UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Hispanic Interest Coalition of Alabama, *et al*.,

Plaintiffs,

v.

Governor Robert Bentley, *et al*.,

Defendants.

Case No. 5:11-cv-02484-SLB

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 65(a), Plaintiffs hereby move for a preliminary injunction enjoining Defendants from enforcing House Bill 56 ("HB 56"). Ala. Laws Act 2011-535. (Doc. No. 1-2, Ex. A to Compl.) Federal courts have already enjoined similar state immigration laws in Arizona and Georgia. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *aff'g* 703 F. Supp. 2d 980 (D. Ariz. 2010); *Georgia Latino Alliance for Human Rights ("GLAHR") v. Deal*, 11-CV-1804, 2011 WL 2520752 (N.D. Ga. June 27, 2011). Governor Robert Bentley proclaimed that Alabama's HB 56 is "the strongest immigration bill in the country."[1] Indeed, HB 56 is a state immigration law of unprecedented reach.

Plaintiffs respectfully submit that this Court should enjoin HB 56 because it is a blatantly unconstitutional state law that regulates immigration and will require Alabama state and local officers to violate core constitutional rights. The requested injunction is urgently needed to prevent this unconstitutional law from causing irreparable injury to Plaintiffs and countless other individuals.

FACTUAL BACKGROUND

Alabama HB 56 is a comprehensive state-law system of immigration regulation. It is designed to impose new punishments for violations of immigration

[1] Samuel King, *Sheriffs' Association, Dept. of Justice To Meet Concerning Immigration Law*, WSFA.com (June 24, 2011), *available at* http://www.wsfa.com/Global/story.asp?S=14974594.

law (as defined by state law and state officers); to cause the detention and expulsion of those the State deems to be unworthy of continued residence; to restrict the civil and human rights of suspected undocumented immigrants for the express purpose of driving them out of the state; and to effectively require all Alabamians, particularly lawful immigrants and citizens of color, to carry documents establishing their immigration and citizenship status at all times, and to subject them to verification of that status in routine transactions undertaken in the course of daily life. HB 56's provisions impermissibly regulating immigration include the following:

State Immigration Investigation and Detention (Sections 12, 18, 19, & 20)

HB 56 mandates state and local law enforcement officers to detain persons for the purpose of immigration enforcement. Section 12(a) of HB 56 requires every state and local law enforcement officer in Alabama to investigate the immigration status of any person the officer stops, arrests or detains if the officer has a "reasonable suspicion" that the person is "unlawfully present in the United States." Under Section 12, an officer may demand that any person subject to "*any* lawful stop, detention, or arrest" produce one of six state-approved identity documents. HB 56 §§ 12(a), (d) (emphasis added). Only individuals who can produce such a document receive a presumption that they are not "unlawfully present." HB 56 § 12(d). If an individual cannot produce such a document, then

the officer is required to investigate his or her "citizenship and immigration status" by contacting the federal government. This necessarily will result in prolonging the stop strictly for the purpose of immigration enforcement.

Sections 18, 19 and 20 mandate the continued custodial detention of individuals in Alabama jails, even after any lawful basis for custody has expired, solely on the basis of suspected federal civil immigration violations. HB 56 §§ 18(d), 19(b), 20.

Alabama State Alien Registration Scheme (Section 10)

Section 10 of HB 56 enacts a state-law alien registration regime by creating the new state crime of "willful failure to complete or carry an alien registration document." The statute makes it a crime for "an alien unlawfully present in the United States" to be "in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a)," referring to existing federal statutes that impose certain requirements that noncitizens register with the federal government and carry registration documents. Among other penalties, violations of this new state crime may result in incarceration. HB 56 § 10(f).

Provisions Blocking Students from Immigrant Families from Public Schools, Colleges and Universities (Sections 8 & 28)

HB 56 contains broad provisions that are aimed at blocking children and young people from attending Alabama public schools, from kindergarten through colleges and universities, if they are noncitizens or even if they are simply the

children of noncitizens. Section 8 provides that only U.S. citizens, lawful permanent residents ("LPRs"), and individuals who hold a "nonimmigrant visa under 8 U.S.C. § 1101, *et seq.*" can enroll in or attend an Alabama public postsecondary institution. Section 8 thus excludes noncitizens whom the federal government has authorized to remain in the United States but who do not hold LPR status or a "nonimmigrant visa"—including *inter alia* those whom the federal government has granted asylum, refugee status, Temporary Protected Status because of environmental disaster or armed conflict in their home countries, or deferred action.

Section 28 of HB 56 deters and burdens access to K-12 public education by requiring public schools to inquire into children's and, in many cases, parents' immigration status, and permits school officials to share their conclusions regarding immigration status with the federal government.

Section 28(a)(1) requires that "[e]very 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." To make this determination under Section 28, schools must require that each child produce his or her birth certificate. HB 56 § 28(a)(2). If "upon review of the student's birth certificate it is determined that the student was

born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States," or if the child's birth certificate is unavailable, the child's parents must prove the child's citizenship or immigration status within 30 days. HB 56 § 28(a)(3). Otherwise, the school "shall presume . . . that the student is an alien unlawfully present in the United States." HB 56 § 28(a)(5). Section 28 also fails to ensure that information in a student's educational records remains confidential. HB 56 § 28(e). And Section 28 provides no limitations at all on school officials' ability to report *parents* to the Department of Homeland Security ("DHS").

State Laws Criminalizing Work (Section 11)

Section 11 criminalizes the solicitation of work, and is particularly aimed at the ways in which day laborers express their availability for work. Section 11(a) makes it unlawful for an "unauthorized alien"[2] to "apply for work, solicit work in a public or private place, or perform work as an employee or independent contractor in this state." Section 11(f) makes it unlawful for "an occupant of a motor vehicle that is stopped on a street . . . to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic." Section 11(g) makes it unlawful for any person "to enter a motor vehicle that is stopped on a street . . . in order to be hired by an occupant of

[2] This term is defined as "[a]n alien who is not authorized to work in the United States as defined in 8 U.S.C. § 1324a(h)(3)." HB 56 § 3(16).

the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic."

State Alien Harboring Crimes (Section 13)

Section 13 creates four new state-law immigration crimes punishable by fines and/or imprisonment. First, it criminalizes "[c]onceal[ing], harbor[ing], or shield[ing]" an alien "from detection in any place in this state" if the alien "has come to, has entered, or remains in the United States in violation of federal law." HB 56 § 13(a)(1). Second, it makes it a crime to "[e]ncourage or induce an alien" "to come to or reside in this state" if the alien's coming to or residing in the state is or will be in violation of federal law. HB 56 § 13(a)(2). Third, it makes it illegal to "[t]ransport" an alien if that alien "has come to, has entered, or remained [*sic*] in the United States in violation of federal law." HB 56 § 13(a)(3). Fourth, Section 13 makes it a crime to "harbor an alien unlawfully present" by entering into an agreement for the alien to rent a place to live. HB 56 § 13(a)(4).

State Laws Penalizing Transactions with Immigrants (Sections 27 & 30)

HB 56 renders suspected undocumented immigrants non-persons in the eyes of the law, exempt from civil rights protections. With a few narrow exceptions, Section 27(a) prohibits Alabama state courts from recognizing or enforcing contracts between an alien "unlawfully present in the United States" and any other party, provided that the other party had direct or constructive knowledge that the

alien was "unlawfully present in the United States," and provided that the contract "requires the alien to remain unlawfully present in the United States for more than 24 hours after the time the contract was entered into or performance could not reasonably be expected to occur without such remaining."

Section 30 criminalizes a host of routine interactions between individuals and state and local government. Section 30 makes it a felony for an "alien not lawfully present" to enter or attempt to enter into any "transaction" with the state or local government agency. HB 56 § 30(b). Section 30 also prohibits a third party from entering or attempting to enter into a business transaction "on behalf of an alien not lawfully present in the United States." *Id.* The statute does not define the term "business transaction" beyond stating that it "includes *any transaction between a person and the state or a political subdivision*," with only the narrow exception of applying for a marriage license. HB 56 § 30(a) (emphasis added). The statute specifically covers ordinary "transactions" such as applying for a state identification card or business license, *id.*, but it also reaches much further to basic activities like applying for a birth certificate of an infant born in the state, filing a crime victim compensation claim, or filing a worker's compensation claim. The effect of these provisions is to require anyone suspected of being an immigrant to have to verify his status when entering into any contract or business transaction. If allowed to take effect, these provisions will hinder not only undocumented

immigrants but also countless people of color, including U.S. citizens, in the State of Alabama who might be suspected of being undocumented, from entering into routine contracts and business transactions.

Provisions Limiting Ability to Present a Defense (Sections 10, 11, & 13)

Sections 10, 11, and 13 create crimes for which immigration status is a central element. Sections 10(e) and 13(h) provide that "[a] verification of an alien's immigration status received from the federal government pursuant to 8 U.S.C. § 1373(c) shall constitute proof of that alien's status." State courts are prohibited from considering any evidence regarding whether an individual is "lawfully present" other than the federal government's verification. *Id.* Section 11(e) creates the same scheme to prove that a person lacks work authorization.

Provisions Mandating Enforcement of Immigration Laws (Sections 5 & 6)

Section 5 of HB 56 requires all state and local agencies and officials to enforce federal immigration law, under threat of personal civil liability, steep monetary penalties, and the loss of state funding. Section 5(a) provides that "[n]o official or agency of this state or any political subdivision thereof, including . . . an officer of a court . . . , may adopt a policy or practice that limits . . . communication between its officers and federal immigration officials in violation of 8 U.S.C. § 1373 or . . . § 1644," which are federal statutory provisions that pertain to information-sharing by state and local agencies with the federal government.

Section 5(b) requires state officials to "fully comply with and, to the full extent permitted by law, support the enforcement of federal law prohibiting the entry into, presence, or residence in the United States of aliens in violation of federal immigration law." Section 5 contains numerous other provisions to punish state or local officials in the event they do not implement a zero-tolerance immigration enforcement regime, including a private cause of action for any U.S. citizen or "lawfully present" immigrant to sue any official who either "adopts or implements a policy or practice that is in violation of 8 U.S.C. § 1373 or . . . § 1644." HB 56 § 5(d).

Section 6(a) of HB 56 prohibits any agency of the state or any political subdivision thereof from adopting a policy or practice that limits or restricts the enforcement of HB 56 "to less than the full extent permitted by this act." Violations of this zero-tolerance policy may result in defunding of the state or local agency, HB 56 § 6(a), and/or personal civil penalties for agency officials, § 6(d).

State or local government employees who fail to report any violations of the Alabama zero-tolerance immigration enforcement law are subject to criminal prosecution for "obstructing governmental operations," punishable by up to a year in prison. HB 56 §§ 5(f), 6(f); Ala. Code § 13A-10-2.

ARGUMENT

Plaintiffs are entitled to a preliminary injunction because: (1) there is a

substantial likelihood of success on the merits of their claims; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to Plaintiffs outweighs whatever damage the proposed injunction may cause Defendants; and (4) the injunction would not be adverse to the public interest. *See McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. HB 56 Is an Unconstitutional State Law Regulating Immigration

HB 56 should be preliminarily enjoined in its entirety because Plaintiffs are likely to succeed on the merits of their claim that the entire enactment is a state law attempting to regulate immigration. State laws regulating immigration are unconstitutional, regardless of whether or not Congress has exercised its power to regulate in the same area, because "[p]ower to regulate immigration is unquestionably *exclusively* a federal power." *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (emphasis added); *Hines v. Davidovitz*, 312 U.S. 52, 66 (1941). To withstand constitutional scrutiny, a state law relating to immigration must primarily address legitimate local concerns and have only a "purely speculative and indirect impact on immigration." *DeCanas*, 424 U.S. at 355.

HB 56 violates the constitutional prohibition on state regulation of immigration because its express purpose and actual function is to control which classes of immigrants can enter and the conditions under which they can remain in

Alabama—a brazen usurpation of the federal government's exclusive authority. *DeCanas*, 424 U.S. at 355 ("determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain," constitute direct regulation of immigration exclusively reserved for the federal government); *see also Toll v. Moreno*, 458 U.S. 1, 11 (1982). HB 56 consists of provisions that directly relate to the expulsion of immigrants from Alabama, including: (1) laws requiring state and local law enforcement officers to investigate the immigration status of persons they encounter during stops, and necessarily to detain such persons strictly for the purpose of immigration enforcement (HB 56 § 12); (2) a criminal law imposing Alabama-specific penalties for failure to carry alien registration documents (§ 10); (3) investigation and prosecution by state officials for state-defined immigration crimes (§§ 10, 11, 13, 30); and (4) the imposition of obstacles, and in some cases, prohibitions—including criminal penalties—on immigrants' attempts to seek redress from state courts (§§ 5 & 6), to enroll their children in public K-12 education (§ 28), to attend public postsecondary educational institutions (§ 8), to enter into and enforce contracts (§ 27), to solicit employment (§ 11), to rent housing (§ 13(a)(4)), and even to engage in any type of transaction with a state or local agency, including seeking basic services (§ 30).

