

United States Court of Appeals
for the
Eleventh Circuit

CASE NO. 11-14532-CC
D.C. Docket No. 2:11-cv-2746-SLB
UNITED STATES OF AMERICA,

Plaintiffs/Appellants,

v.

STATE OF ALABAMA, et al.,

Defendants/Appellees.

CASE NO. 11-14535-CC
D.C. Docket No. 5:11-cv-2484-SLB

HISPANIC INTEREST COALITION OF ALABAMA, et al.,

Plaintiffs/Appellants,

v.

GOVERNOR OF ALABAMA, et al.,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

**BRIEF OF *AMICUS CURIAE* MEMBERS OF CONGRESS
IN SUPPORT OF THE UNITED STATES AND THE
HISPANIC INTEREST COALITION OF ALABAMA**

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Nos. 11-14532 & 11-2746

Hispanic Interest Coalition of Alabama, et al.v. Governor of Alabama, et al.

Nos. 11-14535 & 11-2484

U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**CERTIFICATE OF INTERESTED PARTIES AND
CORPORATE DISCLOSURE STATEMENTS**

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that the below-listed individual *Amici Curiae* members of Congress are non-corporate individuals. To the best of the undersigned's knowledge, the list of persons, firms, and associations contained in the Certificate of Interested Persons filed by the United States, and set forth at pages C-1 through C-5 of the United States' opening brief, and the list contained in the Certificate of Interested Persons filed by the Hispanic Interests Coalition of Alabama, as set forth at pages C-1 through C-14 of the Hispanic Interests Coalition of Alabama's opening brief, are complete and accurate. Those Certificate of Interested Persons are incorporated by reference herein.

In addition, the undersigned lists the following as additional persons who may have an interest in the outcome of this case:

United States of America v.State of Alabama, et al.

Nos. 11-14532 & 11-2746

Hispanic Interest Coalition of Alabama, et al.v. Governor of Alabama, et al.

Nos. 11-14535 & 11-2484

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INTEREST OF THE AMICUS CURIAE

Amici curiae are United States Representatives Joe Baca (CA), Xavier Becerra (CA), Dennis Cardoza (CA), Judy Chu (CA), Yvette Clarke (NY), John Conyers, Jr. (MI), Jim Costa (CA), Ted Deutch (FL), Keith Ellison (MN), Anna Eshoo (CA), Charles Gonzalez (TX), Al Green (TX), Raúl Grijalva (AZ), Luis Gutierrez (IL), Janice Hahn (CA), Rubén Hinojosa (TX), Mike Honda (CA), Steny Hoyer (MD), Jesse L. Jackson, Jr. (IL), Zoe Lofgren (CA), Carolyn Maloney (NY), Jim McDermott (WA), Gregory Meeks (NY), Gwen Moore (WI), Jim Moran (VA), Grace Napolitano (CA), Eleanor Holmes Norton (DC), Pedro Pierluisi (PR), Jared Polis (CO), Mike Quigley (IL), Charles Rangel (NY), Silvestre Reyes (TX), Lucille Roybal-Allard (CA), Gregorio Sablan (MP), Janice Schakowsky (IL), José Serrano (NY), Terri Sewell (AL), Albio Sires (NJ), and Nydia Velázquez (NY).

Amici are all currently serving in the One Hundred Twelfth Congress.

Amici curiae are dedicated to preserving a consistent, uniform approach to the regulation of immigration in the Nation, as required by the Constitution. In particular, *amici* believe that the doctrine of federal preemption prevents states from encroaching upon immigration regulation, an area of the law explicitly reserved to the federal government. As members of Congress, with the authority and responsibility to enact laws governing immigration, *amici* are aware of the importance of consistent enforcement of those laws throughout the Nation.

Additionally, *amici* are concerned about the deleterious effects on foreign relations that could well arise should individual states enact their own immigration schemes, and the burden that laws such as Alabama’s H.B. 56 will place on already taxed federal resources. *See* Beason–Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Act 535 (“H.B. 56”).

Further, as elected federal officials, *amici* have an interest in protecting the Constitutional rights of their constituents and the American people in general. *Amici* are concerned that H.B. 56 and similar laws will deprive Alabama residents of the basic civil liberties and rights guaranteed to them under the Constitution.¹

STATEMENT OF THE ISSUES

(1) Whether the district court erred in holding that Appellants were not likely to prevail as a matter of law with respect to whether certain provisions of Alabama’s H.B. 56 are preempted by federal law.

(2) Whether the district court erred in failing to find irreparable harm where H.B. 56 will violate numerous Constitutional rights of Alabama residents.

