and-arrest protocols for law-enforcement officers is a traditional state function, so the presumption against preemption applies. But even if it did not, the United States would have no claim that Congress has excluded the States from this field or that these provisions stand as obstacles to the accomplishment of Congress’s purposes and objectives.

That is so because §1373 requires the Executive Branch to respond to all state and local inquiries into a person’s immigration status. Subsection (c) says the INS, which is now DHS, “shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.” 8

U.S.C. §1373(c). Meanwhile, subsections (a) and (b) preclude Executive Branch officials from “restrict[ing]” state and local authorities from requesting “information regarding” the “immigration status, lawful or unlawful, of any individual.” *Id.* §1373(a) & (b). And both say federal entities and officials cannot make any restrictions “[n]otwithstanding any other provision of Federal . . . law.” *Id.*; *accord id.* §1644.

In light of §1373, the United States cannot and does not maintain that Congress has precluded state officers from contacting DHS to verify suspects’ immigration status as a general matter. Nor does the United States attempt to defend the Ninth Circuit majority’s reasoning on this point, which turned on the assertion that all state officers conducting status checks must “be subject to the direction and supervision of the Attorney General.” *Arizona*, 641 F.3d at 348, 350-51. Instead, the United States launches three different criticisms of Alabama’s provisions, but none shows that Sections 12 and 18 stand as obstacles to Congress’s goals.

a. These inquiries are within §1373(c)’s purposes.

As an initial matter, it is not clear on what basis the United States is asserting that these status checks are not within §1373(c)’s “purposes.” U.S. Br. 50. ICE’s website calls its Law Enforcement Support Center “a single national point of contact that provides timely customs information and immigration status

and identity information and real-time assistance to local, state and federal law enforcement agencies on aliens suspected, arrested or convicted of criminal activity.”³ And the statute’s straightforward language eliminates all doubt about whether providing this information is within its purposes.

b. These provisions cannot be enjoined on the ground that they burden lawfully present aliens.

Nor does the United States have firm grounds for asserting that Sections 12 and 18 are impliedly preempted because they “improperly” subject lawfully present “aliens to distinct burdens.” U.S. Br. 50. As an initial matter, this sort of speculation cannot be grounds for a pre-enforcement facial challenge, under which a court’s analysis must be confined to “the statute’s facial requirements,” without any “speculat[ion] about ‘hypothetical’ or ‘imaginary’ cases.” *Wash. State Grange*, 552 U.S. at 449-50. But this speculation is unwarranted in any event.

Section 12, for its part, imposes no unique and undue burden on lawfully present aliens. It requires officers to inquire into the status of *any* person who is stopped or arrested and is reasonably suspected to be unlawfully present—whether that person turns out to be a citizen, a lawfully present alien, or an unlawfully present alien. The fact that subsection (d) requires officers to presume that persons are lawfully present if they have certain documentation makes Section 12 more

³ <http://www.ice.gov/lesc/> (visited 12/21/2011).

reasonable, not less. Subsection (d) is “designed to protect ... lawfully admitted aliens ..., rather than to add to their burdens,” by establishing a basis on which the overwhelming majority of them may easily eliminate any suspicion that they are not lawfully present. *DeCanas*, 424 U.S. at 358 n.6 (saying similar things about California’s employment prohibition). And subsection (d) does not facially *require* officers to make an inquiry in the rare event that they stop someone within one of the very limited “categories of persons lawfully present in the country” who might not have documents of this variety “readily available.” U.S. Br. 50. So long as other circumstances eliminate suspicion that those persons are not lawfully present—such as, for example, their provision of documents indicating that they are within one of those categories—they will not be subject to whatever minimal burdens a brief status check would impose.

Nor does Section 18 impose unreasonable burdens on lawfully present aliens. Like Section 12, Section 18 applies on its face to *all* persons arrested for driving without a license. And the United States’ concern that Section 18 will lead to undue detention of lawfully present aliens is unfounded. *See* U.S. Br. 51. Section 32-6-9 of the Alabama Code already authorized police to arrest and detain persons lawfully stopped for a traffic violation who are driving without a license. Nothing in Section 18 authorizes police to detain persons for longer than they already could for that crime. As long as the federal government promptly responds

to the §1373(c) request—or the lawfully present alien can confirm his or her status in some other way—no undue burden will follow.

Whatever modest and speculative burdens sections 12 and 18 might impose on the general public, they pale in comparison to the “distinct, unusual and extraordinary burdens” on lawful residents that the Supreme Court found problematic in *Hines*. U.S. Br. 51. The *Hines* Court addressed a Pennsylvania law that, on its face, required all lawfully present aliens to register with the State. As the *Hines* Court explained, Congress had preempted that system by adopting an exclusive federal registration scheme. 312 U.S. at 69-74. In contrast, §1373 affirmatively encourages States to make immigration-status checks. If status checks were preempted because officers might occasionally make inquiries about lawfully present persons, then States would have effectively no ability to inquire into the immigration status of *any* person. As §1373 confirms, that is not the law. *Cf. Muehler v. Mena*, 544 U.S. 93, 101, 125 S.Ct. 1465, 1471 (2005) (during lawful detention, officer can inquire into immigration status); *United States v. Cantu*, 227 Fed.App’x 783, 785 (11th Cir. 2007) (defendant convicted on federal immigration charges after officers contacted DHS).

c. The United States erroneously asserts that these provisions are preempted because they conflict with Administration priorities.

Third, the United States has no basis for asserting that Sections 12 and 18 are preempted because they “divert DHS resources from” other Administration “priorities.” U.S. Br. 53. Section 1373 says when state and local officials call to make status checks, DHS has to answer. The Administration cannot, in the name of priorities or otherwise, “prohibit, or in any way restrict, any governmental entity or official from sending to, or receiving from” DHS “information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” 8 U.S.C. §1373(a). Because “Congress encourages state and federal authorities to communicate regarding immigration status,” the fact that these provisions may “result in additional inquiries to the federal government” makes them “consistent with federal law,” not preempted by it. *Ariz. Contractors Ass’n v. Napolitano*, No. CV07-1355-PHX-NVW, 2007 WL 4570303, at *15 (D. Ariz. Dec. 21, 2007).

It is no response for the United States to say that mandatory protocols conflict with the supposed “requirement,” found in the §1357(g)(10) savings clause, that states “cooperate” with the Attorney General when helping to identify unlawfully present persons. *See* U.S. Br. 54. As noted above, §1357(g)(10) simply clarifies that States’ ability to enter into agreements to deputize their officers as ICE agents does not mean that they also need agreements to make status checks or “otherwise to cooperate” with the Attorney General in the “identification, appre-

hension, detention, or removal” of unlawfully present aliens. *See supra* at 23. The United States cannot transform that clause into a rule that impliedly preempts any state status-check policy that an Administration deems “uncooperative.” That reading would not be reasonable in light of what §1373 says DHS must do. As Judge Bea put it, the Administration’s “interpretation turns §1357(g)(10) and §1373(c) into: ‘Don’t call us, we’ll call you,’ when what Congress enacted was ‘When the state and local officers ask, give them the information.’” 641 F.3d at 377. It is utterly unclear, in any event, how a state officer is supposed to know whether a person is an Administration “priority” until the officer actually places a call to DHS. And it is striking that the district courts that preliminarily enjoined similar provisions in South Carolina and Georgia did not even cite §1373. *See United States v. South Carolina*, No. 2:11-cv-2958 (D.S.C. Dec. 22, 2011) (slip op. 28-37); *Ga. Latino Alliance for Human Rights v. Deal*, 793 F.Supp.2d 1317, 1330-33 (N.D.Ga. 2011).