These restrictions subject all immigrants, whether documented or not, to

repeated verification of their status in the course of their normal, daily activities, and fundamentally alter the conditions under which they may remain in Alabama. For example, Section 30 subjects immigrants to verification of their immigration status every time they transact business with the state or local government, whether they are registering a car, paying a parking ticket, or paying property taxes. It prohibits an LPR from performing any of these transactions on behalf of her undocumented spouse, even if she is in the process of sponsoring him for a family-based visa. And it makes it a felony for an immigrant who is not "lawfully present" to attempt to perform any of these transactions, such as applying for a permit for a public assembly or simply a birth certificate for a U.S. citizen child, even though the parent may not be subject to detention or removal by federal immigration authorities. Yet the sweeping restrictions of Section 30 are just one example of the broad sweep of HB 56's regulation of the conditions under which immigrants may remain in Alabama.

The text of HB 56 as well as the legislative debates make clear that HB 56 is centrally concerned with immigration, and not with matters of traditional state control. The preamble to HB 56 states that it is a law "[r]elating to illegal immigration" and that its purposes include the regulation of documents that immigrants must carry, the employment of immigrants, the classification of immigrants as "lawfully present" or not, and the punishment of perceived

violations of immigration law.

The legislative history also demonstrates that HB 56 is intended to expel undocumented immigrants from the State of Alabama. The original bill arose through a "Joint Interim Patriotic Immigration Commission" created by the Alabama legislature in 2007 to address the "unprecedented influx of non-English speaking legal and illegal immigrants." Ex. 42-I, State of Alabama, Joint Interim Patriotic Immigration Commission Report at 1 (Feb. 13, 2008). The Commission made sweeping recommendations to the Alabama legislature on how to regulate immigration by limiting access to public education, benefits, and medical services, as well as by making law enforcement policies more punitive and employer hiring practices more restrictive—all expressly for the purpose of discouraging illegal immigration. *Id.* at 8-11. One of HB 56's two primary drafters and sponsors, Representative Hammon, stated that the bill was based on the Commission's recommendations. Ex. 42-J, Transcript of April 5, 2011 House Debate on HB 56 ("April 5 Debate") at 24:39-43.[3]

Legislative supporters of HB 56 expressed disagreement with federal immigration policy and their intent that, with HB 56, the State of Alabama would supplant the federal government as the enforcer and regulator of immigration in Alabama. Representative Hammon repeatedly stated that the federal immigration

[3] The other primary sponsor, Senator Beason, introduced a similar bill into the Senate, SB 256. The two bills were subsequently consolidated into HB 56.

system is "broken" and that "this issue [of immigration enforcement] is now the responsibility of the State of Alabama and not the federal government." April 5 Debate at 1:12-14, 7:35-42, 73:44-74:1, 86:33-35. Other legislative supporters, including Senators Holley and Scofield and Representative Rich, expressed similar views that the State of Alabama should enact a law to regulate immigrants and to expel and deter undocumented immigrants from the State. April 5 Debate at 16:34-43 (Rep. Rich); Ex. 42-K, Transcript of April 21, 2011 Senate Debate on SB 256 at 54:9-24 (Sen. Schofield); 77:23-40 (Sen. Holley). Specifically, as Representative Hammon stated, HB 56 is intended to implement an Alabama state immigration policy of "attacking *every aspect* of an illegal immigrant's life . . . so they will deport themselves." April 5 Debate at 9:3-8 (emphasis added).

It is well settled that such state laws regulating immigration are unconstitutional because they tread on the federal government's exclusive power.[4] The Supreme Court has explained that state laws that subject immigrants to "indiscriminate and repeated interception and interrogation by public officials" and "the possibility of inquisitorial practices and police surveillance" are preempted. *Hines*, 312 U.S. at 66, 74 (striking down state statute requiring aliens to carry

[4] Even Speaker of the House Mike Hubbard, who supported the law's passage, agreed with this. He noted that Alabama "really shouldn't be in the business of immigration, that's the federal government's job," and went on to acknowledge that "[s]ome of the parts of [HB 56] may be stricken down and we may have to come back and revisit it." Tommy Steverson, *Hubbard Makes No Apologies for Alabama Immigration Bill*, Tuscaloosa News (July 14, 2011), *available at* http://www.tuscaloosanews.com/article/20110714/NEWS/110719860?tc=ar.

registration card). Courts have repeatedly enjoined such state laws regulating the conditions under which noncitizens may remain in the country—a function exclusively reserved by the Constitution to the federal government. *DeCanas*, 424 U.S. at 355-56; *see also Henderson v. Mayor of the City of New York*, 92 U.S. 259, 274-75 (1876) (enjoining statute imposing additional local regulations on immigrants); *Graham v. Richardson*, 403 U.S. 365, 377-80 (1971) (finding state statutes imposing durational residence requirements not authorized by federal law on immigrants seeking public assistance violated the Supremacy Clause, and observing that the restrictions "necessarily operate . . . to discourage entry into or continued residency in the State"); *Villas at Parkside Partners v. City of Farmers Branch ("Farmers Branch 2010")*, 701 F. Supp. 2d 835, 855 (N.D. Tex. 2010) (invalidating ordinance requiring noncitizens to demonstrate immigration status prior to renting housing), *appeal docketed* No. 10- 10751 (5th Cir. July 28, 2010). In fact, in its regulation of immigration HB 56 far surpasses the laws that were invalidated in these cases, since its status verification requirements and prohibitions extend to every aspect of daily life.

HB 56 has already implicated the U.S. foreign relations interests that underlie the constitutional preemption of state laws regulating immigration. *See GLAHR*, 2011 WL 2520752 at *11 (finding that international relations concerns raised by Georgia's HB 87 were direct and immediate); *Arizona*, 641 F.3d at 368

(Noonan, J., concurring) ("Whatever in any substantial degree attempts to express a policy by a single state or by several states toward other nations enters an exclusively federal field."); *Hines*, 312 U.S. at 64. On the day Governor Bentley signed HB 56 into law, the Mexican government protested 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." Mexican Foreign Affairs Ministry, *The Mexican Government Regrets the Enactment of HB 56 in Alabama* (June 9, 2011).[5] Unless it is enjoined, HB 56 will unacceptably strain the United States' relations with foreign nations. *See* Ex. 41, Abraham F. Lowenthal Decl. ¶ 11 (explaining with respect to Arizona's SB 1070 that "if allowed to stand, [it] would significantly impair the relations of Mexico with the United States, the attitudes and opinions of Mexicans, officials and the general public, towards the United States, and the capacity of U.S. Government officials to conduct constructive relations with Mexico in the national interest of the United States and its citizens").

In response to similar state anti-immigrant laws, such as Arizona's SB 1070 and Georgia's HB 87, numerous foreign governments and international bodies expressed concern that such laws will cause widespread violations of the United

[5] *Available at* http://www.consulmexatlanta.org/HB56ALABAMA/PressSRE200.pdf.

States' treaty obligations, harming their nationals living in or visiting the United States. *See, e.g.*, Ex. 42-G, Br. of the United Mexican States as Amicus Curiae in Supp. of Pls. at 1, *Friendly House v. Whiting*, No. 10-01061 at 1 (Doc. No. 299) (D. Ariz. filed July 8, 2010); Ex. 42-H, Mot. of the Gov'ts of Argentina, *et al.* for Leave to Join Br. of the United Mexican States as Amicus Curiae in Supp. of Pls. at 3, *GLAHR*, No. 11-1804, Doc. No. 54 (N.D. Ga. filed June 15, 2011); Inter-American Commission on Human Rights, Organization of American States, *IACHR Expresses Concern Over New Immigration Law in U.S. State of Alabama* (June 24, 2011)[6]; Decl. of the Council of Heads of State and Government of The Union of South American Nations (May 4, 2010).[7] No less than Arizona's SB 1070 and Georgia's HB 87, HB 56 intrudes on this sensitive and exclusively federal realm and must be enjoined.[8]

---

[6] *Available at* http://www.cidh.oas.org/Comunicados/English/2011/63-11eng.htm.

[7] *Available at* http://www.cdsunasur.org/index.php?option=com_content&view=article&id=344%3Adeclaration-of-the-council-of-heads-of-state-and-government-of-the-union-of-south-american-nations-unasur&catid=58%3Aingles&Itemid=189&lang=es.

[8] As set forth above, in the field of immigration, constitutional preemption principles apply. *DeCanas*, 424 U.S. at 354. In addition, by enacting the Immigration and Nationality Act ("INA") (Title 8 of the U.S. Code), Congress has occupied the entire field of immigration enforcement, and thus state immigration laws are subject to statutory "field preemption," which "occurs when federal regulation in a legislative field is so pervasive that we can reasonably infer that Congress left no room for the states to supplement it." *Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1068 (11th Cir. 2010). Congress has enacted a comprehensive federal statutory scheme through the INA, and the federal government has promulgated myriad regulations and policies that fully regulate immigration and the employment, registration and requirements for immigrants. In this circumstance, a state scheme for immigration regulation cannot be squared with Congress's occupation of the field. *See Hines*, 312 U.S. at 66-67 ("where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . [regarding an immigration-related matter—alien registration in that case], states

B. HB 56 Violates the Supremacy Clause Because It Conflicts with Federal Law

As set forth above, the Constitution reserves the regulation of immigration exclusively to the federal government, and HB 56 is therefore directly preempted under the Constitution. Congress's power to regulate immigration is "exclusive." *DeCanas*, 424 U.S. at 354-55. In addition, HB 56 is preempted on the separate and independent ground that its provisions conflict with federal law. Conflict preemption occurs where the challenged law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *GLAHR*, 2011 WL 2520752 at *7 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Hines*, 312 U.S. at 67 (1941)). Thus, "[e]ven when the Constitution does not itself commit exclusive power to regulate a particular field to the Federal Government, there are situations in which state regulation, although harmonious with federal regulation, must nevertheless be invalidated under the Supremacy Clause." *DeCanas*, 424 U.S. at 356. And regardless of whether the state and the federal government share the same concerns, "[t]he fact of a common end hardly neutralizes conflicting means" of addressing those concerns. *Crosby*, 530 U.S. at 379. HB 56 is in conflict with federal immigration law or other federal

---

cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail *or complement*, the federal law, *or enforce additional or auxiliary regulations*") (emphasis added); *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (Congress's intent to occupy a field exclusively may be inferred "when an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject' ").

statutes in several respects, including but not limited to the following:

1. Alabama State Classifications of Aliens

HB 56 is fundamentally at odds with federal immigration law in its premise that there is a clearly defined category of immigrants who are clearly removable or "unlawfully present" and who may be subjected to state-law penalties and burdens. For example, several criminal provisions in HB 56 include as an element that the defendant (or a person interacting with the defendant) be an "alien unlawfully present in the United States." *See* HB 56 §§ 3(10) (defining the term for purposes of HB 56), 10(f) (providing criminal penalties for an "alien unlawfully present in the United States" who fails to carry registration documents); 13(a)(4) (setting out criminal penalties for renting to "an alien unlawfully present in the United States"), 30(b) (setting out criminal penalties for "an alien not lawfully present in the United States" who "attempt[s] to enter into a business transaction with the state or a political subdivision of the state"). Other provisions of HB 56 include similar state immigration definitions, such as Section 8 (creating a state definition of "lawfully present" noncitizens for purposes of eligibility for public higher education that includes only LPRs and non-immigrant visa holders); and Section 28 (creating a category of schoolchildren who are "presume[d] … unlawfully present" if they fail to present a birth certificate upon enrollment, or if they present a birth certificate showing birth outside the United States or that a parent is an "an alien not lawfully

present in the United States" and fail to produce additional proof of status within 30 days). Such immigration categorization is exclusively a federal function, and such state definitions are preempted. *See, e.g., Toll,* 458 U.S. at 44-46 (invalidating state university policy denying in-state tuition rates to G-4 visa holders).

The INA does not define a category of "unlawfully present" aliens subject to deportation.[9] This is an intentional omission on the part of Congress. Under federal law, a noncitizen's immigration status is governed by numerous sections of the INA; turns on complex legal questions, myriad individualized factors, and in many cases, the exercise of administrative discretion; is fluid and subject to change over time; and ultimately is decided through an administrative adjudication process subject to federal court review. *See* Ex. 42-D, Bo Cooper Decl. ¶¶ 14-20 (former INS General Counsel).