¹ Pursuant to 11th Cir. R. 29, undersigned counsel states that all parties consented to the filing of this brief. No party’s counsel authored this brief in whole or in part and no person – other than the *amici curiae*, its members or its counsel – contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Amici urge this Court to enjoin sections 10, 12, 18, 27, 28, and 30 of H.B. 56. All of these sections are impliedly preempted by federal law and Congressional power and, if allowed to stand, will create an unworkable conflict between federal and state enforcement schemes and priorities. Such a conflict will frustrate the orderly enforcement of federal immigration law and could jeopardize this Nation's relationships with its closest allies.

ARGUMENT

- I. Sections 10, 12, 18, 27, 28 and 30 of H.B. 56 Are Preempted by Federal Law**
 - A. The Supremacy Clause Makes Clear the Importance of the Federal Preemption Doctrine and Its Application to Immigration Law**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2 (the "Supremacy Clause").

The Supremacy Clause serves a critical purpose in delineating the relationship between the powers of the federal government and those of the states. The Framers understood that it was vital to cordon off certain areas of law as the province of the federal government in order to ensure consistency throughout the Nation with respect to those issues that implicate national interests. The Framers,

in describing how the Supremacy Clause would operate, explained its importance, and that of preemption, to the effective functioning of the federal government:

This exclusive delegation . . . would exist... where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

Federalist No. 32, 194 (Alexander Hamilton) in *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 1961) (emphasis in original).

As a prime example of an area where the Constitution “granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*,” Alexander Hamilton identified Article I, Section 8, Clause 4, the

clause which declares that Congress shall have power “to establish an UNIFORM RULE of naturalization throughout the United States.” This must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.

Id. Similarly, James Madison wrote that

The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions...The new Constitution has accordingly, with great propriety, made provision against them, and all other proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

Federalist No. 42, 265-67 (James Madison). The Framers intended the Constitution’s grant of power to Congress to establish a “uniform Rule of Naturalization” to preempt state authority on matters of naturalization and immigration. U.S. Const. art. I, § 8, cl. 4.

The Supreme Court has repeatedly recognized Congress’s power to create an exclusive and “uniform” scheme for naturalization and immigration. *See, e.g., De Canas v. Bica*, 424 U.S. 351, 354 (1976) (“Power to regulate immigration is unquestionably *exclusively* a federal power”). The Court made clear in *Takahashi v. Fish & Game Commission* that

The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. *State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.*

334 U.S. 410, 419 (1948) (internal citations omitted) (emphasis added); *see also*

Hines v. Davidowitz, 312 U.S. 52, 66 (1941) (“[S]pecialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider

in discharging its constitutional duty ‘To establish an Uniform Rule of Naturalization.’”).²

B. The History of Federal Immigration Law Demonstrates that Immigration Is a Field of Law that Congress Intends to Occupy Exclusively

Given this history, it is unsurprising that Congress – and not the states – has legislated heavily in the field of immigration. The parties and the district court below described the history and scope of federal immigration legislation, and it is unnecessary to repeat that history here. *See, e.g., United States v. Alabama*, No. 11-2746, 2011 WL 4469941 *3-8 (N.D. Ala. Sept. 28, 2011), *citing Lozano v. City of Hazleton*, 620 F.3d 170 (3d Cir. 2010), *vacated and remanded on other grounds*, No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011); Appellant (US) Br. at 3-12; Appellant (HICA) Br. at 15-16, 20-21.

² In arguing that Congress has exclusive authority to regulate immigration, *amici* recognize that there are certain narrow exceptions pursuant to which states can pass laws that affect immigrants or touch on immigration. Those exceptions, however, are limited to areas of the law that Congress has explicitly reserved for the states and that do not conflict with Congress’s powers concerning naturalization and immigration. *See, e.g., De Canas*, 424 U.S. at 361-62 (allowing state regulation of employment laws that affect immigrants, after finding that “Congress intends that States may, to the extent consistent with federal law, regulate the employment of illegal aliens”); *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1978 (2011) (allowing state regulation of business licenses on the basis of immigration status of employees because IIRCA specifically preserves state authority to impose sanctions “through licensing and similar laws”). These narrow exceptions are inapplicable to H.B. 56, which, as explained in this and Appellants’ briefs, is far reaching and intended to remove undocumented immigrants from Alabama.