Congress’s priorities in this area make sense. “How can simply informing federal authorities of the presence of an illegal alien,” Judge Bea cogently asked, “possibly interfere with federal priorities and strategies—unless such priorities and strategies are to avoid learning of the presence of illegal aliens?” 641 F.3d at 379. Section 1373(c) establishes that the government must respond to *every* State inquiry that comes in, and Section 1373(b) precludes the government from

restricting state inquiries. DHS has shown that when these inquiries go up, it can adapt. See <http://www.ice.gov/lesc/> (last visited Dec. 21, 2011) (“The number of requests for information sent to the LESC increased from 4,000 in FY 1996 to 807,106 in FY 2008, to 1,133,130 in FY 2010.”). But if the Administration believes that Congress’s priorities are out of whack, the right response is to ask Congress to allocate DHS more resources or to amend §1373. It is not to seek judicial invalidation of state laws that do what Congress said States can do. Section 1373 gave the District Court ample grounds to conclude that Sections 12 and 18 are not preempted.

2. Congress has not preempted Section 10.

DOJ is even more open about seeking to displace Congress’s priorities when it asserts that the District Court should have preliminarily enjoined Section 10. That provision makes it a state-law misdemeanor for unlawfully present aliens to violate federal law by failing to apply for federal registration or carry federal registration papers. See ALA. CODE §31-13-10. The United States asserts that this provision is preempted because, among other things, the Administration apparently has elected not to enforce the federal statutes that criminalize the same conduct. The United States rightly points out that the full Ninth Circuit, including Judge Bea, held that Arizona’s version of this provision is preempted. See *Arizona*, 641 F.3d at 354-57; accord *South Carolina*, *supra*, slip op. at 24-27. But for the reasons

given by the District Court below, *see* Doc 93-Pg 16-36, the Supreme Court is highly likely to reverse the Ninth Circuit on this point, too.

Congress's objectives in this area are clear. Federal statutes make it a misdemeanor, punishable by fines up to \$1000 and imprisonment up to six months, for aliens to willfully fail to apply for federal registration. 8 U.S.C. §1306(a). Federal statutes also make it a misdemeanor, punishable by fines not to exceed \$100 and imprisonment not to exceed 30 days, for aliens over the age of 18 to fail to carry their registration papers. *Id.* §1304(e).

If anything stands as an obstacle to Congress's achievement of these objectives, it is the Administration, not Section 10. The Administration says it has adopted a "more flexible approach" to §§ 1304(e) and 1306(a), U.S. Br. 39, which apparently means it does not enforce them. Section 10, on the other hand, imposes penalties for the conduct Congress deemed worthy of punishment. Section 10 does not require aliens to register with Alabama authorities. It simply makes it a state-law misdemeanor for an unlawfully present alien to be "in violation of 8 U.S.C. §1304(e) or 8 U.S.C. §1306(a)." The Legislature was careful to make Section 10's penalties no broader, and in some respects narrower, than those set out in §§1304(e) and 1306(a): Section 10 violations are punishable by no more than 30 days in jail and a \$100 fine. Unlike federal law, which punishes both lawful and unlawful aliens who violate §1304(e) and §1306(a), 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). And the person’s “immigration status shall be determined” not by state officials independently, but “by verification of the alien’s immigration status with the federal government pursuant to 8 U.S.C. §1373(c).” *Id.* §31-13-10(b).

The Supreme Court has made clear that States may impose requirements on their residents that parallel federal-law prohibitions. *See Medtronic v. Lohr*, 518 U.S. 470, 495, 116 S.Ct. 2240, 2255 (1996). In light of Alabama’s interest in encouraging compliance with the federal scheme and, correspondingly, being able to identify all persons within its borders, the State has legitimate reasons to independently require all its residents to comply with their federal registration obligations.

In invoking *Hines* for the contrary proposition, the United States is again reading more into that decision than its text or reasoning will bear. To be sure, *Hines* held that “states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal [registration] law, or enforce additional or auxiliary regulations.” 312 U.S. at 66. But *Hines* was not referring to state laws that “complement” the federal scheme by imposing sanctions on those who violate it. *Hines* was referring to state laws that “complement,” in its words, the federal “*standard* for the registration of aliens.” *Id.* (emphasis

added). Whereas the federal standard in *Hines* required a one-time registration, the Pennsylvania standard required all aliens, including lawfully present ones, to register each year. Whereas the federal standard did not require registered aliens to carry cards at that time, the Pennsylvania standard did. And whereas the federal standard criminalized only the willful failure to register, Pennsylvania made any failure to register with the State a crime. *See id.* at 59-61. *Hines* found that Congress had provided a “standard for alien registration in a single integrated and all-embracing system” and intended to enact only “one uniform national registration system.” *Id.* at 74; *see also id.* at 66 (emphasizing that one basis for its holding was the constitutional command for Congress to “establish an uniform Rule of Naturalization”). The complementary system Pennsylvania had created, because it imposed a different and conflicting standard for the registration of aliens, was thus inconsistent with Congress’s purposes.

Section 10, on the other hand, does not impose its own standard. It creates no registration requirements at all. It simply imposes penalties on persons for violating the federal requirements, and it ensures that its language tracks the federal system in all relevant respects. It is thus, unlike the Pennsylvania system, consistent with the federal registration laws.

The Supreme Court’s decision last Term in *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011), strongly suggests that Section 10’s imposition of

these penalties is a permissible exercise of parallel state-enforcement power. *Whiting* considered an implied-preemption challenge against an Arizona law that provides, on top of certain federal penalties Congress enacted after *DeCanas*, for revocation of licenses for businesses that employ unauthorized aliens. To be sure, the controlling opinion in *Whiting* did note that Congress had expressly authorized States to adopt licensing schemes punishing employers. *Id.* at 1981 (plurality opinion) (discussing 8 U.S.C. §1324a(h)(2)). But critically for present purposes, the plurality also emphasized that “Arizona went the extra mile in ensuring that its law closely tracks IRCA’s provisions in all material respects.” *Id.* The same is true of Section 10.

The United States is wrong when it asserts that precedent from other contexts shows that States never have room, even in the face of problems causing substantial harm at the local level, to “augment the remedies created in a comprehensive federal scheme.” U.S. Br. 37. The Supreme Court has held, for example, that States may “provid[e] a damages remedy for claims premised on a violation of FDA regulations” because those state penalties “parallel,” rather than “add to,” the “federal requirements.” *Riegel v. Medtronic*, 552 U.S. 312, 330, 128 S.Ct. 999, 1011 (2008).