As the Supreme Court has recognized, "it is impossible for a State to determine which aliens the Federal Government will eventually deport, which the Federal Government will permit to stay, and which the Federal Government will ultimately naturalize." *Plyler v. Doe*, 457 U.S. 202, 240 n.6 (1982) (Powell, J.,

[9] The INA defines the phrase "unlawfully present" only in the narrow and technical context of a statute that establishes bars on the admission of a person who has previously been "unlawfully present" in the United States for certain periods of time. The phrase is explicitly restricted to that context, and its application depends on factors that cannot be quickly and definitively ascertained, such as whether the person "has a bona fide application for asylum pending." 8 U.S.C. § 1182(a)(9)(B)(ii) (defining "unlawful presence" "[f]or purposes of this paragraph"); Ex. 42-F, Bo Cooper Decl. ¶ 8.

concurring). Thus, Alabama's state laws attempting to define some category of "unlawfully present" immigrants inevitably will lead to conflicts with federal law. Section 3 of HB 56, which defines "unlawful presence," provides that "[a] person shall be regarded as an alien unlawfully present in the United States only if the person's unlawful immigration status has been verified by the federal government pursuant to 8 U.S.C. § 1373(c)." HB 56 § 3(10). This reliance is at odds with the federal government's intended purpose for verifications under 8 U.S.C. § 1373, which are carried out through the database checks by the DHS's Law Enforcement Support Center ("LESC"). LESC responses "do not always provide a definitive answer as to an alien's immigration status," and will often generate "no match" notices that cannot be used to conclusively determine status. Ex. 42-A, David C. Palmatier Decl. ¶¶ 12, 19 (Unit Chief for LESC).[10] Section 30(c)'s specific provision (inexplicably in conflict with Section 3) that Alabama state officials rely on the federal government's Systematic Alien Verification for Entitlements ("SAVE") database in determining the lawful presence of immigrants who attempt to engage in a business transaction with the state is similarly at odds with the stated purposes of the federal government. The SAVE database, which is designed to

[10] Federal immigration officials have explicitly warned that DHS "databases cannot be relied upon accurately to determine immigration status because immigration status is dynamic[,]" and that database entries may be outdated. U.S. Department of Justice, Office of the Inspector General, *Follow-up Review of the Status of IDENT/IAFIS Integration*, at 41 (2004), *available at* http://www.justice.gov/oig/reports/plus/e0501/final.pdf.

help determine eligibility for public benefits, is expressly not designed to make "a finding of fact or conclusion of law that [an] individual is not lawfully present." 65 Fed. Reg. 58301, 58302 (Sept. 28, 2000).

Thus, HB 56 conflicts with federal law by imposing state-created penalties and burdens—including criminal penalties—by using federal tools that are expressly contraindicated for such purposes. *See Villas at Parkside Partners v. City of Farmers Branch ("Farmers Branch 2008")*, 577 F. Supp. 2d 858, 874 (N.D. Tex. 2008).

2. State and Local Law Enforcement Requirement to Investigate and Detain for Immigration Purposes

Numerous sections of HB 56, including Sections 12, 18, 19, and 20, require state and local law enforcement officers to investigate immigration violations and to detain persons for immigration purposes. These provisions directly conflict with federal mandates and limitations on immigration enforcement.

Federal law contains narrow authorizations for state and local police to enforce federal immigration laws only in specific circumstances. First, federal law authorizes state and local officers to enforce two specific *criminal* immigration offenses. Under 8 U.S.C. § 1252c, state and local officers may arrest and detain a noncitizen for the federal crime of illegal re-entry by a previously deported alien, if the federal government provides "appropriate confirmation" of the suspect's status. And under 8 U.S.C. § 1324(c), federal law allows state and local officers to make

arrests for the *federal* immigration crimes of transporting, smuggling, or harboring certain aliens.

Outside of those two narrow contexts for enforcing specific federal criminal immigration statutes, Congress has authorized state and local officers to assist with the enforcement of *civil* immigration offenses in only two specific circumstances. The U.S. Attorney General may authorize "any State or local enforcement officer" to enforce immigration laws upon certification of "an actual or imminent mass influx of aliens"—a provision that has never been invoked. 8 U.S.C. § 1103(a)(10). And under 8 U.S.C. § 1357(g)(1), the federal government may enter into written agreements (commonly known as "287(g) agreements") with state or local agencies in order for certain designated officers to receive specialized training and exercise delegated immigration enforcement authority in clearly specified and carefully monitored circumstances. These officers must first be "determined by the Attorney General to be qualified to perform [such] functions" and "shall be subject to the direction and supervision of the Attorney General." 8 U.S.C. §§ 1357(g)(1), (3). The written agreement must specify "the specific powers and duties that may be, or are required to be, exercised or performed by the individual, [and] the duration of the authority of the individual." 8 U.S.C.

§ 1357(g)(5).[11] *See also* Ex. 37, Sheriff Todd Entrekin Decl. ¶¶ 4-10 (describing Etowah County Sheriff Office 287(g) program).

HB 56 directly conflicts with Congress's careful limitation of state and local power to enforce immigration law by giving state officers broad authority and mandates to detain and arrest individuals for perceived violations of civil immigration law.[12] Section 12 requires *every* state and local law enforcement officer in Alabama to investigate the immigration status of any person the officer stops, arrests or detains, if the officer has a "reasonable suspicion" to believe that the person is unlawfully present in the United States. HB 56 § 12(a). Under Section 12, whenever an officer develops such "reasonable suspicion," the officer is required to contact the federal government to verify the person's immigration status. *Id.* Thus, Section 12 mandates that officers prolong detentions solely in

[11] Section 1357(g)(10) further provides that Section 1357(g) does not forbid police from "cooperat[ing] with the Attorney General" in certain aspects of immigration enforcement. That provision, however, plainly does not authorize states to pursue their own policy objectives or enact their own immigration enforcement initiatives that correct the federal government's alleged failures, as Alabama has here. Indeed, if Section 1357(g)(10) authorized the enforcement at issue here, the specific authorizations Congress provided in §§ 1103(a)(10), 1357(g)(1)-(9), 1252c, and 1324(c) would be surplusage. "Congress intended for state officers to aid in federal immigration enforcement only under particular conditions, including the Attorney General's supervision." *Arizona*, 641 F.3d at 350; *see also GLAHR*, 2011 WL 2520752 at *9-10.

[12] Being present in the United States without lawful immigration status is not a crime. *See GLAHR*, 2011 WL 2520752, *9 ("mere presence in this country without authorization is not a federal crime"); *Martinez-Medina v. Holder*, No. 06-75778, __ F.3d __, 2011 WL 855791, at *6 (9th Cir. Mar. 11, 2011) ("unlike illegal entry, which is a criminal violation, an alien's illegal presence in the United States is only a civil violation").

order to investigate a person's immigration status.[13] *Id*.

Similarly, Section 18 of HB 56 requires that state, local, and municipal law enforcement officers verify the citizenship or immigration status of those found to be driving without a valid driver's license, and allows individuals to be detained for up to 48 hours solely to verify their immigration status. HB 56 § 18(c), (d). Sections 18, 19 and 20 also mandate the continued custodial detention of individuals in Alabama jails, even after any lawful basis for custody has expired, solely on the basis of suspected federal civil immigration violations. HB 56 §§ 18(d), 19(b), 20.

Sections 12, 18, 19, and 20 thus conflict with the federal statutes limiting the role of state and local officers in immigration enforcement. *See GLAHR*, 2011 WL 2520752 at *11 (finding similar state immigration enforcement provision "attempts an end-run—not around federal criminal law—but around federal statutes defining the role of state and local officers in immigration enforcement"). As the Ninth Circuit held, "[b]y imposing mandatory obligations on state and local officers, [such provisions] interfere[] with the federal government's authority to implement its priorities and strategies in law enforcement, turning [state] officers into state-

[13] *See Arizona*, 641 F.3d at 352 ("states do not have the inherent authority to enforce the civil provisions of federal immigration law."); *United States v. Urrieta*, 520 F.3d 569, 574 (6th Cir. 2008) ("local law enforcement officers cannot enforce completed violations of civil immigration law (*i.e.*, illegal presence) unless specifically authorized to do so by the Attorney General under special conditions").

directed DHS agents." *Arizona*, 641 F.3d at 351-52.

Indeed, HB 56's immigration enforcement authorization is so broad that it permits peace officers to make warrantless civil immigration arrests in circumstances where even *federal* immigration agents cannot. *See* 8 U.S.C. § 1357(a)(2). In order to arrest an individual for undocumented presence without a warrant, the arresting federal officer must reasonably believe that the alien is in the country unlawfully *and* that he is likely to escape before a warrant can be obtained for his arrest. *Id*. Together, Sections 12(a) and 12(e) of HB 56 permit state and local officers to make warrantless arrests for perceived immigration violations without such restrictions.

3. State Alien Registration Scheme

Section 10 of HB 56 establishes an Alabama-specific alien registration regime by creating a new state criminal offense for failure to carry certain immigration documents.[14, 15] Federal courts have already enjoined an identical provision in Arizona's SB 1070 because the Supreme Court has specifically struck

[14] For a detailed description of Section 10, *see supra* at 3.

[15] Plaintiffs' claims against the state-specific immigration crimes created under HB 56 are not precluded by the Supreme Court's plurality opinion in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011). *Whiting* involved an Arizona statute, the Legal Arizona Workers Act, that was enacted pursuant to an explicit authorization in federal law for state "licensing" laws relating to unauthorized workers and that does not resemble the provisions discussed here. *Id.* at 1981 (citing 8 U.S.C. § 1324a(h)(2)); *GLAHR*, 2011 WL 2520752 at *14 ("whereas the Arizona statute in *Whiting* imposed licensing laws specifically authorized by a statutory savings clause, HB 87 imposes additional criminal laws on top of a comprehensive federal scheme that includes no such carve out for state regulation").

down state alien registration laws. *Arizona*, 641 F.3d at 355-57 (citing *Hines*, 312 U.S. at 66-67). The recent decision on the Arizona analog to Section 10 explains why the explicit reference to federal alien registration statutes does not save the state registration scheme. *Id*. As a legal matter, even laws that "complement [] the federal [alien registration] law [and] enforce additional or auxiliary regulations" are preempted. *Hines*, 312 U.S. at 66-67; *see also Crosby*, 530 U.S. at 379-80 ("conflict is imminent when two separate remedies are brought to bear on the same activity") (internal quotes, citations, and punctuation omitted); *Wis. Dep't of Indus. Lab & Hum. Rel. v. Gould Inc.*, 475 U.S. 282, 286-88 (1986) (invalidating state statute that imposed additional sanction on companies that violated federal law); *Farmers Branch 2010*, 701 F. Supp. 2d at 857 ("a local regulation may not—though it may share a common goal with federal law—interfere with Congress's chosen methods").

HB 56 goes well beyond "complementing" or "enforcing" federal registration provisions. Section 10 provides Alabama state courts with the authority to apply *additional penalties* to noncitizens in Alabama when they are found to have violated the registration provisions of 8 U.S.C. §§ 1304(e) and 1306(a). These additional state criminal penalties are in conflict with those set by federal law. This conflict is particularly glaring because the federal government rarely prosecutes registration violations. *See* Ex. 42-L, Bureau of Justice Services

Statistics (showing only 30 such prosecutions in 15 years). Indeed, the statutes referenced in Section 10 specifically rely on a federal regulation, 8 C.F.R. § 264.1, that is obsolete and that the federal government has chosen not to update or enforce. Bo Cooper Decl. ¶¶ 27, 28.

HB 56's alien registration scheme is particularly problematic because many foreign nationals who reside in the United States with the permission or knowledge of the United States do not possess or have readily available documentation that is acceptable under HB 56. These categories of foreign nationals include those with explicit permission to remain, such as those with deferred action, travelers visiting from countries participating in the Visa Waiver Program, individuals with Temporary Protected Status, those who have applied for visas as victims of crimes (such as Plaintiff Jane Doe #2), and those who are here through the Family Unity Program (such as Plaintiff Zamora). *See* Ex. 42-C, Michael Aytes Decl. ¶¶ 17, 19, 21 (Acting Deputy Director, USCIS). Subjecting these immigrants, whom the federal government is not attempting to remove, to criminal prosecution conflicts with federal law and policy. *See DeCanas*, 424 U.S. at 358 n.6 ("Of course, state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress. . . .").

4. Criminal Penalties for Immigrant Workers

HB 56's attempt to impose criminal sanctions on unauthorized workers impermissibly conflicts with federal law. Section 11(a) makes it a state crime for unauthorized individuals to work or seek work in Alabama.[16, 17] This section is preempted by the comprehensive federal scheme regulating the employment of noncitizens, the Immigration Reform and Control Act of 1986 ("IRCA"), and Congress's express intent to deter the unauthorized employment of immigrants through *employer* sanctions rather than punishment of employees. The Ninth Circuit has held that a nearly identical Arizona state law is preempted for this reason. *See Arizona*, 641 F.3d at 357-60. The Eleventh Circuit has also recognized Congress's decision not to penalize workers. *United States v. Zheng*, 306 F.3d 1080, 1087 (11th Cir. 2002) (noting that "the House Committee was of the opinion that the most reasonable approach to the problem [of unauthorized workers] was to make unlawful the 'knowing' employment of illegal aliens," and that "Congress . . . chose to penalize *employers* for hiring illegal aliens . . . ." (emphasis added)).[18] HB 56's criminal penalties on individuals who work, or merely seek work, in Alabama without authorization therefore conflicts directly

[16] For a detailed description of Section 11, *see supra* at 5.