The myriad policies and priorities inherent in United States immigration are primarily embodied in the Immigration and Nationality Act (“INA”), as amended. *See* 8 U.S.C. § 1101 *et seq.* (2011). Congress has been legislating immigration-related issues for over two hundred years: the first national immigration law was the Naturalization Act of 1790, followed by the Alien and Sedition Acts of 1798. *See* 1 Stat. 103; 1 Stat. 566-59. Since 1790, Congress has passed no fewer than *ninety* laws regulating immigrants and the immigration process, in a constant effort to balance all of the Nation’s considerable interests implicated by immigration. *See* Ira J. Kurzban, IMMIGRATION LAW SOURCEBOOK (12th ed. 2011) at 3-29. The interests reflected by these laws include sustaining the Nation’s unique melting-pot culture and reaping the benefits of diversity, maintaining control over national borders, giving refuge, adhering to treaty obligations respecting human rights, regulating the immigration process, foreign policy and diplomatic issues, and national security issues. *Id.* The breadth of the Nation’s concerns in regulating and implementing immigration law and procedure explain why the Framers left the matter to the federal government, and not the several states.

The INA is a “comprehensive federal statutory scheme for regulation of immigration and naturalization,” which Congress periodically reviews and amends. *See Chamber of Commerce of United States v. Whiting*, 131 S. Ct. 1968, 1973 (2011). For example, the Department of Homeland Security Appropriations Act of

2010 extended visas in certain categories, permitted spouse beneficiaries of green card petitions to obtain benefits even if the petitioning spouse dies, and provided similar relief for spouses and children in all family- and employment-based preference categories, where the petitioner dies while the petition is pending. *See* Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, Title I, 123 Stat. 2142 (2009). More pertinently here, that Act directed DHS to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.” *Id.* Clearly H.B. 56, which, for instance, requires Alabama police and other officials to check all detainees’ and arrestees’ immigration status with the federal government, will create logistical and resource hurdles and frustrate that Congressionally-mandated priority.

Given the express Constitutional grant of power, immigration-related issues are some of the most significant areas of law on which the federal government acts. Discussion of immigration law stands at the forefront in Congressional politics and is traditionally a significant issue in federal elections. *See, e.g.,* David Leonhardt, *The Border and the Ballot Box*, N.Y. TIMES, Mar. 2, 2008, at WK1 (“[I]mmigration has a fantastically complicated political history in the United States . . . immigration has always roiled large sections of the electorate.”). Congress has continuously passed immigration enforcement laws in the last decade and a half following the enactment of the Illegal Immigration Reform and Immigrant

Responsibility Act of 1996.³ This year alone, Members of Congress have proposed over three hundred bills and resolutions relating to the subject of immigration, showing that Congress continues to exercise its broad powers and responsibility over immigration.⁴

Federal immigration law reflects the federal government's evolving policies regarding all aspects of immigration, and these policies must be consistent nationwide. Permitting the states to legislate in this area to protect their own interests, at cross-purposes with national and foreign policy interests, frustrates the federal government's ability to prioritize its enforcement efforts on aliens convicted of serious crimes and immigration offenses and destroys certainty in the application of law to immigrants.

C. The District Court Misapplied the Federal Preemption Standard

As the district court acknowledged, it is settled that

every preemption analysis “must be guided by two cornerstones.” The first is that “the purpose of Congress is the *ultimate* touchstone.” The second is that a presumption against preemption applies when “Congress has legislated . . . in a field which the States have traditionally occupied.”

³ For example, in 2002 Congress passed the Homeland Security Act of 2002 abolishing the Immigration and Naturalization Service. Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (2002). As a result, Congress assigned the administration and enforcement of the Immigration and Nationality Act primarily to the Secretary of Homeland Security. 8 U.S.C. § 1103.

⁴ <http://www.govtrack.us/congress/subjects.xpd?type=crs&term=Immigration>

Alabama, 2011 WL 4469941 *12, citing *Wyeth v Levine*, 555 U.S. 555, 565 (2009) (internal citations omitted) (emphasis added). While the district court correctly articulated this standard, it failed to apply it properly and to honor the fact that the “purpose of Congress is the *ultimate* touchstone.”

The district court held that those areas in which federal law preempts state law with respect to the 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.” *Alabama*, 2011 WL 4469941 *39, citing *De Canas*, 424 U.S. at 355; *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (“The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.”).

While the district court acknowledged the correct standard, it applied that standard incorrectly. The court’s primary (though not exclusive) error is that it failed to take into consideration the purpose behind H.B. 56. The Alabama legislature passed H.B. 56 explicitly for the purpose of controlling the entrance of immigrants into Alabama, forcing immigrants to leave Alabama, and regulating

which immigrants may remain in Alabama. Indeed, the preamble of the bill contends that it was being enacted as a law

[r]elating to illegal immigration . . . to prohibit aliens unlawfully present in the United States from receiving any state or local public benefits . . . from seeking employment in this state and to provide penalties . . . to require the verification of the legal status of persons by law enforcement under certain circumstances . . . to require law enforcement to detain any alien whose lawful immigration status cannot be verified . . .