The precedents the United States cites for the contrary proposition have no application here. *See* U.S. Br. 37-38. The Supreme Court’s decision in *Wisconsin*

Department of Industry, Labor & Human Relations v. Gould, for example, arose from the unique—and sweepingly preemptive—nature of the National Labor Relations Act. 475 U.S. 282, 106 S.Ct. 1057 (1986). The *Gould* Court found a supplementary state law preempted only because through the “NLRA Congress largely displaced state regulation of industrial relations.” *Id.* at 286. Under the Supreme Court’s NLRA jurisprudence, “States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.” *Id.* But those principles are unique to the NLRA. *DeCanas* itself rejected the employer’s attempt to invoke NLRA-preemption jurisprudence, reasoning that “nothing remotely resembling the NLRA scheme is to be found in the INA.” 424 U.S. at 359 n.7.

Nor does *Buckman v. Plaintiffs’ Legal Committee* indicate that Section 10 is not a valid exercise of parallel-enforcement power. 531 U.S. 341, 121 S.Ct. 1012 (2001). *Buckman* held that state-law “fraud-on-the-FDA” claims are impliedly preempted, but for reasons that are unique to that context. *Buckman* reasoned that the federal government should have primacy in ensuring the integrity of its internal FDA processes, and expressed concern about the possibility of state courts determining that an applicant had defrauded the FDA when federal authorities had determined that no fraud occurred. *Id.* at 348-53. Section 10 presents no similar danger. It does not police the federal government’s internal processes for determining whether a person should be registered. It instead penalizes failures to

register or to carry registration papers. Determining whether someone has violated that rule involves a yes-or-no-type question whose answer does not require the State to delve into federal administrative procedure. Far from leaving defendants open to inconsistent determinations, Section 10 relies on the federal determination under §1373(c) that the alien is unlawfully present. Congress wanted all aliens to register and carry their documentation, so imposing additional penalties does not “skew[]” any “balance” here. *Id.* at 348.

It is thus difficult to see how Section 10 could be considered an obstacle to the achievement of federal goals—unless the goals are to avoid enforcing the registration requirement altogether. Sections 1304(e) and 1306(a) make clear that this is not Congress’s objective.

3. *Congress has not preempted Section 30.*

The United States again elevates its own preferences over Congress’s when it comes to Section 30, which prohibits unlawfully present aliens from entering into “business transactions” with the State. ALA. CODE §31-13-29. This provision regulates the traditional state function of conducting governmental business with residents. So it falls squarely within the presumption against preemption, and the United States has not overcome it.

The District Court rightly read the term “business transactions” as limited to transactions involving licenses or similar documents. *See* Doc 93-Pg 109-14. In

guidance issued thereafter, the Alabama Attorney General adopted that interpretation. His guidance explains that “for purposes of Section 30, a ‘business transaction’ is 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).⁴

The Attorney General’s position is binding on state officials, *see Chapman v. Gooden*, 974 So.2d 972, 988 (Ala. 2007), and it arises from the way Section 30 defines “business transaction.” Section 30 calls the term “any transaction between a person and the state or a political subdivision of the state.” ALA. CODE §31-13-29(a). But it specifies that the transactions include, but are “not limited to, applying for or renewing a motor vehicle license plate, applying for or renewing a driver’s license or nondriver identification card, or applying for or renewing a business license.” *Id.* The statute also excludes marriage licenses from the definition. *Id.* Because that list of inclusions and exclusions includes items that do not involve traditional “business transactions,” the *ejusdem generis* maxim of statutory interpretation, under which a general term’s meaning is garnered from the specific terms that follow it in a list, clarifies the statute’s meaning. That maxim indicates “that the Legislature was not referring to all transactions involving traditional

⁴ Available at <http://www.ago.state.al.us/Page-Immigration>.

business, but rather transactions involving the issuance of official government documents, licenses, or like items of similar formality granting authorization to the person to engage in some activity.” ALA. ATT’Y GEN. GUIDANCE 2011-02, at 2-3.

With that in mind, every indicator of congressional intent shows that Section 30 is consistent with Congress’s purposes and objectives. Congress has provided that “commercial licenses” are a form of “State and local public benefit” for which unlawfully present aliens are ineligible unless States say otherwise. 8 U.S.C. §1621(a)&(c). Congress also has provided that no federal agency may “accept” a State’s driver’s license “for any official purpose” unless the State confirms the citizenship or lawful-immigration status of all driver’s-license applicants. Pub. L. 109-13, § 202(a)(1) & (c)(2)(B), 119 Stat. 231 (2005). Congress thus envisions that States may withhold these sorts of licenses from unlawfully present aliens—and, indeed, encourages them to do so. It is thus difficult to see how Congress could have intended to keep States from withholding other types of licenses from persons who are not lawfully present. And Congress’s reverence for States’ primacy in their licensing processes is evident from 8 U.S.C. §1324a(h)(2), the express-preemption clause the Supreme Court addressed in *Whiting*. That provision preempts most state sanctions against employers but leaves decidedly undisturbed any sanctions imposed through licensing laws.

The United States does not appear to deny that Section 30’s prohibition on the issuance of these licenses, found in subsection (b), has a plainly legitimate sweep and is thus valid. *See supra* at 11 (citing *Salerno*, 481 U.S. at 745). As Judge Thrash put it when upholding Georgia’s drivers’-license ban 10 years ago, a State has a compelling interest in “not allowing its governmental machinery to be a facilitator for the concealment of illegal aliens.” *Doe*, 147 F.Supp.2d at 1376. But the United States focuses on subsection (d), which makes an unlawfully present alien’s violation of this prohibition a felony. *See* ALA. CODE §31-13-29(d).⁵ On that basis, the United States asserts that Section 30 is preempted because subsection (d) “criminalizes otherwise lawful conduct” and has the effect of “criminalizing unlawful presence.” U.S. Br.40-41. If that argument were correct, it would mean at most that subsection (d)’s criminal penalty should be severed, and the rest of the statute allowed to stand. But the argument is incorrect for at least two reasons.

⁵ A District Court recently found that a set of plaintiffs was likely to show that Section 30 is preempted as applied to mobile-home registrations. *See Cent. Ala. Fair Housing*, 2011 WL 6182334, at *5-*13. This is the same decision that found Section 30 likely to be racially discriminatory based on statements made by the Act’s opponents, *see supra* at 7 n.2, and its preemption analysis is just as flawed. It holds, among other things, that a condition placed on *unlawfully present* aliens alone can be a constitutionally preempted “regulation of immigration.” *But see supra* at 17 (citing *DeCanas*). Regardless, even if Section 30 were preempted as applied to mobile-home registrations, that would not indicate that the United States could prevail in this facial challenge, in which it must show that all of Section 30’s applications are preempted.