[17] As discussed *supra* at n.15, the Supreme Court's decision in *Whiting* is inapposite because Section 11(a) criminalizes *workers* rather than imposing "licensing or similar laws" on *employers*.

[18] In fact, IRCA sharply limits criminal sanctions against employees to specific acts including making a false statement or presenting fraudulent documents in connection with the employment verification system. *See* 8 U.S.C. §§ 1324a(d)(2)(F) (noting that the forms "may not be used for law enforcement purposes, other than for enforcement of this [Act or sections] 1001, 1028, 1546, and 1621 of title 18, United States Code."); 1324c (providing penalties for document fraud).

with federal law regulating the employment of noncitizens.

5. State Alien Harboring Crimes

Section 13 of HB 56 creates new Alabama state crimes relating to (1) concealing, harboring, or shielding; (2) encouraging or inducing; (3) transporting; and (4) renting to certain immigrants.[19] HB 56 § 13(a). These new provisions impermissibly conflict with the operation of federal immigration law, as a federal court has already recognized with respect to a similar Georgia statute. *See GLAHR*, 2011 WL 2520752 at *13

Section 13 materially differs from the federal alien harboring statute, 8 U.S.C. § 1324. For example, the federal statute's "encourage or induce" provision concerns aliens entering the United States—*not* the movement of noncitizens within the United States. Section 13(a)(2) explicitly criminalizes encouraging or inducing an alien to enter the State of Alabama, regardless of whether the state is the alien's first destination in the country or whether he or she entered the United States 20 years ago in another state. *See GLAHR*, 2011 WL 2520752 at *13 ("Once in the United States, it is not a federal crime to induce an illegal alien to enter Georgia from another state."). Furthermore, Section 13 criminalizes conduct that is specifically exempted from enforcement under federal law. *Compare* HB 56 § 13(e) (exempting only first responders and protective service providers) *with*

[19] For a detailed description of Section 13, *see supra* at 6.

8 U.S.C. § 1324(a)(1)(C) (creating religious exemptions).

But even if Section 13 were identical to 8 U.S.C. § 1324, it would still impermissibly conflict with the federal statute. Section 13 will be enforced at the discretion of state law enforcement officers and prosecutors and will be interpreted by state judges. Thus, as the district court held in enjoining a similar provision in Georgia, "[d]ecisions about when to charge a person or what penalty to seek for illegal immigration will no longer be under the control of the federal government. Similarly, [state] judges will interpret [these] provisions, unconstrained by the line of federal precedent mentioned above." *GLAHR*, 2011 WL 2520752 at *13. HB 56 includes no provision for federal discretion and no mechanism to accommodate the immense complexity of federal immigration law. Section 13's resemblance to 8 U.S.C. § 1324 does not make it a "mirror" of federal law. *Cf. Plyler*, 457 U.S. at 225. Instead, it allows the state to challenge and "undermine[] the congressional calibration" of federal law and policy in this area.[20] *Crosby*, 530 U.S. at 380.

HB 56 reaches beyond the Georgia state harboring law by defining the rental of a home to an undocumented immigrant as alien harboring. There is no corresponding provision in federal immigration law, and the federal harboring law,

[20] The federal government infrequently prosecutes potential Section 1324 violations. For example, from 2001 to 2005 there were only two reported prosecutions under Section 1324 in Alabama, while in 2005—the latest year for which plaintiffs have been able to obtain statistics—there were no prosecutions for such conduct. Transactional Records Access Clearinghouse, *Percent of Immigration Criminal Convictions by Lead Charge* (2006), *available at* http://trac.syr.edu/tracins/findings/05/criminal/glawgph05.html.

8 U.S.C. § 1324(a)(1)(A)(iii), "has never been interpreted to apply so broadly as to encompass the typical landlord/tenant relationship." *Lozano v. City of Hazleton*, 620 F.3d 170, 223 (3d Cir. 2010), *vacated and remanded on other grounds*, No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011).[21] Indeed, several federal laws explicitly or implicitly permit landlords to provide housing and other services to undocumented immigrants. *See* 24 C.F.R. § 5.508(e) (providing that households in which some, but not all, family members establish eligible immigration status may nonetheless receive a federal housing subsidy); 42 U.S.C. §§ 10401 *et seq.* (providing federal funding to battered women's shelters without any restrictions on housing undocumented women); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11 (providing for immigration benefits for undocumented youth residing in foster care). The INA authorizes many persons who currently lack legal immigration status, including those awaiting the processing of their application for lawful status, to work in the United States, and thus implicitly to obtain housing. *See* 8 C.F.R. §§ 274a.12(c)(8)-(11), (14). Thus, far from prohibiting the renting of apartments or provision of housing to undocumented immigrants, Congress has permitted it in numerous circumstances.

Federal courts have been unanimous in striking down state and local rental

[21] *Lozano* addressed both a local housing restriction and a local employment eligibility verification regulation; after the Supreme Court upheld a state employment verification regulation in *Whiting,* 131 S.Ct. 1968 (2011), the Court in *Lozano* vacated and remanded the case "for further consideration in light of [*Whiting*]." 2011 WL 2175213 (U.S. June 6, 2011).

prohibitions on preemption grounds. *Lozano*, 620 F.3d at 223; *Farmers Branch 2008*, 577 F. Supp. 2d at 857; *Farmers Branch 2010,* 701 F. Supp. 2d at 859; *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1059 (S.D. Cal. 2006) (temporarily enjoining ordinance and finding "serious questions" as to its constitutionality, after which municipality suspended ordinance and settled case). These cases have recognized that a local regulation that restricts the ability of landlords to rent private housing amounts to a restriction on residence, and therefore is an impermissible local effort to regulate immigration that "directly impact[s] immigration in a way that restrictions on employment" do not. *Farmers Branch 2010,* 701 F. Supp. 2d at 855; *see also Lozano,* 620 F.3d at 220 ("Through its housing provisions, Hazleton attempts to regulate residence based solely on immigration status. Deciding which aliens may live in the United States has always been the prerogative of the federal government").

6. Prohibition on the Right to Make and Enforce Contracts

Section 27 of HB 56 regulates in the area of immigration by prohibiting "aliens unlawfully present" from enforcing or accessing the courts to enforce contracts. The practical effect of the provision is to require all immigrants to verify their status in order to enter into an enforceable contract and to discourage individuals from contracting with those they believe may be undocumented—something which cannot be readily observed or even verified by a private

individual. In addition to being preempted as a regulation of immigration and based on a conflict with federal immigration statutes, Section 27 is also preempted by a core federal civil rights statute, 42 U.S.C. § 1981.[22]

Although Section 1981 was originally drafted in 1866 with a limit on the guarantee of equal contract rights to all "citizens," Congress explicitly expanded the guarantee of equal contract rights to "all persons within the jurisdiction of the United States" when it amended the statute in 1870. *See Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 385 (1982). The very purpose of the change was to extend the protections of the 1866 Act to "aliens." *See Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 653-54 (5th Cir. 1974) (adopting district court's opinion that Congress "explicitly broadened the language of the portion of the 1866 Act that has become § 1981 to include 'all persons' in order to bring aliens within its coverage") (footnotes omitted), *overruled on other grounds*, *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1981), *vacated*, 492 U.S. 901 (1989), *reinstated on remand*, 887 F.2d 609 (5th Cir.) (per curiam); *see De Malherbe v. Int'l Union of Elevator Constructors*, 438 F. Supp. 1121, 1136-38 (N.D. Cal. 1977).

[22] 42 U.S.C. § 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.").

Section 27 of HB 56 should be enjoined not only based on conflict preemption, but also on the ground that in enacting § 1981, Congress occupied the field regarding the right of aliens to make and enforce contracts. *See Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419 (1948) (describing § 1981, then codified at 8 U.S.C. § 41, as part of a "comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization"). Congress having so provided, Alabama's law creating different "alien" classifications for purposes of determining who has the right to enforce contracts and access Alabama's state courts to enforce contracts is preempted by § 1981.[23]

7. HB 56 Impermissibly Burdens the Federal Government

HB 56 is also preempted because it imposes an impermissible burden on federal resources that creates "obstacle[s] to the accomplishment and execution of

---

[23] This conclusion is further supported in a district court's discussion in *Martinez v. Fox Valley Bus Lines, Inc.*, 17 F. Supp. 576 (N.D. Ill. 1936). In *Martinez*, the plaintiff sued for negligence. The defendant argued that the plaintiff was not entitled to maintain an action because he was subject to deportation. *Martinez*, 17 F. Supp. at 577. The court rejected the argument:

> The position of the defendant is that if an alien . . . is unlawfully in the United States he may be despoiled of his property, contracts with him may be breached, that he may be unlawfully assaulted and injured, and that he is with-out redress . . . . I cannot agree with this contention.
>
> It is within the exclusive jurisdiction of Congress to determine what aliens may enter this country and their rights and disabilities while here. Congress has legislated on these subjects, but at no time has it declared that any alien, either lawfully or unlawfully within this country, shall be debarred from access to the courts. On the contrary, it has expressly provided . . . that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, sue and be sued, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

Id. (citing to 8 U.S.C. § 41, re-codified at 42 U.S.C. § 1981).

the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. HB 56 is replete with directives for state and local officers to contact the federal government in order to run immigration database checks on individuals under circumstances in which the federal government has not invited such requests. In attempting to regulate every aspect of life for noncitizens in Alabama—from education to routine police encounters to the right to enforce contracts—HB 56 authorizes and often requires state and local officials to verify a person's immigration status by directly contacting the federal government, and triggering the federal government's statutory responsibility to respond. *See* 8 U.S.C. § 1373(c). Federal courts have preliminarily enjoined similar state laws in Arizona and Georgia on this ground. *Arizona*, 641 F.3d at 351-52; *GLAHR*, 2011 WL 2520752 at *11.

Sections 5, 6, 8, 10, 11, 12, 13, 15, 17, 18, 19, 20, 27, 29, and 30 of Alabama's HB 56 will directly undermine federal immigration enforcement priorities by vastly increasing the number of immigration status verification queries to the federal government. Section 8 allows any public postsecondary education official to seek federal verification of an alien's immigration status at any time. HB 56 § 8. State and local officers would be required to contact the federal government in the enforcement of Alabama's alien registration scheme, § 10(b), (e); the anti-solicitation of work provision, § 11(b), (e); and the new criminal harboring, encouraging, transporting, and renting provisions, § 13(g), (h).

Federal immigration queries will be made during routine police encounters, § 12(a), and when individuals are arrested and booked into state custody, or is convicted if any violation of any state or local law, §§ 18(c), 19(a), 20(a).

Provisions restricting employment of unauthorized aliens will similarly require a federal inquiry, §§ 15(h), 17(e). Determinations of whether to enforce a contract will require a federal inquiry, § 27(d), as will prosecutions for entering into unlawful business transactions, § 30(c), (f). Even proving that a person has the right to vote could require a federal inquiry, § 29(k)(4). Furthermore, Sections 5 and 6 create an interlocking scheme compelling Alabama agency officials and "officers of the court" to report individuals to federal immigration officials in order to avoid civil liability, such as steep monetary penalties, and the loss of state funding. *See* §§ 5(a)-(d), 5(f), 6(a)-(c), 6(f).

By flooding the federal government with uninvited requests for immigration status verification in a wide range of circumstances, HB 56's immigration enforcement regime thus undermines the federal government's ability to focus on its priorities, including the apprehension of the most dangerous aliens and to exercise prosecutorial discretion in certain instances. David Palmatier Decl. ¶ 18; Ex. 42-B, Daniel H. Ragsdale Decl. ¶ 41 (Executive Associate Director for Management and Administration at ICE); *see also* ICE Director John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and*

Removal of Aliens (Mar. 2, 2011)[24]; ICE Director John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* at 2 (June 17, 2011)[25] (explaining that "the term 'prosecutorial discretion' applies to a broad range of discretionary enforcement decisions" that includes "deciding whom to stop, question, or arrest for an administrative violation" and "deciding whom to detain").