Preamble to H.B. 56. Indeed, one of the bill’s sponsors made clear that H.B. 56 “attacks every aspect of an illegal alien’s life” and “is designed to make it difficult for them to live here so they will deport themselves.” Statement of Rep. Hammon, *quoted in* Conor Friedersdorf, *Why Alabama’s Immigration Bill is Bad for Citizens*, THE ATLANTIC, June 13, 2011, <http://www.theatlantic.com/politics/archive/2011/6/why-alabamas-immigration-bill-is-bad-for-citizens/240297>. The purpose and effect of H.B. 56 as a whole, therefore, is squarely within an area of law reserved for Congress. It is with this background that each of the individual sections of H.B. 56 should be measured.

The district court acknowledged this background but explicitly chose to ignore it:

As a matter of historical fact, anti-illegal immigrant sentiment and frustration with federal immigration policies has driven the enactment of H.B. 56. *Nevertheless, any determination of whether H.B. 56 is preempted as a state regulation of immigration must be based on the language of the Act alone and not the motivation for its enactment.*

Hispanic Interest Coalition of Alabama v. Bentley, No. 11-2484, 2011 WL 5516953 *17(N.D. Ala. Sept. 28, 2011) (emphasis added). This was an error; the court should have considered the bill’s purpose. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (“Just as the inevitable effect of a statute on its face may render it unconstitutional, a statute’s stated purposes may also be considered.”).

The district court also erred in its pinched and improper reading of preemption law. The district court incorrectly held that even *implied* preemption can only occur where Congress has made clear that it intends to act exclusively. *Alabama*, 2011 WL 4469941 *54. The court misread *De Canas*, which focuses not on whether Congress has clearly stated that it intends to occupy an area but rather on whether there exists “affirmative evidence . . . that Congress sanctioned concurrent state legislation on the subject covered by the challenged state law.” 424 U.S. at 363; *see also Toll v. Moreno*, 458 U.S. 1, 17 (1982). No such affirmative evidence exists here.

Based on these analytical errors, the district court failed to enjoin sections of H.B. 56 that are preempted; and we respectfully join Appellants in asking that this Court reverse the district court’s decision with respect to sections 10, 12, 18, 27, 28, and 30.

D. The District Court Erred in Declining to Enjoin Certain Sections of H.B. 56

1. H.B. 56 § 10 Infringes on the Federal Government’s Exclusive Role in Determining Foreign Policy

The district court erred in holding that Appellants were not likely to succeed on their preemption claim against H.B. 56 section 10. Section 10(a) states: “In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), and the person is an alien unlawfully present in the United States.” Alabama’s addition of state penalties for a federal law violation – even where the parameters for proving legal status are similar to the federal scheme – intrude into a realm reserved exclusively for Congress. *See* Appellant (US) Br. at 15; Appellant (HICA) Br. at 13.

By imposing conditions on and criminalizing presence in the United States, section 10 effectively determines which non-citizens can live in Alabama. It therefore impermissibly regulates immigration status, which is the sole province of the federal government. *See* Appellant (HICA) Br. at 14 (*citing De Canas*, 424 U.S. at 354-55).

Reserving to Congress the right to impose penalties for failing to register or failing to carry documents serves to safeguard the federal government’s exclusive role in foreign relations. As the Supreme Court made clear in *Hines*, Congress

“has provided a standard for alien registration in a single integrated and all-embracing system.” 312 U.S. at 74. In explaining Congress’s intention with respect to a federal registration scheme, the Court noted:

The legislative history of the Act indicates that Congress was trying to steer a middle path, realizing that any registration requirement was a departure from our traditional policy of not treating aliens as a thing apart, but also feeling that the Nation was in need of the type of information to be secured.

Id. at 73-74. The Supreme Court also made clear that subjecting aliens to registration requirements inevitably “affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.” *Id.* at 68.

The Declaration of William J. Burns, Deputy Secretary of State, submitted by the United States, confirms that H.B. 56 threatens to disrupt “uniform foreign policy regarding the treatment of foreign nations” and “risks negative reciprocity of the treatment of U.S. citizens abroad, among other deleterious effects.”

Alabama, 2011 WL 4469941 *17. These “deleterious effects” are demonstrated by the Mexican government’s protests that “the law will threaten the ‘human and civil rights of Mexicans who live in or visit Alabama’ and that it is ‘[in]consistent with the vision of shared responsibility, mutual respect and trust under which the governments of Mexico and the United States have agreed to conduct their bilateral relations.’” Hispanic Interest Coalition of Alabama Preliminary

Injunction Motion at 16, *citing* Mexican Foreign Affairs Ministry, *The Mexican Government Regrets the Enactment of H.B. 56 in Alabama* (June 9, 2011).