First, at least when it comes to drivers' and business licenses, subsection (d) does not criminalize mere unlawful presence. Unlawfully present aliens who try to obtain one of those licenses are facilitating further violations of state and federal law. And these prohibitions are grounded in critical policy concerns. A "driver's license is one of the most useful single items of identification for creating an appearance of lawful presence." *Doe*, 147 F.Supp.2d at 1376. For that reason, "the overall intent" of congressional enactments encouraging states not to issue driver's licenses to unlawfully present aliens is to foster "detection and removal of illegal aliens, particularly those having terrorist connections, from U.S. soil." *State v. Ramos*, 993 So.2d 281, 288-89 (La. App. 2008). Plus, the "State has a legitimate interest in restricting" driver's licenses because "persons subject to immediate deportation will not be financially responsible for property damage or personal injury due to automobile accidents." *Doe*, 147 F.Supp.2d at 1376. Criminal sanctions are a reasonable response to those who break these laws.

Second, once Congress has authorized States to take certain actions with respect to unlawfully present aliens, a State's response is not impliedly preempted merely because it adopts penalties that exceed those set out under federal law. *Whiting* makes that clear. There the plaintiff argued that Arizona's licensing sanctions were impliedly preempted because even though Congress had left room for state licensing sanctions, Congress has enacted its own set of sanctions in the

Immigration Reform and Control Act. “[T]he harshness of Arizona’s law,” the *Whiting* plaintiff asserted, “exert[s] an extraneous pull on the scheme established by Congress that impermissibly upsets that balance.” 131 S.Ct. at 1983. The controlling opinion rejected that argument, reasoning that “in preserving to the States the authority to impose sanctions through licensing laws, Congress did not intend to preserve only those state laws that would have no effect.” *Id.* at 1984-85 (plurality opinion). “The balancing process that culminated in IRCA resulted in a ban on hiring unauthorized aliens,” the Court explained, “and the state law here simply seeks to enforce that ban.” *Id.* at 1985.

The same is true here. Congress’s balancing led to provisions encouraging States to stop issuing various licenses, and Section 30—complete with criminal penalties—simply seeks to enforce these prohibitions. Section 30’s sanctions thus have a plainly legitimate sweep, and the District Court correctly found that they stand as no obstacle to Congress’s goals.

4. Congress has not preempted Section 27.

The Administration continues to substitute its own policy choices for Congress’s when it asserts that Section 27 is facially preempted. Section 27 amends Alabama law by specifying that certain contracts knowingly entered into with unlawfully present aliens are unenforceable. *See* ALA. CODE §31-13-26. Defining parties’ capacity to contract is a traditional state concern, *see United States*

v. Yazell, 382 U.S. 341, 351-53, 86 S.Ct. 500, 506-07 (1966), so the presumption against preemption applies. As the District Court concluded, *see* Doc 93-Pg 100-02, the United States has not shown that Congress’s manifest purpose was to preempt provisions like this one.

Once again, every indicator of congressional intent supports an inference that Section 27 bolsters Congress’s goals in this area. No federal statute preserves a person’s right to contract with unlawfully present aliens, and multiple statutes make specific contracts with these persons illegal. One prohibits anyone from using “a contract, subcontract, or exchange” to “obtain the labor of an alien in the United States knowing that the alien is an unauthorized alien.” 8 U.S.C. §1324a(a)(4). Another makes it a crime to enter into agreements with unlawfully present aliens to harbor, transport, or conceal them in furtherance of their unlawful presence. *See id.* §1324(a)(1)(A). A third declares unlawfully present aliens ineligible for “State and local public benefits” and defines that term to include any “contract . . . provided by an agency of a State or local government or by appropriated funds of a State or local government.” *Id.* §1621(c)(1)(A). And Section 27(c) goes the extra mile by specifying that if federal law happens to “authorize[]” any such contract, “[t]his section shall not apply to” it. ALA. CODE §31-13-26(c). These provisions demonstrate Section 27’s plainly legitimate sweep, and for that reason

alone the District Court was right to find that the United States’ facial challenge cannot succeed. *See supra* at 11 (citing *Salerno*, 481 U.S. at 745).

But Section 27’s legitimate sweep goes beyond these examples. Far from marking a “radical innovation,” U.S. Br. 44, Section 27 is part of a long tradition of state laws determining which contracts are void because they violate public policy. *See, e.g.*, ALA. CODE §10A-2-15.02(a) (contracts entered into by foreign corporations unenforceable if business has not qualified to do business in Alabama). No preemption principle suggests that States are precluded, when making these determinations, from considering whether the contracts undermine federal policies. *Cf. Bankers & Shippers Ins. v. Blackwell*, 51 So.2d 498, 502 (Ala. 1951) (contract unenforceable even though “not prohibited by law” because contract’s subject violated federal law). Section 27 simply takes that consideration into account, and does so legitimately. The provision is justified for much the same reason as the California statute in *DeCanas*. Section 27 is more focused on the party contracting with the unlawfully present alien than the alien himself; a contract is unenforceable only if *that party* knows that the person is unlawfully present. Thus, like California’s bar on knowingly employing unlawfully present aliens, Alabama’s bar on knowingly contracting with them protects the State’s “fiscal interests and lawfully resident” businesses “from the deleterious effects on

its economy” resulting from the willingness of some businesses to contract with unlawfully present rather than lawfully present persons. *DeCanas*, 424 U.S. at 357.

The United States offered “nothing,” as the District Court put it, that “shows Congress intended that such contracts would be enforceable.” Doc 93-Pg 102. Neither of the arguments the United States now advances can establish that Congress has completely occupied this field or that Section 27 runs contrary to Congress’s purposes and objectives here.

As an initial matter, the United States cannot morph *Hines*’s recognition of the traditional policy of not treating *lawful* aliens as “a thing apart” into a rule that States cannot place distinct conditions on *unlawfully present* aliens. U.S. Br. 44. As noted above, that reading of *Hines* is wrong. *See supra* at 20. It is particularly implausible in this context, where Congress not only enacted provisions declaring some of these contracts unlawful, but also specifically provided that unlawfully present persons are not eligible to enter into certain contracts with States. *See supra* at 47.

Nor can the United States maintain a facial challenge by speculating that Section 27 will “encourage[] private citizens to decline to contract with even lawfully present aliens out of fear that the contract will ultimately turn out to be unenforceable.” U.S. Br. 44. As was true with Sections 12 and 18, speculation of that sort cannot support a pre-enforcement facial challenge, before any evidence is

offered about how the law works in practice. *See supra* at 30 (citing *Wash. State Grange*, 552 U.S. at 449-50). If the United States' speculation came to fruition, it would need to be the subject of a post-enforcement challenge, not a pre-enforcement one.