The federal LESC, which is responsible for responding to immigration status queries from law enforcement agencies, has experienced "continuous and dramatic increases" in immigration status determination queries over the past four years. David Palmatier Decl. ¶ 9. The verification process at the LESC is time-intensive and takes, on average, over 80 minutes even for simpler cases. *Id.* ¶ 8. In some cases, where a review of the individual's physical file is required, the review may take two days or more. *Id.* ¶ 11. In addition, the LESC is unable to verify the status of most U.S. citizens, since their records are not contained in the LESC databases. *Id.* ¶ 19. The additional queries created by HB 56, combined with the already time-intensive verification process, will necessarily strain the federal government's resources. Federal courts have enjoined similar provisions in

[24] *Available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.
[25] *Available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

Arizona's and Georgia's immigration laws because such increased demands on the federal government "will undermine federal immigration enforcement priorities by vastly increasing the number of immigration queries to the federal government from [state and local agencies]." *GLAHR*, 2011 WL 2520752 at *10; *accord Arizona*, 641 F.3d at 351-52.

Moreover, local law enforcement agencies, school districts, and other government agencies across Alabama's 67 counties inevitably will interpret HB 56's vague and expansive provisions differently, leading to a patchwork of enforcement even within Alabama. *See GLAHR*, 2011 WL 2520752, at *10; *see also* Todd Entrekin Decl. ¶¶ 20-21; Ex. 38, Sheriff Mike Hale Decl. ¶¶ 10-11. This discord in enforcement poses a serious threat to the federal government's ability to regulate immigration. With respect to Georgia's HB 87, which would impose similar burdens on the federal government, the President of the United States has declared: "It is a mistake for states to try to do this piecemeal. We can't have 50 different immigration laws around the country." Matthew Bigg, *Obama Criticizes New Georgia Immigration Law*, Reuters, Apr. 26, 2011.[26] Janet Napolitano, the former governor of Arizona and current U.S. Secretary of Homeland Security, publicly opposed Arizona's SB 1070, saying: "The Arizona immigration law will likely hinder federal law enforcement from carrying out its priorities of detaining

[26] *Available at* http://www.reuters.com/article/2011/04/27/us-obama-immigration-georgia-idUSTRE73P7QD20110427.

and removing dangerous criminal aliens." *Divisive Arizona Immigration Bill Signed Into Law*, CBS/AP, Apr. 23, 2010.[27]

The Court should also consider the cumulative impact of other states passing similar legislation. *See, e.g., GLAHR*, 2011 WL 2520752, *10 (the "risk [of inconsistent civil immigration policies] is compounded by the threat of other states creating their own immigration laws") (citing *Arizona*, 641 F.3d at 354); *Gould,* 475 U.S. at 288–89 ("Each additional statute incrementally diminishes the [federal government's] control over enforcement of the [federal statute] and thus further detracts from the 'integrated scheme of regulation' created by Congress."). This concern is far from speculative. Alabama is one of six states to have passed far-reaching immigration enforcement measures.[28] Although the similar state laws that preceded HB 56 are either currently enjoined or not yet in effect, the actual implementation individually and, in particular, when aggregated, would further burden the federal government's immigration priorities. *See* David Palmatier Decl. ¶ 7.

C. HB 56 Violates the Fourth Amendment

HB 56 requires state and local law enforcement officers to detain and arrest individuals solely for the purpose of verifying immigration status, and without any suspicion of criminal conduct. Section 12 mandates the prolonged detention or

[27] *Available at* http://www.cbsnews.com/stories/2010/04/23/politics/main6426125.shtml.
[28] These states are: Alabama, Arizona, Georgia, Indiana, South Carolina, and Utah.

arrest of individuals based only on perceived violation of federal civil immigration law. Sections 18, 19, and 20 likewise require the continued custodial detention of individuals even after any lawful basis for custody has expired—again based solely on suspected violation of federal civil immigration law. These provisions violate the Fourth Amendment by authorizing the prolonged detention and arrest of individuals without suspicion of criminal conduct.

1. Prolonged Detention During Stops

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. HB 56 § 12(a) (emphasis added). In these circumstances, officers are required to contact the federal government in order to verify a person's status, a process that takes an average of 80 minutes when a determination can be made through a database search, and up to several days when a search of paper files is required. David Palmatier Decl. ¶¶ 8, 12, 19; *see also* Todd Entrekin Decl. ¶ 18 ("From our own experience running the 287(g) program, this is usually not a quick process, but can take hours to complete."); Mike Hale Decl. ¶ 9.

Thus, by mandating verification, Section 12(a) guarantees that stops will be prolonged well past the time needed to effectuate the original purpose of the stop. The verification requirement applies to all stops, even the most minor, and those

not requiring any probable cause of criminal wrongdoing (*e.g.*, *Terry* stops requiring only reasonable suspicion). Todd Entrekin Decl. ¶ 13 (When a law enforcement officer has reasonable suspicion that a person is present unlawfully, Section 12(a) requires that officer to "detain the suspect on the side of the road, or in the jail, pending confirmation of the individual's immigration status."); Mike Hale Decl. ¶ 9; Ex. 40, Eduardo Gonzalez Decl. ¶¶ 17-18; Ex. 39, George Gascón Decl. ¶ 16.

Such prolonging of stops based solely on "reasonable suspicion" of undocumented immigration status violates the Fourth Amendment. The Fourth Amendment requires that "*Terry*" stops, for example, "must 'last no longer than necessary to effectuate the purpose of the stop.' " *United States v. Pruitt*, 174 F.3d 1215, 1220 (11th Cir. 1999) (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)); *see also Terry*, 392 U.S. at 30. Once the purpose of the initial stop has been effectuated, the stop "may not last 'any longer than necessary to process the [original] violation' unless there is articulable suspicion of other illegal activity." *United States v. Purcell*, 236 F.3d 1274, 1277 (11th Cir. 2001) (quoting *United States v. Holloman*, 113 F.3d 192, 196 (11th Cir. 1997)). And an officer may question a person who has been lawfully stopped on unrelated subjects, but *only* if such questioning does not unreasonably prolong the stop. *See Muehler v. Mena*, 544 U.S. 93, 100-01 (2005); *Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009);

United States v. Hernandez, 418 F.3d 1206, 1209 n.3 (11th Cir. 2005) (extending *Muehler* to the traffic stop context).

By requiring officers to prolong a traffic stop well beyond the time needed to address the original basis for the stop—by an average of 80 minutes, under the best-case scenario—HB 56 will result in systemic violations of the Fourth Amendment. Section 12 mandates the prolonged detention of persons who have been stopped solely for the purpose of undertaking an immigration investigation and based only on "reasonable suspicion" that a person is an undocumented immigrant. HB 56 § 12(a). "Reasonable suspicion"—even of criminal activity—justifies only a *brief* investigatory stop. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989) (citing *Terry*, 392 U.S. at 30). More fundamentally, because unlawful presence is a federal civil violation and not a crime, *see supra* n.12, this scheme violates the Fourth Amendment by requiring seizures without suspicion of or probable cause to believe a person is engaging in criminal activity. *See*, *e.g.*, *United States v. Tapia*, 912 F.2d 1367, 1370 (11th Cir. 1990) (finding that officer's further investigation of a lawfully stopped driver unlawfully prolonged the detention because of lack of suspicion of criminal activity beyond a traffic citation).

Beyond the prolonged detentions required under Section 12(a), Section 12(e) separately violates the Fourth Amendment by requiring law enforcement to take

custody of individuals if they are verified as being "unlawfully present." Section 12(e) requires that state and local law enforcement agencies coordinate the transfer of suspects determined to be "unlawfully present," if the federal government so requests. HB 56 § 12(e). Because of Section 12(e), law enforcement officers will detain a suspect without any basis other than a civil immigration violation while the federal government coordinates taking custody, for which the law specifies no time limit. *Id.*; Todd Entrekin Decl. ¶ 19; George Gascón Decl. ¶ 15. State and local law enforcement are required to hold the suspect "as long as necessary," solely on the basis of suspected unlawful status, without regard to how long federal authorities wait to take action. Todd Entrekin Decl. ¶ 19; *see also* George Gascón Decl. ¶ 15. Thus, under Section 12(e) individuals will be effectively arrested without probable cause of any criminal wrongdoing. It is well established, however, that "an arrest without probable cause to believe a *crime* ha[s] been committed" violates the Fourth Amendment.[29] *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990) (emphasis added); *see also Lee v. Ferraro*, 284 F.3d 1188, 1195-96 (11th Cir. 2002). Section 12(e) thus authorizes seizures in clear violation of Fourth Amendment jurisprudence.

[29] The only exception to the requirement that the suspicion be of criminal activity is for civil traffic code violations. The Supreme Court has "carve[d] out an exception in the context of traffic stops, *i.e.*, a stop is 'reasonable' where an officer suspects an individual has committed a traffic violation." *United States v. Choudhury*, 461 F.3d 1097, 1102 (9th Cir. 2006) (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)). No similar exception has been created for civil immigration violations, such as unlawful presence in the United States.

2. Prolonged Detention in State and County Jails

Sections 18, 19, and 20 violate the Fourth Amendment by mandating the continued custodial detention of an individual in Alabama jails, even after any lawful basis for custody has expired, solely on the basis of suspected federal civil immigration violations. Section 19(b) mandates the continued detention of anyone "confined for *any period* in a state, county, or municipal jail," if the person is determined to be unlawfully present, until he or she is handed over to federal immigration authorities, regardless of whether the lawful basis for their original custody has ended. HB 56 § 19(a) (emphasis added). Section 18(d) similarly mandates detention when an arrest is made for driving without a license. Individuals who would normally be released from custody (because, for example, charges against them were dismissed) will face continued detention based *solely* on suspicion of federal civil immigration violations. Similarly, Section 20 requires law enforcement officials to continue to detain a person after the conclusion of lawful confinement or upon payment of a fine solely on the basis of suspected unlawful presence in order to transfer the suspect to federal custody. For example, in the case of a person found guilty in court and assessed only a fine, Section 20 allows that he or she be held in custody even after that fine is paid, if he or she is suspected of civil immigration violations. These provisions violate the Fourth Amendment because they require Alabama jails to maintain custody of a person

solely because an immigration status check is pending and absent any lawful basis for detention.

Courts have regularly found that the Fourth Amendment is violated where plaintiffs who are initially detained on a lawful basis are held in custody after they were entitled to release, or after any lawful basis for detention has expired. *See, e.g.*, *Jones v. Cochran*, No. 92-6913, 1994 U.S. Dist. LEXIS 20625 at *14-17 (S.D. Fla. Aug. 8, 1994) (holding that plaintiffs initially held on probable cause, acquitted, and then detained for several hours post-acquittal, were held in violation of Fourth Amendment); *Ringuette v. City of Fall River*, 906 F. Supp. 55, 57 (D. Mass. 1995); *cf. Berry v. Baca*, 379 F.3d 764, 766-67 (9th Cir. 2004) (reversing grant of summary judgment to county sheriff on Fourth and Fourteenth Amendment claims where plaintiffs alleged they were detained for periods ranging from 26 to 29 hours after the court authorized their release).

D. HB 56 Violates the Equal Protection Clause

Sections 8 and 28 of HB 56 unconstitutionally violate the Equal Protection Clause because each section unlawfully discriminates against certain noncitizens regarding their access to educational activities in Alabama.

1. Section 8 Unconstitutionally Excludes Lawful Noncitizens from Higher Education Institutions

Section 8 violates the Equal Protection Clause of the Fourteenth Amendment

by excluding lawful noncitizens from public colleges and universities.[30] By its terms, Section 8 bars a host of lawful noncitizens, including those who have a legal right to remain in the United States—sometimes indefinitely—from higher education. For example, individuals who have been granted asylum under 8 U.S.C. § 1158 or refugee status under 8 U.S.C. § 1157 (such as Plaintiffs Haile and Tesfamariam), are entitled to remain in the United States. Ex. 23, Esayas Haile Decl. ¶ 3; Ex. 24, Fiseha Tesfamariam Decl. ¶ 3. Yet under Section 8, because they possess neither "lawful permanent residence" nor a "nonimmigrant visa," HB 56 § 8, they will be barred from attending public postsecondary school. The same is true of individuals granted Temporary Protected Status, petitioners under the Violence Against Women Act whose applications have been approved but who are waiting for visas to become available, and DREAM Act-eligible students whom the federal government has granted deferred action status so that they may continue living and attending school in the United States.

State classifications based on alienage are "'inherently suspect and subject to close judicial scrutiny.'" *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (quoting *Graham*, 403 U.S. at 372). This rule applies not only to state laws that distinguish between citizens and aliens, but also to laws that, like Section 8, distinguish among classes of aliens. What ultimately matters is that the state law is "directed at aliens

[30] For a detailed description of Section 8, *see supra* at 3-4.

and that only aliens are harmed by it." *Id*. at 9 (applying strict scrutiny to strike down New York statute providing financial aid only to LPRs who have applied or intend to apply for citizenship); *see also Pena v. Bd. of Educ. of City of Atlanta*, 620 F. Supp. 293, 299-300 (N.D. Ga. 1985) (applying strict scrutiny to strike down school board policy discriminating among nonimmigrant visa holders for the purposes of charging tuition). Thus, Section 8 cannot stand unless "the governmental interest claimed to justify the discrimination is . . . legitimate and substantial" and "the means adopted to achieve the goal are necessary and precisely drawn." *Nyquist*, 432 U.S. at 7 (internal quotation marks omitted).