The district court acknowledged that “[l]egislation affecting the treatment and movement of another country’s citizens living abroad [such as H.B. 56’s state registration requirements] necessarily touches the foreign relations between the visiting and the host nations.” *Alabama*, 2011 WL 4469941 *17. The court, however, failed to weigh – or, in some cases, even consider – this evidence, all of which supports an injunction.

2. H.B. 56 § 12(a) and H.B. 56 § 18, Requiring State and Local Law Enforcement Officers to Investigate the Immigration Status of Persons They Encounter During Stops and to Detain Those Persons Until Immigration Status Can Be Verified, Are Preempted

Section 12 requires state and local law enforcement officers to investigate the immigration status of persons during traffic stops and other routine police encounters, and section 18 requires police to detain individuals solely for immigration enforcement purposes. Both sections are preempted because they would undermine federal immigration law and consistent national enforcement priorities by impermissibly burdening the federal government. *See* Appellant (US) Br. at 17; Appellant (HICA) Br. at 24.

Requiring police to verify the immigration status of all arrested or detained persons will undoubtedly greatly increase the number of immigration status

determination requests. Because 8 U.S.C. § 1373(c) obligates the federal government to respond to those requests, sections 12 and 18 will burden the federal government, distracting it from its Congressionally-mandated enforcement priorities.⁵

While federal law permits state assistance in enforcement of federal law in *limited* specifically prescribed instances, by allowing states to rely on federal citizenship verification, the federal government will be hampered from executing and enforcing its own statutes if forced to satisfy endless state verification requests. The district court erred in failing to consider this significant burden. *See, e.g., Georgia Latino Alliance for Human Rights v. Deal*, No. 11-1804, 2011 WL 2520752 (N.D. Ga. June 27, 2011) (“This will undermine federal immigration enforcement priorities by vastly increasing the number of immigration queries to the federal government from [the legislating state].”); *United States v. Arizona*, 641 F.3d 339, 351-52 (9th Cir. 2011) (“By imposing mandatory obligations on state and local officers, Arizona interferes with the federal government’s authority to

⁵ Moreover, as the brief for Appellant United States makes clear, the federal database is not the last word on whether an immigrant has or can obtain lawful status in the United States. Appellant (US) Br. at 21. “The fact that an alien is removable does not mean that federal law requires that he or she must be removed from the country.” *Id.* at 5. Indeed, many classes of immigrants who the database might identify as being unlawfully present have claims to lawful admission through asylum status, a petition by a U.S. citizen spouse, or unrecognized citizenship. Federal enforcement priorities may well not focus on such immigrants, even if they are identified by Alabama law enforcement.

implement its priorities and strategies in law enforcement, turning Arizona officers into state-directed DHS agents.”). Because the delegation of federal resources should be left to Congress, sections 12 and 18 of H.B. 56 should be enjoined.

3. H.B. 56 § 27, Which Bars Alabama Courts from Enforcing a Contract, Is Unconstitutional and Preempted

The Contract Clause of the Constitution states that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts” U.S. Const. art. I, § 10, cl. 1. The right to form contracts is guaranteed to *all* persons within the United States. *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 653-54 (5th Cir. 1974), *overruled on other grounds*, *Bhandari v. First Nat. Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987) (“Congress explicitly broadened the language of . . . § 1981 to include ‘all persons’ in order to bring aliens within its coverage.”); *Sagana v. Tenorio*, 384 F.3d 731, 737 (9th Cir. 2004) (“The right to dispose of one’s labor freely by contract is at the heart of the protections afforded by § 1981.”).

By rendering contracts entered into by undocumented workers judicially unenforceable, section 27 effectively denies these workers their constitutional right to enter into contracts. This provision therefore directly conflicts with the Constitution and is preempted by federal law. *See* Appellant (US) Br. at 17; Appellant (HICA) Br. at 38-39.

Denying undocumented aliens the right to form contracts also burdens the unwitting United States citizen (or immigrant in status) who contracts with an undocumented immigrant. That citizen (or immigrant in status) can no longer be assured that he can sue to enforce a contract because the court cannot enforce the contract if it believes that one party had actual or constructive knowledge of the other's undocumented status. The statute's narrow exceptions – for “lodging for one night,” but *not* multi-night hotel stays; “purchase of food to be consumed by the alien,” but *not* catering of events; “transportation of the alien that is intended to facilitate the alien's return to his country of origin,” but *not* domestic flights – demonstrate section 27's broad reach and H.B. 56's potential to affect virtually every aspect of Alabamian's lives.