But the statute's structure guards against that possibility in any event. The Supreme Court considered a similar issue in *Whiting*. The plaintiff argued that Arizona's prohibition on hiring unauthorized aliens would cause employers to "err on the side of discrimination" against lawful aliens "rather than risk the 'business death penalty'" by accidentally "hiring unauthorized workers." 131 S.Ct. at 1984. The plurality dismissed that concern, noting among other things that "[t]he Arizona law covers only knowing or intentional violations" and "[o]ther federal laws, and Arizona anti-discrimination laws, provide further protection against employment discrimination." *Id.* The same is true here. Section 27 renders a contract unenforceable only if "the party had direct or constructive knowledge that the alien was unlawfully present in the United States at the time the contract was entered into." ALA. CODE §31-13-26(a). A party "acting in good faith need have no fear" of the contract eventually being declared invalid. *Whiting*, 131 S.Ct. at 1984 (plurality opinion). Moreover, the prospect of liability for money damages under civil-rights laws for discriminating on the basis of alienage should serve as "strong incentive for" contracting parties "not to discriminate" here. *Id.*; *see also Anderson v. Con-*

boy, 156 F.3d 167, 170-79 (2d Cir. 1998) (holding that 42 U.S.C. §1981 prohibits alienage discrimination by private parties in the making of contracts).

There is thus no reason to second-guess the District Court’s decision on Section 27. Between the presumption against preemption, Congress’s specification that certain contracts with unlawfully present aliens are illegal, and the State’s legitimate interest in defining its contract law, Section 27 is consistent with congressional intent.

5. *Congress has not preempted Section 28.*

The District Court also was right about Section 28. *See* Doc 93-Pg 102-09. Section 28 requires officials to gather data about the immigration status of students in public elementary and secondary schools. *See* ALA. CODE §31-13-27. In light of the “primacy of States in the field of education,” the presumption against preemption is at its apex in this area. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 208, 102 S.Ct. 3034, 3052 (1982). And the United States has not established that Congress’s manifest purpose was to prevent States from gathering this kind of data.

To that end, three points about Section 28 bear emphasis. First, although Section 28’s introductory clause envisions that schools will try to determine whether parents are “alien[s] not lawfully present in the United States,” ALA. CODE §31-13-27(a)(1), Section 28 does not appear to provide for schools to actually gather that data. That is so because Section 28(a)(2) limits the school’s inquiry to

the student’s “birth certificate.” As the District Court noted, “[i]nformation about the immigration status of a parent is not reflected on Alabama birth certificates,” and “[n]othing in the record indicates that immigration status is reflected on the birth certificates from other states or countries.” Doc 93-Pg 105-06. Thus, the District Court correctly assumed that “Section 28 does not compel school officials to determine the immigration status of a parent.” *Id.* at 106.

Second, although Section 28’s introductory clause also envisions that schools will try to determine whether a student is lawfully present, as a technical matter Section 28 does not actually require students to release any information if they choose not to. That is so because Section 28 provides that if the student declines to produce documentation, the school official is simply to presume for reporting purposes that the student is unlawfully present. The District Court thus also correctly assumed that “it is possible that children will be presumed unlawfully-present aliens who are neither aliens nor unlawfully-present.” Doc 93-Pg 107.

Third, nothing in Section 28 instructs or authorizes school officials to “deny a free public education” to any students, regardless of how they respond to the data-collection process. U.S. Br. 47-48 (citing *Plyler*, 457 U.S. at 226). Instead, Section 28 calls for school districts to send the information to the State Board of Education, which then submits annual reports to the Legislature listing “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.” ALA. CODE §31-13-27(d)(2). As the United States observes, public disclosure of information that “personally identifies any student shall be unlawful, except for purposes permitted pursuant to 8 U.S.C. §§1373 and 1644.” *Id.* §31-13-27(e). The Superintendent of the Alabama Department of Education has made “clear that no child will be denied an education based on unlawful status or on a failure to provide the requested documentation.” Doc 69-Pg 56. He also does not read Section 28 “to require further action in the form of a phone call, *etc.*, reporting anyone is an illegal alien.” *Id.* at 56-57.

Section 28 is thus unlikely to yield particularly precise data, but its lack of precision is hardly grounds for finding it preempted. The United States has not suggested as much, but has instead offered two other arguments that cannot overcome the presumption against preemption.

The United States cannot get far, as an initial matter, with its assertion that Section 28 is preempted because it “imposes particular burdens on aliens, whether lawfully or unlawfully present.” U.S. Br. 47. Like Sections 12 and 18, *see supra* at 30-32, Section 28 imposes burdens on citizens and aliens alike. That is so because even citizens are asked to present their birth certificates. And in light of a lawful alien’s option not to produce any documentation at all, *see supra* at 52, any burden

Section 28 imposes on them does not approach what was going on with the state-registration scheme in *Hines*. This is hardly the only instance in which the government asks persons to provide a birth certificate or, if none is available, some other certification of the person's identity. *See, e.g.,* ALA. CODE §32-6-3(a) (conditioning issuance of driver's license to minors upon provision of birth certificate or statement from educator). The fact that laws require that sort of documentation does not render them preempted.

Nor is the United States right when it asserts that Section 28 is preempted because it "advances no legitimate state interest." U.S. Br. 47. Whether a state law advances a legitimate state interest is not the test for implied preemption; but even if it were, the State has numerous interests in this data. It could help the Legislature budget by highlighting districts that, because of an unusually high number of unlawfully present students, may have an insufficient tax base to support the school's needs. *See* ALA. CODE §31-13-27(d)(4) (requiring Board of Education to "analyze and itemize the fiscal costs to the state and political subdivisions thereof of providing educational instruction, computers, textbooks and other supplies, free or discounted school meals, and extracurricular activities to students who are aliens not lawfully present"). The data could help the State defend litigation, like the present case, in which the costs imposed by illegal immigration are an issue. And

in the very least, the data could help enlighten the public about illegal immigration's impacts.

Whether or not the Administration believes that this provision is good policy, it is hardly clear Congress wanted to preclude States from enhancing public knowledge in this way. As it did with the other provisions, the District Court correctly denied the United States' request for the preliminary injunction on Section 28.

II. In Alabama and the Governor's cross-appeal, this Court should reverse.

The District Court did enjoin four provisions on a more limited theory, but that decision was error. As explained below, because none of those provisions is preempted, the United States cannot show that it is likely to succeed in these challenges.

A. The District Court abused its discretion when it preliminarily enjoined Section 13.

The District Court enjoined Section 13, the Act's harboring provision, on narrow grounds. The Court cast no doubt on the sound proposition that States may make it a crime for their residents to harbor persons who are not lawfully present. Congress has made the harboring of unlawfully present aliens a crime, 8 U.S.C. §1324(a)(1)(A), and state provisions providing for parallel enforcement are consistent with Congress's objectives in this area. *See supra* at 37-40. Even apart

from Congress's and the States' shared goals in curbing illegal immigration, States have a compelling interest in ensuring that their own citizens and lawful residents are not helping others break the laws—whether those laws are their own or another sovereign's. Congress recognized as much by expressly granting state police officers authority to make arrests for violations of §1324(a)(1)(A). *See* 8 U.S.C. §1324(c). Correspondingly, the district court in *Arizona* declined to enjoin Arizona's harboring provision, and the United States did not appeal. *See United States v. Arizona*, 703 F.Supp.2d 980, 1002-04 (D. Ariz. 2010); *see also State v. Flores*, 188 P.3d 706, 711-12 (Ariz. Ct. App. 2008) (upholding state human-smuggling provisions that trace federal provision).