Section 8 plainly cannot survive this heightened review, nor even rational basis review. Alabama has no legitimate interest, much less a "substantial" one, in excluding from its public colleges and universities entire categories of noncitizens whom the federal government has authorized to remain in the United States. *See, e.g*., *Graham*, 403 U.S. at 374-75 (rejecting "fiscal integrity" as basis for alienage discrimination); *accord Nyquist*, 432 U.S. at 11 n.15; *Pena*, 620 F. Supp. at 300-01.

2. Section 28 Unconstitutionally Deters Children in Immigrant Families from Enrolling in Public School

Section 28 violates the Equal Protection Clause of the Fourteenth Amendment by creating an obstacle to the enrollment of children from immigrant

families in public school.[31] Nearly 30 years ago, the U.S. Supreme Court held in *Plyler v. Doe*, 457 U.S. 202 (1982), that all children have a constitutional right to public primary and secondary education regardless of their immigration status. Section 28 violates this longstanding rule by creating enrollment procedures that will deter not only undocumented students, but also U.S. citizen children in immigrant families, from securing access to the classroom.

Section 28 deters children from enrolling in school in two ways: (1) by requiring that schools determine the citizenship or immigration status of every student and his or her parents at the time of enrollment, and (2) by authorizing and effectively requiring schools to report children and parents whom they presume to be "unlawfully present" to federal immigration authorities. *See supra* at 4-5. Section 28(e) specifically provides that school officials may "[p]ublic[ly] disclos[e] . . . information obtained pursuant to this section which personally identifies any student . . . for purposes permitted pursuant to 8 U.S.C. §§ 1373 and 1644,"[32] provided they "first apply to the [State] Attorney General and receive a

[31] For a detailed description of Section 28, *see supra* at 3-5.

[32] 8 U.S.C. §§ 1373 and 1644 limit states' and localities' ability to adopt policies restricting the sharing of immigration status information with the federal government. Importantly, however, §§ 1373 and 1644 contemplate *voluntary* information-sharing by law enforcement and public benefits agencies within the broader enforcement framework the federal government has designed; they are not "an invitation for states to affirmatively enforce immigration laws outside Congress' carefully constructed . . . system." *Arizona*, 641 F.3d at 351 n.11. Like Arizona's SB 1070, HB 56 attempts to make mandatory the information-sharing that Congress, in enacting §§ 1373 and 1644, made voluntary.

waiver of confidentiality." HB 56 § 28(e).[33] And, importantly, it provides no limitations on school officials' ability to report students' *parents* to DHS, which can be done without a waiver from the State Attorney General.

Section 28 does not in so many words *require* school officials to disclose students' and parents' information to federal immigration authorities, but that is Section 28's inevitable effect when read in light of HB 56 as a whole. In particular, Sections 5 and 6 forbid state and local agencies, including schools, from maintaining any "policy or practice" that "limits . . . communication between its officers and federal immigration officials," or "that limits or restricts the enforcement of [HB 56] *to less than the full extent permitted by this act* . . . ." HB 56 §§ 5(a), 6(a) (emphasis added). Schools that adopt a policy of not reporting students and their parents to DHS, or that otherwise have a practice of engaging in immigration enforcement to anything "less than the full extent permitted" by HB 56, are subject to the loss of state funds, and are subject to draconian penalties of $1,000 to $5,000 for each day that the policy or practice is in effect. §§ 5(a) &(d), 6(a) & (d). School officials who fail to report such policies and practices are guilty

[33] In this way, Section 28 also violates the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, which prohibits the disclosure of certain identifying information about a student unless the student's parent gives written consent. The U.S. Departments of Justice and Education recently reaffirmed that FERPA's protections apply to noncitizen children, emphasizing that the circumstances in which a school district may disclose noncitizen students' information are "*limited and unlikely to be applicable in the majority of situations school districts confront*." U.S. Dep't of Justice and U.S. Dep't of Educ., Questions and Answers for School Districts and Parents, at 3, *available at* http://www2.ed.gov/about/offices /list/ocr/docs/qa-201101.pdf (emphasis in original).

of a Class A Misdemeanor. HB 56 §§ 5(f), 6(f). Thus, HB 56 ensures that school officials will be compelled to disclose the identities of students and their parents whom they believe to be unlawfully present.

As a result, Section 28 flatly violates *Plyler* by imposing an obstacle to the enrollment in public school for children of immigrant parents. By requiring school officials to inquire into immigration status and authorizing them to report that information to DHS, Section 28 ensures that not only undocumented children, but also U.S. citizens and lawfully-residing immigrant children in mixed-status families, will avoid school registration for fear of bringing themselves or their parents to the attention of the immigration authorities. Section 28 thus goes even further than the law *Plyler* struck down, by hindering educational access not just for undocumented children, but also for U.S. citizen children based on their place of birth and the immigration status of their parents.[34]

Section 28 does so, moreover, without any relation to a legitimate (let alone compelling) state interest. Although the law professes that the purpose of this intrusive and intimidating data collection scheme is to assess the costs and "other educational impacts on the quality of education provided to students who are citizens of the United States, due to the enrollment of aliens who are not lawfully

[34] *See Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001) (applying *Plyler* to invalidate the denial of automatic Medicaid eligibility to newborn U.S. citizen children solely because of their mothers' unlawful immigration status).

present in the United states," HB 56 § 28(d)(5), it is clear from HB 56's history and design that deterring children in immigrant families from enrolling in public school—not assessing educational costs—was the real motivating purpose behind Section 28.

Tellingly, the statements of HB 56's sponsors confirm that deterrence of enrollment of certain children is the law's aim. HB 56's sponsor in the House, Rep. Micky Hammon, described the bill as motivated by the costs of "educat[ing] the children of illegal immigrants" and predicted that HB 56 will result in "cost savings for this state." David White, *Alabama Legislative Panel Delays Voting on Illegal Immigration Bill*, The Birmingham News, Mar. 3, 2011.[35] Likewise, Senator Beason, the bill's 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?" Ex. 42-M, Brian Lyman, *Immigration Law Makes School Officials Uneasy*, The Montgomery Advertiser, June 8, 2011.

In addition, while Section 28 requires schools to determine the immigration status of students' *parents* and report that information to the State Board of Education, *see* HB 56 § 28(a)(1), (c), the law says nothing about what the State Board of Education should do with that information. Parental information is not

[35] *Available at* http://blog.al.com/spotnews/2011/03/alabama_legislative_panel_dela.html.

included in the list of information the State Board of Education must report to the Legislature, *see* § 28(d)(2). The only purpose of collecting information about children's parents, then, is to intimidate mixed-status families and place an obstacle in the path of student enrollment.

Recent federal guidance by the U.S. Department of Justice and U.S. Department of Education specifically recognizes that a school district violates *Plyler* when it adopts enrollment practices that "may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents' or guardians' actual or perceived citizenship or immigration status."[36] Because Section 28 will serve to exclude children of all statuses from the classroom based on alienage (theirs and that of their parents), it violates the Equal Protection Clause and must be enjoined.

E. Section 11 Violates the First Amendment's Right to Freedom of Expression

Section 11 of HB 56 constitutes an impermissible content-based regulation of speech by criminalizing work-related communications in traditional public fora

[36] "Dear Colleague" Letter from the U.S. Dep't of Justice and U.S. Dep't of Educ., May 6, 2011, at 1, *available at* http://www.justice.gov/crt/about/edu/documents/plylerletter.pdf. *See also* U.S. Dep't of Justice and U.S. Dep't of Educ., Questions and Answers for School Districts and Parents, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201101.pdf; U.S. Dep't of Justice and U.S. Dep't of Educ., Fact Sheet: Information on the Rights of All Children to Enroll in School, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201101.pdf.

and by criminalizing the solicitation of work by certain noncitizens.[37] To be upheld, Section 11 must be shown to serve a compelling state interest using the least restrictive means. It cannot satisfy these exacting standards.

Solicitation, including solicitation for financial gain, is clearly First Amendment-protected activity. *See 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) (begging protected); *Fane v. Edenfield*, 945 F.2d 1514, 1517 (11th Cir. 1991) (in-person solicitation by accountants protected); *see also One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1286 (11th Cir. 1999) (using tables to distribute literature protected). Sections 11(f) and (g) infringe on the First Amendment right to engage in such speech by making it unlawful for a person in a vehicle "to attempt to hire or hire" day laborers, and making it unlawful for a person to enter a car "in order to be hired." HB 56 §§ 11(f), (g). These are content-based regulations of speech because liability attaches only when individuals engage in speech about day labor. *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1254-55 (11th Cir. 2004) (ordinance that regulated "only political speakers, leaving soccer-players, sidewalk performers, and tailgating groups untouched" was content-based); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1266 (11th Cir. 2005) (code that regulated some

[37] For a detailed description of Section 11, *see supra* at 5.

type of signs "based on the nature of the messages they seek to convey" was "undeniably a content-based restriction on speech."); *see also S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998) (hallmark of content-based regulation is where official must examine content of message that is conveyed in order to enforce regulation).

Under well-established First Amendment principles, content-based regulations are subject to strict scrutiny and can be upheld only if they advance a compelling governmental interest using the least restrictive means. *Burk*, 365 F.3d at 1251. The State cannot show a compelling interest for imposing these restrictions, or that these are the least restrictive means to achieve its goal. Assuming that the State's goal is to protect traffic safety, the State cannot reasonably justify why it has opted to criminalize only one form of solicitation but has left untouched vast swaths of related conduct that occurs on or near the street—such as soliciting charitable donations from cars or selling newspapers to cars. For this reason, a motion to dismiss a First Amendment challenge to an identical section of Arizona's SB 1070 was denied, and that court found the identical Arizona provision to be a content-based regulation of speech. *See* Ex. 42-E, *Friendly House v. Whiting*, No. 10-1061, at *19-20 (D. Ariz. Oct. 8, 2010).[38] If

[38] Although the Arizona district court denied Plaintiffs' subsequent motion for a preliminary injunction against this provision on First Amendment grounds, the court did so solely to preserve judicial resources in light of the pending decision of the *en banc* Ninth Circuit court in a related

the State is concerned with traffic safety, it has ample traffic laws that it could enforce. Moreover, HB 56 provides no indication that labor solicitation is a problem of statewide proportions requiring a statewide prohibition.

Section 11(a) also imposes a content-based speech restriction on speech by criminalizing the application for or solicitation of work in public areas by noncitizens who do not have federal work authorization. HB 56 § 11(a). Again, this is a content-based law because it prohibits only one type of solicitation—solicitation for work. *Burk*, 365 F.3d at 1254-55; *Solantic*, 410 F.3d at 1266; *S.O.C., Inc.*, 152 F.3d at 1145. Nor can the State establish that Section 11(a) is the least restrictive means to achieve a compelling interest. *See supra* at 28-29 (discussing IRCA preemption).[39]

In addition, Section 11 is unconstitutionally overbroad. A statute is overbroad "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130

---

case that would likely influence the result on Plaintiffs' preliminary injunction motion. *See* Ex. 42-F, *Friendly House v. Whiting*, No. 10-1061, at *3 (D. Ariz. May 10, 2011). The court denied Plaintiffs' motion without prejudice, indicating that refiling may be appropriate after the Ninth Circuit decision. *Id*. This Court need not await a decision from the Ninth Circuit, because as discussed above, under binding Eleventh Circuit law Plaintiffs have clearly established that they are likely to succeed on their claim that Section 11 violates their First Amendment rights.

[39] Even if the prohibition on solicitation of work were viewed under the First Amendment standard applied to commercial speech, the prohibition on solicitation in section 11(a) would be an impermissible restraint. *See Fane*, 945 F.2d at 1517 ("[C]ommercial speech . . . is undeniably entitled to substantial protection under the First and Fourteenth Amendments . . . Blanket prohibitions on commercial speech are disfavored.") (citations omitted). The court in *Fane* further noted: "Prophylatic restraints on commercial speech based on unsupported assertions or unsubstantiated fears are not acceptable." *Id.* at 1518.

S. Ct. 1577, 1587 (2010) (internal citation and quotation marks omitted); *Ala. Educ. Ass'n v. Bentley*, 2011 WL 1484077, *1, 24 (N.D. Ala. 2011). "The danger in an overbroad statute is not that actual enforcement will occur or is likely to occur, but that third parties . . . may feel inhibited in utilizing their protected first amendment communications because of the existence of the overly broad statute." *Clean Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985); *see also CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1270 (11th Cir. 2006).