4. H.B. 56 § 28, Which Requires Schools to Determine the Immigration Status of Its Students, Should Be Enjoined

Section 28 burdens the right of the children of immigrants to a free public education, and therefore violates the Equal Protection Clause. Section 28(a)(1) is mandatory: “Every public elementary and secondary school . . . at the time of enrollment in kindergarten or any grade in such school, *shall determine* whether the student enrolling in public school was born outside the jurisdiction of the United States *or is the child of an alien not lawfully present in the United States.*” H.B. 56 § 28(a) (1) (emphasis added). Section 28, which is not a model of clarity, includes an involved reporting procedure that compels schools to report their students'

citizenship status to the State Board of Education and allows state officials to report that citizenship status to the federal government. *See* H.B. 56 § 28(f). H.B. 56 also imposes penalties – both civil and criminal – for officials who fail to enforce it. *See* H.B. 56 §§ 5 (d) & (f) and 6(b), (d), & (f); Appellant (HICA) Br. at 54-58.

The district court erred when it failed to enjoin section 28. The court ignored settled Supreme Court precedent mandating that a state must demonstrate the furtherance of a substantial state interest before it deprives children access to public primary and secondary education on the basis of immigration status. *Plyler v. Doe*, 457 U.S. 202 (1982). Congress recognized this standard when it passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), Pub. L. No. 104-193, 110 Stat. 2105 (1996), a federal welfare system reform act. PRWORA provides that “[n]othing in this chapter may be construed as addressing alien eligibility for a *basic public education as determined by the Supreme Court of the United States* under *Plyler v. Doe*.” Section 28 contravenes *Plyler* by creating enrollment procedures designed to deter undocumented students, as well as U.S. citizen children with immigrant parents, from securing access to the classroom.⁶ Fear of revealing immigration status will

⁶ Legislative history confirms that keeping these children out of school was the purpose of section 28. For example, H.B. 56’s sponsor in the House, Representative Micky Hammon, described the bill as motivated by the costs of “educat[ing] the children of illegal immigrants” and predicted that H.B. 56 will result in “cost savings for this state.” Similarly, Senator Scott Beason, the bill’s

almost certainly cause children who have a constitutional right to an education to avoid school registration. *See* Appellant (US) Br. at 17; Appellant (HICA) Br. at 53-54.

Alabama cannot show that section 28 “furthers some substantial goal of the State.” *Plyler*, 457 U.S. at 224. The Alabama legislature has explicitly stated the purpose of section 28 is to measure the fiscal impact on the State’s school systems of aliens “not lawfully present.” H.B. 56 § 2. More than twenty years ago, the Supreme Court made clear that “a concern for the preservation of resources standing alone can hardly justify the classification used in allocating these resources.” *Plyler*, 457 U.S. at 227. The Court added: “In terms of educational cost and need . . . undocumented children are basically indistinguishable from legally resident alien children.” *Id.* at 229. Therefore, because section 28 creates an alienage classification, it must withstand strict scrutiny. *See Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (“[C]lassifications by a State that are based on alienage are ‘inherently suspect and subject to close judicial scrutiny.’”) The State of Alabama cannot provide any valid justification for section 28’s classifications or the resulting educational barriers sufficient to justify deterring children from securing

sponsor in the Senate, stated that educating immigrant children and the children of immigrants “is where one of our largest costs come[s] from It’s part of the cost factor. Are the parents here illegally, and if they were not here at all, would there be a cost?” Brian Lyman, *Immigration Law Makes School Officials Uneasy*, THE MONTGOMERY ADVERTISER, June 8, 2011.

constitutionally-mandated access to public education based on their immigration status. *See* Appellant (HICA) Br. at 52-63. Section 28 conflicts with *Plyler* and with PRWORA, is unconstitutional, and should be enjoined.

5. H.B. 56 § 30, Which Prohibits Undocumented Immigrants from Engaging in All Business Transactions with the Government, Is Preempted

Section 30 makes it a felony for an “alien not lawfully present” in the United States to “enter into or attempt to enter into a business transaction with the state or a political subdivision of the state.” H.B. 56 § 30(b). The district court declined to enjoin it, although it acknowledged that the term “business transaction,” “[a]s commonly understood . . . would prohibit *all* commercial contracts between unlawfully-present aliens and the state or one of its political subdivisions.” *Alabama*, 2011 WL 4469941 *59. The district court disregarded this plain-language understanding of the incredibly broad statutory language and asserted that the *true* purpose of section 30 was much more limited: only “to prohibit the state from issuing a license to an unlawfully-present alien.” *Id.* This narrow reading, unsupported by the statute, formed the basis for the court’s conclusion that the section was not preempted, and its ruling that Appellants failed to demonstrate “that Congress has – expressly or implicitly – preempted the power of the states to refuse to license an unlawfully-present alien.” *Id.* at 114.

The district court’s interpretation is plain error. Section 30(a) defines “business transaction” to include

any transaction between a person and the state or a political subdivision of the state, including, *but 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.