The District Court preliminarily enjoined Section 13, however, because it believed that the provision deviated too much from its federal counterpart, §1324(a)(1)(A). *See* Doc 93-Pg 74-84. Section 13 largely traces §1324(a)'s language, making it a state-law crime to conceal, harbor, shield, encourage, induce, or transport aliens in a manner that facilitates their continued unlawful presence in the United States. *See* ALA. CODE §31-13-13(a). The District Court observed, however, that there are four differences between these provisions:

- (1) Section 13(a)(2) prohibits inducing unlawfully present aliens to enter "this state," while §1324(a)(1)(A)(i) prohibits inducing them to come to, enter, or reside in "the United States."
- (2) Section 13(a)(3) has a sentence, not found in §1324(a), specifying that it is a crime for someone to conspire to be transported in furtherance of his or her unlawful presence.

- (3) Section 13(a)(4) specifies that harboring includes “entering into a rental agreement ... with an alien to provide accommodations,” while §1324 has no subsection making that specification.
- (4) Unlike the federal prohibition, Section 13(a) has does not have the exception, found in §1324(a)(1)(C), that allows certain religious organizations to “invite, call, allow, or enable” unlawfully present aliens “to perform the vocation of a minister or missionary.”

Several of these purported differences are, at most, simply clarifications of what the federal statute means. Nonetheless, because of these distinctions, the District Court concluded that Section 13 “represents a significant departure from homogeneity, which stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Doc 93-Pg 84 (internal quotation marks omitted). And it preliminarily enjoined Section 13 in its entirety.

That injunction should not have issued for two reasons.

1. Section 13 need not be perfectly congruent with its federal counterpart.

First, Section 13(a)’s lack of perfect symmetry with §1324(a)(1)(A) does not impliedly preempt it. A State’s decision to prohibit persons from acting as accessories to those who are violating the law is “a classic exercise of its police power” to which the presumption against preemption applies. *Flores*, 188 P.3d at 711-12. A “mere difference between state and federal law is not conflict.” *Ariz. Contractors Ass’n*, 534 F.Supp.2d at 1053. No federal statute purports to prevent States from taking these actions. There is no indication that the differences

between the state provision and §1324(a)(1)(A) are so dramatic that they will “directly interfere[] with the operation of the federal program.” *Whiting*, 131 S.Ct. at 1983 (plurality opinion).

2. *In the very least, the District Court should have severed the offending provisions.*

Second, even if the differences between Section 13 and §1324(a)(1)(A) stood as obstacles to Congress’s goals, the District Court’s preliminarily injunction would be overbroad in the very least. Although the bulk of Section 13 overlaps perfectly with §1324(a)(1)(A), the District Court enjoined the entire provision. But a court should not “nullify more of a legislature’s work than is necessary, for we know that [a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.” *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329, 126 S.Ct. 961, 967 (2006) (internal quotation marks omitted). “Accordingly, the normal rule is that partial, rather than facial, invalidation is the required course, such that a statute may be ... declared invalid to the extent that it reaches too far, but otherwise left intact.” *Id.* (internal quotation marks omitted). Rather than striking down an entire statute, the court must “sever its problematic portions while leaving the remainder intact” and “enjoin only the unconstitutional applications of a statute while leaving other applications in force.” *Id.*

Those principles required a narrower injunction here. If the District Court was right about those four provisions being problematic, it should have severed and enjoined three of them: all of Section 13(a)(2); all of Section 13(a)(4); and the last sentence in Section 13(a)(3). At that point, the remainder—consisting of the entirety of Section 13(a)(1), which prohibits harboring, and the first sentence of Section 13(a)(3), which prohibits transporting aliens in furtherance of their unlawful presence—would have had an effective and plainly legitimate sweep. The only remaining discrepancy would have been in Section 13’s failure to set out the narrow defense for religious groups found in §1324(a)(1)(C). And the right way to correct that problem would have been for the Court to “enjoin only [that] unconstitutional application[] . . . while leaving other applications in force.” *Ayotte*, 546 U.S. at 329. If this Court does not hold Section 13 facially valid as written, it should at least order the District Court to narrow the injunction in this way.

B. IRCA does not preempt the Act’s employment provisions.

The District Court also erred when it held that federal law preempts all three of the employment provisions—Section 11(a), Section 16, and Section 17. In light of *DeCanas*, the United States could not and did not challenge these provisions on the same far-reaching theory it mounted against the rest of the statute. It instead focused on the terms of the Immigration Reform and Control Act, the statute Con-

gress passed after *DeCanas*. In IRCA, Congress supplemented state efforts like California's and prohibited the employment of unauthorized aliens as a matter of federal law. *See* 8 U.S.C. §1324a. Congress set out numerous sanctions, including civil and criminal penalties, that would be imposed on employers violating the prohibition. At the same time, Congress made clear that it intended to preempt certain state laws regulating the employment of unauthorized aliens, including the California provisions in *DeCanas*. *DeCanas* had recognized that States have “broad authority under their police powers” to regulate the employment relationship and thus that those laws would not be preempted unless the States’ “complete ouster” was “the clear and manifest purpose of Congress.” 424 U.S. at 357. Congress thus made its preemptive intent clear through the following express-preemption provision:

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

8 U.S.C. §1324a(h)(2).

The Alabama Legislature crafted these three provisions to operate within the constraints set by this preemption clause. With Section 11(a), the Legislature imposed sanctions not on “those who employ” unauthorized aliens, *id.*, but rather the unauthorized aliens themselves. *See* ALA. CODE §31-13-11(a). And with Sections 16 and 17, the Legislature sought to foster the policies underlying the

employment prohibition through means other than “sanctions”: by specifying that employers cannot claim the benefit of a tax deduction for wages of unauthorized aliens in the case of Section 16, and by creating a private cause of action for compensatory-damages for persons who cannot get jobs because unauthorized aliens are holding them in the case of Section 17. *See id.* §§31-13-16 & -17. The United States nevertheless contended, and the District Court agreed, that IRCA preempts all three of these provisions. As explained below, on each of those points the District Court misinterpreted IRCA.

1. IRCA does not impliedly preempt Section 11(a).

Arizona has a provision almost exactly like Section 11(a), and the District Court here reiterated the Ninth Circuit’s erroneous conclusion that IRCA impliedly preempts state-law sanctions against employees. *See Arizona*, 641 F. 3d at 357-60; Doc 93-Pg 37-52. The Supreme Court will shortly be considering, and should reject, the Ninth Circuit’s conclusion, for it is inconsistent with §1324a(h)(2)’s language and the presumption against preemption.

The District Court recognized that no IRCA provision expressly preempts Section 11(a). The Court also acknowledged that “[b]ecause the power to regulate the employment of aliens not authorized to work is ‘within the mainstream’ of the states’ historic police power, a presumption against preemption applies.” Doc 93-Pg 37 (citing *DeCanas*, 424 U.S. at 356). The Court nevertheless concluded that

“the clear and manifest purpose of Congress was to” supersede “Alabama’s authority to enact H.B. 56 § 11.” *Id.* at 44-45. But neither basis the Court offered for that conclusion establishes that this was the case.

a. IRCA’s text does not preempt sanctions against employees.