Section 11 will have a profound limiting effect on the exercise of free speech by day laborers across the state. Plaintiffs John Doe #5 and #6 have expressed that HB 56 will inhibit their willingness to seek day labor work. *See* Ex. 35, John Doe #5 Decl. ¶¶ 8-10; Ex. 36, John Doe #6 Decl. ¶ 6. HB 56 will have a substantial chilling effect on the expressive rights of countless others who regularly solicit work in public forums throughout Alabama, including numerous lawful residents and citizens as well as individuals seeking temporary, informal work for which employment authorization is not required. It will also cause great harm to lawful residents like Plaintiff Romero, who has a student visa but plans to solicit work while waiting for his employment authorization to be approved. Ex. 16, Juan Pablo Black Romero Decl. ¶¶ 3, 7. Because Section 11 prohibits substantial constitutionally protected speech, it is overbroad and should be enjoined.

F. HB 56 Violates Core Sixth Amendment Trial Rights

HB 56 dramatically and unconstitutionally dictates the manner in which evidence is presented and guilt is determined for the new state crimes it creates. For the crimes of failing to register, soliciting work and harboring, transporting, encouraging/inducing, and renting, immigration status or work authorization status is a central element. HB 56 §§ 10(a), 11(a), 13(a)(1)-(4). The law restricts how this fundamental element can be proven, and in the process violates the Confrontation Clause and Compulsory Process Clause of the Sixth Amendment.[40]

1. Sections 10, 11, and 13 Violate the Confrontation Clause

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. XVI. "A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531 (2009).

HB 56 contemplates that the prosecution will introduce an immigration status verification from LESC as the sole evidence on the element of a defendant's unlawful immigration status. HB 56 §§ 10(e), 11(e), 13(h); David Palmatier Decl. (describing LESC). Any such verification from LESC is clearly testimonial within the meaning of the Confrontation Clause. *Bullcoming v. New Mexico*, No. 09-

[40] For a detailed description of the proof requirements for Sections 10, 11, and 13, *see supra* at 3, 5, 6.

10876, __ U.S. __, 2011 WL 2472799 at *7 n.6 (June 23, 2011) ("To rank as 'testimonial,' a statement must have a 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.") (citation omitted). The relevant inquiry is whether the declarant of a pretrial statement would reasonably expect that the statement would be available for use at a later trial. *Melendez-Diaz*, 129 S.Ct. at 2531. The verification received by the State from LESC is "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz*, 129 S. Ct. 2532.

The Supreme Court has held that analogous records must be subject to cross-examination under the Confrontation Clause. In *Melendez-Diaz*, the Court held that a forensic analyst's laboratory report is a testimonial statement because it is "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' " *Melendez-Diaz*, 129 S.Ct. at 2532 (citation omitted). Similarly, "a clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it" is testimonial if "the clerk's statement would serve as substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched." *Id.* at 2539. Certificates of Nonexistent Records ("CNR") are inadmissible without

cross-examination for the same reason.[41] *See United States v. Martinez-Rios*, 595 F.3d 581, 584-86 (5th Cir. 2010).[42] These testimonial statements are indistinguishable from the LESC reports HB 56 requires as evidence in criminal prosecutions.

Because HB 56 mandates that these verifications be admitted without an opportunity for cross-examination, Sections 10, 11, and 13 violate the Sixth Amendment and should be enjoined.

2. HB 56 Violates the Compulsory Process Clause

HB 56's exclusive reliance on LESC responses as evidence of unlawful immigration status also violates the Sixth Amendment right to "compulsory process for obtaining witnesses in [a defendant's] favor." U.S. Const. amend. VI. The Clause has been interpreted broadly to ensure, "at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Taylor v. Illinois*, 484 U.S. 400,

[41] For example, it is a federal crime to reenter the United States without authorization from the federal government after having been removed. 8 U.S.C. § 1326. In reentry prosecutions, prior to *Melendez-Diaz*, the government would often submit a CNR from an immigration officer stating that the officer had searched the federal immigration records and could find no evidence that the accused was permitted to reenter the country. *See Martinez-Rios*, 595 F.3d at 583-85. After *Melendez-Diaz*, this practice clearly violates the Sixth Amendment. *Id.*

[42] *See also United States v. Orozco-Acosta*, 607 F.3d 1156, 1161 (9th Cir. 2010), *cert. denied,* 131 S. Ct. 946 (Jan 10, 2011); *Gov't of the Virgin Islands v. Gumbs*, No. 10-3342, 2011 WL 1667438 at *3-4 (3d Cir. May 4, 2011); *United States v. Madarikan*, 356 Fed. App'x 532, 534 (2d Cir. Dec. 16, 2009); *United States v. Salinas-Valenciano*, 220 Fed. App'x 879, 883-85 (10th Cir. 2007).

408 (1988) (internal quotation marks and citation omitted). "Few rights are more fundamental than that of an accused to present witnesses in his own defense. . . . Indeed, this right is an essential attribute of the adversary system itself." *Id.*[43]

By making the federal government's immigration status determination the *only* permitted evidence in criminal cases, HB 56 violates the right to compulsory process. "[I]t could hardly be argued that a State would not violate the [Compulsory Process] clause if it made all defense testimony inadmissible as a matter of procedural law." *Washington v. Texas*, 388 U.S. 14, 22 (1967). Yet this is exactly what the State has done through HB 56 by prohibiting defendants from introducing *any* evidence on the core issue of immigration status. *See* HB 56 §§ 10(a), (e); 11(a), (e); 13(a), (h). This absolute prohibition is a direct affront to the Compulsory Process Clause, and to the entire adversarial process.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF HB 56 IS NOT PRELIMINARILY ENJOINED

Plaintiffs will suffer irreparable harm if HB 56 is not enjoined. "An injury is irreparable if it cannot be undone through monetary remedies" or "if damages would be difficult or impossible to calculate." *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (internal quotation marks and citations omitted). Courts have repeatedly recognized that irreparable harm may result from the enforcement

[43] Though the Supreme Court has generally grounded the right to present a defense in the Compulsory Process Clause, it has sometimes also relied on the Due Process Clause. *See Chambers v. Mississippi*, 410 U.S. 284, 285, 294 (1973).

of a law that violates the Supremacy Clause, *see, e.g.*, *Morales v. Trans World Airlines*, 504 U.S. 374, 381 (1992); *Arizona*, 641 F. 3d at 366; *GLAHR*, 2011 WL 2520752 at *18, as well as constitutional guarantees of individual rights, *see, e.g., KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

If HB 56 goes into effect, it will immediately subject numerous Plaintiffs and members of Plaintiff organizations to the risk of unconstitutional and extended detention while police officers investigate their immigration status. *See* Ex. 27, Jane Doe #3 Decl. ¶ 3; Ex. 10, Mohammad Abdollahi Ali-Beik Decl. ¶¶ 6-7; Ex. 14, Maria D. Ceja Zamora Decl. ¶¶ 7-9; Ex. 7, Eliseo Medina Decl. ¶¶ 9-10, 12; Ex. 8, Harris Raynor Decl. ¶¶ 5, 7; Ex. 17, Pastor Christopher Barton Thau Decl. ¶ 20; Ex. 25, Jane Doe #1 Decl. ¶¶ 4-6; Ex. 26, Jane Doe #2 Decl. ¶¶ 5, 13; Ex. 29, Jane Doe # 5 Decl. ¶ 10; Ex. 33, John Doe #3 Decl. ¶ 11; Ex. 34, John Doe #4 Decl. ¶¶ 8-9; Ex. 9, Joseph Hansen Decl. ¶ 9; Ex. 28, Jane Doe #4, ¶¶ 6-7. Plaintiffs are a diverse group of individuals and organizations who represent racial minorities, national origin minorities, individuals who speak foreign languages or who have accents when speaking English, and individuals who lack the registration and qualifying identity documents enumerated in HB 56. *See id.* If HB 56 takes effect, Plaintiffs will be at risk of discriminatory treatment, unwarranted police scrutiny, prolonged detentions, and arrest every time they come into contact with Alabama law enforcement. These harms are inherently unquantifiable and cannot

be adequately remedied after the fact. *See, e.g.*, *Terry*, 392 U.S. at 9 (describing liberty of person as "sacred" right) (internal quotation marks and citation omitted); *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984) (discriminatory treatment irreparable); *Grodzki v. Reno*, 950 F. Supp. 339, 342-43 (N.D. Ga. 1996) (unlawful detention irreparable); *Collins v. Brewer*, 727 F. Supp. 2d 797, 813 (D. Ariz. 2010) (enforcement of discriminatory state statute would cause irreparable injury).

Plaintiffs and their members also face the very real threat of unlawful criminal prosecutions if HB 56 is allowed to take effect. *See* Mohammed Abdollahi Ali-Beik Decl. ¶¶ 8-9; Jane Doe #2 Decl.¶ 10; Ex. 22, Michelle Cummings Decl. ¶¶ 3-6; Ex. 15, Pamela Long Decl. ¶¶ 8-9, 12; Ex. 19, Robert Barber Decl. ¶¶ 5-9, 13-17; Ex. 18, Ellin Jimmerson Decl. ¶¶ 2, 6-8; Ex. 4, Rosa Toussaint Decl. ¶¶ 5, 7, 9-10, 16; Ex. 6, John Pickens Decl. ¶ 12; Jane Doe #3 Decl. ¶ 2-3; Ex. 20, Daniel Upton Decl. ¶¶ 8-12; Ex. 3, Mary Elizabeth Marr Decl. ¶¶ 4-9; Ex. 2, Isabel Rubio Decl. ¶ 5-8, 14; Ex. 13, Matt Webster Decl. ¶ 6; Pastor Christopher Barton Thau Decl. ¶¶ 7-10; Ex. 5, Jemise Ray Decl. ¶¶ 6-9, 11; Joseph Hansen Decl. ¶ 10; Ex. 21, Jeffrey Beck Decl. ¶¶ 3-6; Jane Doe #4 Decl. ¶¶ 8, 9.

Because of the threat of unreasonable searches and seizures, racial profiling, and unlawful criminal prosecutions, Plaintiffs and countless others will fear contact with law enforcement if HB 56 goes into effect, and several will avoid reporting

crimes to the police or acting as witnesses, thus making them vulnerable targets for criminals and undermining public safety in their communities. *See* Eduardo Gonzalez Decl. ¶¶ 11-12, 14; George Gascón Decl. ¶¶ 8, 11; Isabel Rubio Decl. ¶ 9; Pamela Long Decl. ¶ 19; Pastor Christopher Barton Thau Decl. ¶ 18. Some will avoid contact with police altogether if HB 56 goes into effect. *See* Ex. 12, Grace Scire Decl. ¶ 9; Jane Doe #2 Decl. ¶ 6; Jane Doe #5 Decl. ¶ 9. In addition, some Plaintiffs who do not possess any registration documents that they could show to avoid detention by local police are in heightened peril. *See* Mohammed Abdollahi Ali-Beik Decl. ¶¶ 6, 8; Jane Doe #2 Decl. ¶¶ 5, 13; John Doe #3 Decl. ¶ 7; John Doe #4 Decl. ¶ 10; Jane Doe #5 Decl. ¶ 3. These harms are quintessential examples of irreparable harm because of their intangible and unquantifiable nature.

Countless children in Alabama, including the children of Plaintiffs and the Plaintiff organizations' members, will be harmed by the implementation of Section 28. They will either face the burden of proving their immigration status to school officials and the risk that school officials will report information about them and their family members to DHS, or they will be chilled from attending school out of fear of being reported to the federal authorities. *See* Ex. 11, Scott Douglas Decl. ¶ 11; Isabel Rubio Decl. ¶ 15; Pastor Christopher Barton Thau Decl. ¶¶ 12-13; Jane Doe #2 Decl. ¶ 9; Jane Doe #3 Decl. ¶ 8; Jane Doe #5 Decl. ¶ 6; Ex. 30, Jane Doe #6 Decl. ¶ 8; Ex. 31, John Doe #1 Decl. ¶ 13; Ex. 32, John Doe #2 Decl. ¶¶ 5-6, 8;

Jane Doe #4 Decl., ¶ 5. Several Plaintiffs and many other Alabamians cannot afford private school tuition, so if they lose access to public education, they lose access to education entirely. *See* Jane Doe #2 Decl. ¶¶ 9-11; Jane Doe #5 Decl. ¶ 6; John Doe #2 Decl. ¶¶ 8-9.

These harms are irreparable. As the Supreme Court recognized in *Plyler*, denying or chilling "innocent children" access to a 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 U.S. at 223-24; *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Courts have noted that actions preventing a child from attending school even for a short period of time can irreparably harm the child and diminish his or her chances of educational success. *See, e.g., L.I.H. ex rel. L.H. v. New York City Bd. Of Educ.*, 103 F. Supp. 2d 658, 665 (E.D.N.Y. 2000); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000); *Thomas v. Davidson Acad.*, 846 F. Supp. 611, 619 (M.D. Tenn. 1994).