H.B. 56 § 30(a) (emphasis added). The district court erred in focusing solely on the three enumerated prohibited transactions and ignoring the breadth of the phrase “any transaction” and the inclusive “including, but not limited to” language. *Alabama*, 2011 WL 4469941 *60, *see, e.g., United States v. Fisher*, 289 F.3d 1329, 1338 (11th Cir. 2002) (“As in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.”); *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (“courts should always begin the process of legislative interpretation, and where they often should end it as well, is with the words of the statutory provision”).

Section 30’s broad prohibition would apply to any attempt by an immigrant to acquire goods or services that are regulated by the state, for example, sanitation, water and sewage services, electric power, obtaining a house number, and

recording a document or engaging in any activity in a probate office.⁷ *See* Appellant (HICA) Br. at 42-43. Section 30 will make it difficult, if not impossible, for immigrants to live in Alabama.

As the result of its broad reach, section 30 flies in the face of federal law that imposes restrictions on discriminating against immigrants by denying access to basic necessities and services based on immigration status. *See, e.g., Leger v. Sailer*, 321 F. Supp. 250 (E.D. Pa. 1970) (law discriminating against aliens by depriving them of the means to secure the necessities of life, including food, clothing, and shelter, constitutes an equal protection violation); *see also* Appellant (HICA) Br. at 42-43. For this reason, section 30 is preempted and should be enjoined.

II. H.B. 56 Violates the Constitutional Rights of a Broad Cross-Section of Alabamians

Amici also write out of great concern for what they see as the substantial likelihood of significant constitutional violations that will flow directly from the implementation and enforcement of H.B. 56. Absent an injunction, Alabamians

⁷ Evidence in the record shows that section 30 is already having its intended effect. For example, undocumented immigrants have been obstructed in their attempts to procure such basic necessities as water. *See* 5:11-cv-02484-SLB, Dkt. 143-4 (Declaration of Dominique D. Nong, attaching notice informing customers that, in light of new immigration laws, proof of lawful residence would be required in order to retain water service).

will be faced with a law that will violate their rights under the First, Fourth, Sixth, and Fourteenth Amendments to the United States Constitution.

A. H.B. 56 Violates the Guarantee of Equal Protection Under the Law for Lawfully-Present Alabamians

1. Section 28 Harms Children by Discouraging Them from Attending School and Violates the Equal Protection Clause

Numerous children of immigrants who are lawfully in Alabama (including United States citizens) will be harmed by section 28. They will face the burden of proving their immigration status and that of their parents to school officials and the fear (and the risk) that their family members will be reported to state and federal authorities. We understand that section 28 has *already* had a chilling effect on school attendance in Alabama. In fact, within days after the signing of H.B. 56 into law, thousands of Alabama children failed to show up for school and thousands more called the emergency hotlines established to help people affected by the law. *See, e.g., Campbell Robertson, Critics See ‘Chilling Effect’ in Alabama Immigration Law*, N.Y. TIMES, Oct. 28, 2011, at A14 (“daily absences by Hispanic students ranged as high as 5,143, or 15 percent of the Hispanic student population”). The mere specter of the invasive and discriminatory mandatory reporting has created a threatening and hostile learning environment and has made students from immigrant families feel inferior and unwelcome. Section 28 also harms parents, who have to choose between giving their children access to public

education and the fear that they will be taken from their children and detained by state authorities for immigration violations.

The Supreme Court has made clear that denying or chilling innocent children’s access to public education “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.” *Plyler*, 457 at 223-24. Because the purpose and inevitable result of section 28 will be to exclude children of immigrants from the classroom based on alienage – either theirs or that of their parents – it violates the Equal Protection Clause and must be enjoined.

B. H.B. 56 Violates Alabamians’ First Amendment Right to Freedom of Expression

Section 11(a) makes it unlawful for an “unauthorized alien” to “apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor. . . .” In addition, sections 11(f) and (g) make it unlawful for a person in a vehicle “to attempt to hire or hire” day laborers or for a person to enter a car “in order to be hired.” H.B. 56 §§ 11(f) & (g). In effect, H.B. 56 makes it a state crime for people without lawful immigration status to work or seek work in Alabama. Solicitation, including solicitation for financial gain, however, is protected activity under the First Amendment. *See, e.g., Vill. of*

Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 628-32 (1980); *Smith v. City of Ft. Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999). Furthermore, section 11 is a content-based restriction as it singles out solicitation for work purposes only.

By criminalizing work-related communications in a traditional public forum, section 11 constitutes an impermissible content-based regulation of speech. As a result, it is subject to strict scrutiny and must be shown to serve a compelling state interest using the least restrictive means. *See, e.g., Sorrell*, 131 S. Ct. at 2659, 2664 (2011); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 428-29 (1993). The State cannot show a compelling interest for imposing these restrictions.