First, the fact that IRCA’s text imposes, as the District Court put it, a “detailed scheme of civil and criminal sanctions against *employers*, not *employees*,” Doc 93-Pg 39, does not establish that Congress wanted to preclude States from imposing their own set of employee sanctions. The omission of federal sanctions against employees just as readily suggests that Congress decided to leave it to States to step into this area if they so wished. Before Congress enacted IRCA, *DeCanas* had reasoned that “Congress’ failure to enact general laws criminalizing knowing employment of illegal aliens” could not “justif[y] an inference of congressional intent to pre-empt all state regulation in the employment area.” 424 U.S. at 361 n.9. Instead, “Congress’ failure to enact such general sanctions” just “reinforce[d] the inference ... that Congress believe[d] this problem does not yet require uniform national rules and is appropriately addressed by the States as a local matter.” *Id.* The same reasoning applies to Congress’s decision not to enact employee-based sanctions. IRCA “contains no language circumscribing state action,” but evidences only a decision to “constrain federal action.” *Whiting*, 131 S.Ct. at 1985.

Nor was the District Court right when it said “[o]ther sections in IRCA” establish evidence of preemptive intent because they “provide affirmative protections to unauthorized alien workers.” Doc 93-Pg 40. Those provisions simply prevent unscrupulous employers from knowingly hiring unauthorized aliens and then requiring them “to post a bond or security, to pay or agree to pay an amount, or otherwise to provide a financial guarantee or indemnity, against any potential liability arising under this section relating to such hiring ... of the individual.” 8 U.S.C. §1324a(g)(1). The fact that Section 1324a(g)(2) requires the employer to return the bond or security to the unauthorized alien simply shows that Congress did not believe that it would be fair to allow employers to steal from their workers. It does not show that Congress wanted to preclude States from deterring unauthorized aliens from taking jobs in the first place.

b. IRCA’s legislative history does not establish preemption.

Second, the District Court placed too much weight on “[t]he legislative history of IRCA.” Doc. 93-Pg 41. “Congress’s authoritative statement is the statutory text, not the legislative history.” *Whiting*, 131 S.Ct. at 1980 (internal quotation marks omitted). And IRCA’s legislative history cannot overcome the presumption against preemption in any event.

The legislative history says nothing, and certainly nothing clear, about Congress’s intent regarding States’ ability to regulate in this area. To be sure, the

history establishes that Congress considered and rejected various “proposal[s] that aliens be fined or detained as a deterrence to illegal immigration,” in part because some members believed that these proposals ““would serve no useful purpose.”” Doc 93-Pg 42 (citations omitted). But that suggests only that Congress decided not to impose *federal* restrictions, not that it intended to preempt state efforts. Of similar effect are statements in the House Report that employer-based sanctions were the “most practical and cost-effective” and the most “humane, credible and effective way to respond to the large-scale influx of undocumented aliens.” H.R. Rep. No. 99-682(I), *reprinted in* 1986 U.S.C.C.A.N. 5650, 5653. Those statements hardly declare that Congress precluded States, willing to take on the extra “cost[s]” of doing so, from adopting a different course.

That conclusion cannot change based on an official’s committee-hearing testimony “that the INS would not attempt to control employment during deportation proceedings” because the INS did not “expect the individual to starve in the United States while exhausting both the administrative and judicial roads the [INA] gives him.” Doc 93-Pg 43. That statement suggests only that the INS believed it would be appropriate not to remove unauthorized aliens from their jobs during deportation proceedings—not that States could not make the taking of such a job illegal at the outset. IRCA prohibits employment of unauthorized aliens in any event, so federal law envisions that they will not be able to make a living. And if

the federal government authorizes aliens to work during those proceedings, Section 11(a) will not prohibit them from doing so. That is so because Section 11(a) defines “unauthorized alien” as “[a]n alien who is not authorized to work in the United States as defined in 8 U.S.C. §1324a(h)(3),” *see* ALA. CODE §31-13-11(a), and that federal definition excludes from the definition of “unauthorized alien” any person “authorized to be so employed ... by the Attorney General,” *see* 8 U.S.C. §1324a(h)(3).

If the legislative history suggests anything about the States’ ability to enact employee-focused sanctions, it is that Congress made the affirmative choice *not* to preempt States from doing so. The history shows that Congress considered imposing federal sanctions on both employers and employees. And to be sure, the history makes clear that Congress consciously chose only the former. But the record also shows that Congress enacted the preemption clause, in §1324a(h)(2), that precluded States *only* from imposing sanctions on employers. Because the issue of employee sanctions was clearly being considered by Congress at the same time, one would expect Congress to have included state sanctions against employees within the express-preemption clause if Congress had wanted to go that far. Its failure to do so is powerful evidence that it consciously chose not to preempt states from using alternative methods to tackle the problem. In the very least, neither the text nor legislative history makes it clear, for presumption-

against-preemption purposes, that Congress intended to preempt States from imposing these sanctions.

2. *IRCA does not preempt Section 16.*

Nor was it proper for the District Court to preliminarily enjoin Section 16. Section 16(a) modifies Alabama’s tax structure to specify that money paid to unauthorized workers is not a deductible expense for state income-tax purposes. ALA. CODE §31-13-16(a). Subsection (b), in turn, imposes a penalty on any employer who wrongly tries to take an income-tax deduction for those wages. The District Court held that Section 16(a) is a state law “imposing civil ... sanctions” for employing unauthorized aliens and is therefore expressly preempted by §1324a(h)(2). But the presumption against preemption dictates that “when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.” *Altria Group*, 555 U.S. at 77 (internal quotation marks omitted). And the District Court’s reading of the word “sanction” does not comport with that principle.

It is hardly clear that “laws imposing civil ... sanctions” include laws defining deductible expenses for income-tax purposes. “A sanction is generally considered a ‘penalty or coercive measure,’ such as a punishment for a criminal act or a civil fine for a statutory or regulatory violation.” *Balbuena v. IDR Realty*, 845 N.E.2d 1246, 1255-56 (N.Y. 2006) (citations omitted). That definition is not a

good fit with provisions that merely define what expenses businesses may deduct. The “creation of tax deductions is an exercise of legislative grace under which no substantive rights may vest.” *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1085 (11th Cir. 2004). A State’s failure to designate an item as deductible thus imposes no “sanction,” but simply declines to *reward* a taxpayer for the conduct at issue. If Section 16(a) establishes a sanction, then taxpayers who decide to give money to their children rather than making tax-deductible charitable donations are being “sanctioned” for their choice. That is not what “sanction” means in common parlance, so the presumption against preemption means §1324a(h)(2) cannot extend this far.

IRCA’s structure reinforces this conclusion. Congress preempted state “sanctions” in §1324a(h)(2) because it was enacting a comprehensive set of federal ones. Yet the “sanctions” in IRCA involve criminal punishment or civil penalties imposed directly by the Government. *See* 8 U.S.C. §§1324a(e) & (f). Thus, as the Supreme Court noted in *Whiting*, §1324a(h)(2) was designed to preempt “state laws imposing civil fines for the employment of unauthorized workers like the one [the Court] upheld in *DeCanas*.” 131 S.Ct. at 1975. Because the presumption against preemption requires a narrow reading, IRCA’s preemption clause does not reach laws like Section 16(a).

3. *IRCA does not preempt Section 17.*

Nor should the District Court have preliminarily enjoined Section 17. Section 17(a) makes it a “discriminatory practice” for an employer to fire or fail to hire an authorized employee while knowingly retaining or hiring an unauthorized alien. *See* ALA. CODE §31-13-17(a). Subsection (b), in turn, gives authorized employees a private right of action, for “compensatory relief,” against employers who engage in that practice. The District Court concluded that this provision imposes a “sanction” that §1324a(h)(2) expressly preempts. Doc. 93-Pg 90-97. But on this point, the District Court misinterpreted Section 17 and again read §1324a(h)(2) more broadly than the presumption against preemption allows.

Section 17 does not impose a “sanction” on employers in the ordinary sense of that term. It does not expose them to criminal punishment or civil penalties, but instead compensates private individuals for their losses. Numerous courts have held that “sanctions” under §1324a(h)(2) do not include compensatory remedies. *See Madeira v. Affordable Housing Found.*, 469 F.3d 219, 239-40 (2d Cir. 2006); *Jie v. Liang Tai Knitwear*, 107 Cal.Rptr.2d 682, 690 n.7 (Cal. Ct. App. 2001); *Mendoza v. Zirkle Fruit Co.*, No. CS-00-3024-FVS, 2000 WL 33225470, at *11 (E.D. Wash. Sept. 27, 2000), *rev'd on other grounds*, 301 F.3d 1163 (9th Cir. 2002). Although a Tenth Circuit panel has held that a compensatory cause of action amounts to a “sanction,” one judge on that panel dissented. *See Chamber of*

Commerce v. Edmondson, 594 F.3d 742, 765 (10th Cir. 2010); *id.* at 777 (Hartz, J., dissenting in part). In light of the presumption against preemption, the dissenting judge was right.

While expressing agreement with the Tenth Circuit majority on that point, the District Court simultaneously acknowledged that Section 17 might not be preempted if it “compensate[d] *qualified* employees and applicants for discrimination based on their citizenship and/or authorized alien status.” Doc 93-Pg 96 (emphasis added). But the Court said that in its view, Section 17 allows a plaintiff to sue any employer that does not hire him, even if he is not qualified for a job with that employer, simply because the employer hires an unauthorized alien instead. *Id.* at 95-96. On that rationale, the Court reasoned that Section 17 is not truly compensation for discrimination, but rather simply a sanction for employing unauthorized aliens.

That was a misreading of Section 17 for three reasons. First, Section 17(a) calls the prohibited act a “discriminatory practice.” ALA. CODE §31-13-17(a). That language suggests that the employee must be qualified for the job because unlawful employment “discrimination,” in the ordinary sense of that word, generally involves adverse actions taken against employees who are otherwise qualified. Second, Section 17(b) confirms that the plaintiff must be qualified for the job because “[a]ny recovery under this subsection shall be limited to compensatory

relief.” *Id.* §31-13-17(b). If the plaintiff was not qualified for the job, then there will be nothing to “compensat[e].” Third, to the extent that a statute is susceptible to two constructions,” the “doctrine of constitutional doubt” requires a court to adopt the construction that avoids a serious likelihood that the statute will be held unconstitutional.” *Tilton v. Playboy Entm’t Group*, 554 F.3d 1371, 1376 (11th Cir. 2009). In light of all these considerations, Section 17 is far better read as providing a compensatory remedy to qualified persons whom businesses fire or fail to hire, knowing they will be employing unauthorized aliens instead.

Nor was the District Court right to say the cause of action amounts to a sanction because it does not require the plaintiff to show that the employer discriminated against him based on his citizenship or immigration status. The point of Section 17 is to compensate employees who have no jobs because unauthorized workers have taken them. So even when the employer is not discriminating against plaintiffs based on their citizenship or authorized-worker status *per se*, the plaintiffs still suffer damages for which they can rightly seek compensation. The compensatory remedy is no “sanction” under §1324a(h)(2), and the matter is certainly not clear enough to get the United States past the presumption against preemption. On this and the other employment provisions, the United States is unlikely to prevail, and the preliminarily injunction should not have issued.

Each step of the analysis thus points to a common conclusion: the Constitution and Congress have left States ample room to pass laws like those at issue here. That conclusion should end the matter in the courts.

The question whether laws like HB56 are good policy, on the other hand, should be relegated to a different forum. In Alabama and elsewhere, there has been a vigorous, ongoing political debate about the wisdom of these laws. That debate should be allowed to continue. The Administration has premised this lawsuit on the assumption that courts, rather than the political branches, are the proper places to make these policy choices. But our federalism is built on a different premise. It is “the job of the states themselves, acting through democratic processes,” both to enact laws that serve the public and to make any revisions that later become appropriate. *Deen v. Egleston*, 597 F.3d 1223, 1230 (11th Cir. 2010). If the Administration wishes to effect change, it should go to Congress and seek reform of the federal immigration system, or it should join those who are asking the Legislature to revise the law. This lawsuit was not the answer.

CONCLUSION

In No. 11-14532, this Court should affirm the District Court’s judgment declining to enjoin Sections 10, 12, 18, 27, 28, and 30. In No. 11-14674, this Court should reverse the injunction against Sections 11(a), 13, 16, and 17.

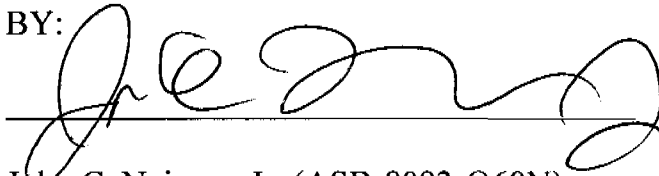
CONCLUSION

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BY:

A handwritten signature in black ink, appearing to read 'John C. Neiman, Jr.', written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

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 16,334 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.



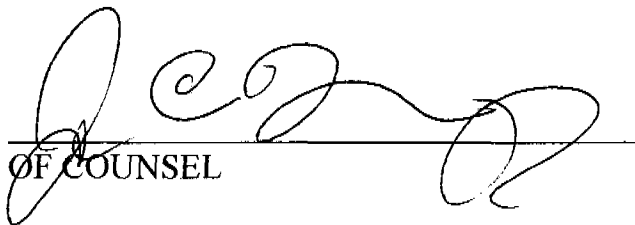
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On December 27, 2011, I dispatched this brief to Federal Express for delivery to the Court within three business days. I also uploaded this brief in electronic format to the Court's website. And I served the following attorneys for the United States by electronic mail:

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