Section 11 will cause irreparable harm to individuals seeking work in Alabama, by subjecting them to criminal sanctions for merely *talking* about employment. Furthermore, section 11 may have a profound chilling effect on the exercise of free speech by day laborers across the state and on the expressive rights of countless others who solicit work in public forums throughout Alabama.

C. Sections 10, 11, and 13 of H.B. 56 Violate Alabamians' Sixth Amendment Rights

Amici are also very concerned because H.B. 56 appears dramatically and unconstitutionally to dictate the manner in which evidence is presented and guilt is

determined for the new state crimes it creates. Alabamians will face the very real threat of unlawful criminal prosecutions if portions of H.B. 56 remain good law.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. It further "prohibits the admission of testimonial hearsay unless the declarant is unavailable and there was a prior opportunity for cross-examination." *United States v. Mendez*, 514 F.3d 1035, 1043 (10th Cir. 2008) (citing *Crawford v. Washington*, 541 U.S. 36, 68 (2004)). In sections 10, 11, and 13 of H.B. 56, the Alabama legislature has created a system in which the prosecution can introduce immigration status verifications from the Department of Homeland Security's Law Enforcement Support Center ("LESC") as the sole evidence of a defendant's unlawful immigration status. See H.B. 56 §§ 10(e), 11(e), & 13(h). Defendants will not be permitted to introduce contradictory evidence, which may well exist, to counter the status verification. See Appellant (HICA) Br. at 21-22 (discussing the unreliability of LESC). This also blatantly violates the Confrontation Clause as it mandates that such verifications, which are clearly testimonial within the meaning of that clause, *Melendez-Diaz v. Mass.*, 129 S. Ct. 2527, 2531 (2009), be admitted without an opportunity for cross-examination. As such, sections 10, 11, and 13 violate the Sixth Amendment and should be enjoined.

D. Sections 12 and 18 Violate the Fourth Amendment

Amici are also very concerned that H.B. 56 will create significant problems in the criminal justice system with regard to improper detentions. Section 12(a) mandates that, “[u]pon any lawful stop, detention or arrest,” law enforcement officers “shall . . . determine the citizenship and immigration status” of a suspect where reasonable suspicion of unlawful presence exists. (Emphasis added.) As a matter of logic and physics, section 12(a) facially violates the Fourth Amendment and should be struck down as unconstitutional.

It is black letter law that “reasonable suspicion” stops “must last no longer than necessary to effectuate the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500 (1983); *see also Arizona v. Johnson*, 555 U.S. 323, 333-34 (2009) (allowing an officer to question a person who has been lawfully stopped on an unrelated issue, but *only* if such questioning does not unreasonably prolong the stop); *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005) (same). But the plain language of section 12(a) demonstrates that the Alabama legislature intended mandatory immigration checks at routine stops, with mandatory and indefinite detention pending the results of those inquiries. H.B. 56 § 12(a). Officers are then required to contact the federal government in order to verify a person’s status, a process that can take up to several days. Section 12(a) therefore mandates that

stops will be prolonged well past the time needed to effectuate the original purpose of the stop because officials are required to verify immigration status.

Moreover, section 12(a) applies to all stops *without requiring any probable cause of criminal wrongdoing*. Prolonging stops based solely on “reasonable suspicion” of undocumented immigration status (a civil violation) violates the Fourth Amendment. *See Florida v. Royer*, 460 U.S. at 500; *Arizona v. Johnson*, 555 U.S. at 333-34. Therefore, by requiring officers to verify an individual’s immigration status upon such stops, section 12 will result in Alabama law enforcement persistently and systemically violating the Fourth Amendment.

Last, section 18 mandates that police detain undocumented aliens who are arrested for driving without a license. HB 56 § 18. Thus, people who would normally be released from custody, if, for example, charges against them were dismissed, will be faced with continued detention based solely on suspicion of unlawful federal civil immigration violations in clear violation of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, *amici* join Appellants in respectfully requesting that the district court’s order be reversed insofar as it denied a preliminary injunction against sections 10, 12, 18, 27, 28, and 30 and further request that a preliminary injunction be issued against those provisions.

Respectfully submitted,

Dated: 11/21/2011



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I hereby certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 28.1(e)(2)(A) and 29(d). This brief contains 6,986 words.



Michael de Leeuw

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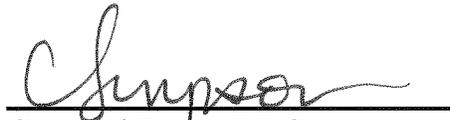
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