For parents, too, Section 28 also threatens irreparable injury. Plaintiff Jane Doe #2 is considering home-schooling her children, even though doing so will hinder her ability to provide financially for her family. Jane Doe #2 Decl. ¶ 9.

Other Plaintiffs face the risk that their families will be torn apart if they are reported to ICE themselves, or if their children or spouses are reported. Jane Doe #3 Decl. ¶ 5; Jane Doe #4 Decl. ¶¶ 6, 7; Jane Doe #6 Decl. ¶ 7; John Doe #1 Decl. ¶ 11.

Several Plaintiffs and Plaintiff organizations' members would be harmed if HB 56 is implemented because Section 8 would forbid them to pursue education at public post-secondary institutions in Alabama. *See* Fiseha Tesfamariam Decl. ¶¶ 3, 6; Esayas Haile Decl. ¶¶ 3, 6; John Doe #3 Decl. ¶¶ 5-6; John Doe #4 Decl. ¶¶ 3-4; Mohammed Abdollahi Ali-Beik Decl. ¶ 8. As the State of Alabama itself recognizes, "[i]n a growing, global, knowledge-based economy, postsecondary education is a prerequisite for increased opportunity" and is "correlated with higher personal incomes, productivity, economic growth, civic participation, and quality of life."[44] Denying students advanced education will deny them economic opportunity and permanently reduce their life chances.

The First Amendment violations in Sections 5, 6, and 11 constitute further irreparable harms to Plaintiffs. Individuals with the will and ability to work in Alabama will be subject to criminal sanctions for communicating about this subject in a public or private forum. HB § 11. Like Plaintiffs John Doe #5 and John Doe

[44] Alabama Commission on Higher Education, *Forging Strategic Alliances: State Plan for Alabama Higher Education, 2009-2014*, at 7, *available at* http://www.ache.state.al.us/SPAC/Forging Strategic Alliances 2 19 10.pdf.

#6, citizens and noncitizens alike will be chilled from lawfully seeking work for fear of prosecution under HB 56's overbroad speech prohibitions. John Doe #5 Decl. ¶¶ 8-10; John Doe #6 Decl. ¶¶ 5-6. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also KH Outdoor*, 458 F.3d at 1271-72.

Plaintiffs would be further harmed by the loss of employment opportunities that flow from this unconstitutional denial of free speech, magnifying the imminent irreparable harms posed by HB 56. *See Comite de Jornaleros de Glendale v. City of Glendale*, No. 04-3521 (C.D. Cal. Jan. 14, 2005); *see also Kinney v. Int'l. Union of Operating Eng'rs, Local 150*, 994 F.2d 1271, 1279 (7th Cir. 1993).

Other Plaintiffs will suffer irreparable harm if HB 56 is implemented because they will be unable to enforce their routine business contracts with individuals who they may know or suspect are in the country without federal immigration authorization. *See* Robert Barber Decl. ¶¶ 19-20; Daniel Upton Decl. ¶ 10; Jemise Ray Decl. ¶¶ 6, 9; Jeffrey Allen Beck Decl. ¶ 8. The labor union Plaintiffs could be prohibited from enforcing a wide range of contracts on behalf of their members and, as a result, would risk having complaints filed against them for failure to properly represent their members. *See* Eliseo Medina Decl. ¶ 16; Harris Raynor Decl. ¶ 10.

Finally, the organizational Plaintiffs will suffer and are already suffering irreparable harm because they are required to divert organizational resources away from core mission activities to address their members' and clients' concerns about the law and repercussions from its enforcement, and will face diminished membership and clients if the law goes into effect. *See* John Pickens Decl. ¶ 11; Isabel Rubio Decl. ¶¶ 13, 15; Rosa Toussaint Decl. ¶¶ 17-20; Mary Elizabeth Marr Decl. ¶ 10; Grace Scire Decl. ¶¶ 12-13; Eliseo Medina Decl. ¶¶ 11, 13, 15; Harris Raynor Decl. ¶¶ 7-8, 11; Scott Douglas Decl. ¶ ¶ 12, 13, 15; Jemise Ray Decl. ¶ 13; Joseph Hansen Decl. ¶¶ 10-11; *see also Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) (threat of loss of customers irreparable). The missions of the organizational Plaintiffs have been and will continue to be frustrated as their members will be afraid to gather in public places, attend marches and meetings, and engage in other advocacy and organizing activities that might bring them into contact with law enforcement. *See* Isabel Rubio Decl. ¶¶ 9, 11-12; Mohammed Abdollahi Ali-Beik Decl. ¶ 9; Rosa Toussaint Decl. ¶¶ 11-12, 15; Mary Elizabeth Marr Decl. ¶ 11; Eliseo Medina Decl. ¶¶ 10, 14; Harris Raynor Decl. ¶¶ 6, 9; Joseph Hansen Decl. ¶ 10. None of these harms can be compensated after the fact, making each a quintessential irreparable injury that justifies an injunction.

III. THE BALANCE OF HARMS STRONGLY FAVORS THE ISSUANCE OF AN INJUNCTION

A preliminary injunction will impose only minimal harm on the State of Alabama because Plaintiffs ask merely for the status quo to be maintained while serious questions about the law's constitutionality are adjudicated. This is precisely the purpose of a preliminary injunction. *See Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1101 n.13 (11th Cir. 2004) ("[T]he textbook definition of a preliminary injunction . . . [is that it is] issued to preserve the status quo and prevent allegedly irreparable injury until the court ha[s] the opportunity to decide whether to issue a permanent injunction"). The equities tip sharply in favor of granting a preliminary injunction while the constitutionality of HB 56 is decided. *See Scott*, 612 F.3d at 1297; *KH Outdoor*, 458 F.3d at 1272.

IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

The interests of Plaintiffs and the general public are aligned in favor of a preliminary injunction in this case. The public interest is not served by allowing an unconstitutional law to take effect. *See Scott*, 612 F.3d at 1297; *KH Outdoor*, 458 F.3d at 1272. Particularly where civil rights are at stake, an injunction *serves* the public interest because the injunction "would protect the public interest by protecting those rights to which it too is entitled." *Nat'l Abortion Fed'n v. Metro. Atlanta Rapid Transit Auth.*, 112 F. Supp. 2d 1320, 1328 (N.D. Ga. 2000). And courts have specifically held that enjoining a state statute that is preempted by federal law will serve the public interest. *See Chamber of Commerce v. Edmonson*,

594 F.3d 742, 771 (10th Cir. 2010); *GLAHR*, 2011 WL 2520752 at *18; *Farmers Branch 2010*, 701 F. Supp. 2d at 859 (granting permanent injunction).

The harms that will be caused by implementation of HB 56 are particularly acute because of the danger to U.S. foreign relations. *See Hines*, 312 U.S. at 64; *Arizona*, 641 F.3d at 365-66. The Government of Mexico has spoken out strongly against HB 56, *see supra* at 16. Strained diplomatic ties, such as those resulting from HB 56, have far-reaching adverse effects on the nation's economy, on federal and state governments' ability to collaborate with foreign governments on issues such as drug and border enforcement and trade, and more broadly on the ability of the United States to maintain peaceable relations with its neighbors. Preserving diplomatic relations with foreign governments is obviously in the public's interest. *See Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669, 675 (S.D. Fla. 1988) (concluding that a preliminary injunction "buttress[ing] the foreign policy of the United States" serves the public interest).

For all of these reasons, the balance of equities tips sharply in favor of issuing a preliminary injunction while the Court fully considers the constitutionality of HB 56.

CONCLUSION

Plaintiffs have met all of the four factors for the issuance of a preliminary injunction. Therefore, Plaintiffs respectfully request this Court grant their Motion

for a Preliminary Injunction and enter the attached Proposed Order enjoining: (a) HB 56 in its entirety because it is preempted as a regulation of immigration and thereby violates the Supremacy Clause of Article VI, Section 2, of the U.S. Constitution; (b) Sections 5, 6, 8, 10, 11, 12, 13, 15, 17, 18, 19, 20, 27, 28, 29, and 30 because these sections directly undermine federal immigration priorities and conflict with federal law in violation of the Supremacy Clause of Article VI, Section 2, of the U.S. Constitution; (c) Section 11 because it violates the First Amendment to the U.S. Constitution; (d) Sections 12, 18, 19 and 20 because they violate the Fourth Amendment to the U.S. Constitution; (e) Sections 10, 11 and 13 of HB 56 because they violate the Sixth Amendment to the U.S. Constitution; and (f) Sections 8 and 28 because they likely violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Respectfully submitted this 21st day of July, 2010.

s/ Samuel Brooke
Samuel Brooke

On behalf of Attorneys for Plaintiffs

Mary Bauer (ASB-1181-R76B)
Andrew H. Turner (ASB-8682-W84T)
Samuel Brooke (ASB-1172-L60B)
SOUTHERN POVERTY LAW CENTER
400 Washington Ave.
Montgomery, Alabama 36104
T: (334) 956-8200

Andre Segura*
Elora Mukherjee*
Omar C. Jadwat*
Lee Gelernt*
Michael K. T. Tan†
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor

mary.bauer@splcenter.org
andrew.turner@splcenter.org
samuel.brooke@splcenter.org

Cecillia D. Wang*
Katherine Desormeau*
Kenneth J. Sugarman*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, California 94111
T: (415) 343-0775
cwang@aclu.org
kdesormeau@aclu.org
irp_ks@aclu.org

Michelle R. Lapointe*
Naomi Tsu*
Daniel Werner*
SOUTHERN POVERTY LAW CENTER
233 Peachtree St., NE, Suite 2150
Atlanta, Georgia 30303
T: (404) 521-6700
michelle.lapointe@splcenter.org
naomi.tsu@splcenter.org
daniel.werner@splcenter.org

Sin Yen Ling*
ASIAN LAW CAUCUS
55 Columbus Avenue
San Francisco, California 94111
T: (415) 896-1701 x 110
sinyenL@asianlawcaucus.org

Erin E. Oshiro*
ASIAN AMERICAN JUSTICE CENTER, MEMBER OF THE ASIAN AMERICAN CENTER FOR
New York, New York 10004
T: (212) 549-2660
asegura@aclu.org
emukherjee@aclu.org
ojadwat@aclu.org
lgelernt@aclu.org
mtan@aclu.org

Linton Joaquin*
Karen C. Tumlin*
Shiu-Ming Cheer*
Melissa S. Keaney*
Vivek Mittal*
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, California 90010
T: (213) 639-3900
joaquin@nilc.org
tumlin@nilc.org
cheer@nilc.org
keaney@nilc.org
mittal@nilc.org

Tanya Broder*
NATIONAL IMMIGRATION LAW CENTER
405 14th Street, Suite 1400
Oakland, California 94612
T: (510) 663-8282
broder@nilc.org

Ben Bruner (ASB-BRU-001)
THE BRUNER LAW FIRM
1904 Berryhill Road
Montgomery, Alabama 36117
T: (334) 201-0835
brunerlawfirm@gmail.com

Freddy Rubio (ASB-5403-D62R)

ADVANCING JUSTICE
1140 Connecticut Ave., NW
Suite 1200
Washington, DC 20036
T: (202) 296-2300
eoshiro@advancingequality.org

Foster S. Maer†
Ghita Schwarz†
Diana S. Sen†
LATINOJUSTICE PRLDEF
99 Hudson St. 14th floor
New York, New York 10013
T: (212) 219-3360
fmaer@latinojustice.org
gschwarz@latinojustice.org
dsen@latinojustice.org

G. Brian Spears
1126 Ponce de Leon Ave., N.E.
Atlanta, Georgia 30306
T: (404) 872-7086
Bspears@mindspring.com

Cooperating Attorney, ACLU of Alabama Foundation
RUBIO LAW FIRM, P.C.
438 Carr Avenue, Suite 1
Birmingham, Alabama 35209
T: (205) 443-7858
frubio@rubiofirm.com

Herman Watson, Jr. (ASB-6781-O74H)
Eric J. Artrip (ASB-9673-I68E)
Rebekah Keith McKinney (ASB-3137-T64J)
WATSON, MCKINNEY & ARTRIP, LLP
203 Greene Street
P.O. Box 18368
Huntsville, Alabama 35804
T: (256) 536-7423
watson@watsonmckinney.com
mckinney@watsonmckinney.com
artrip@watsonmckinney.com

* admitted *pro hac vice*
† application for admission *pro hac vice* forthcoming

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing pleading, including exhibits and a proposed order, was filed through the Court's CM/ECF system, and served electronically on all parties registered through that system. Parties may also access this filing through the court's CM/ECF System.

I further certify that on this day I hand-delivered a copy to the office of

Misty S Fairbanks
Winfield J. Sinclair
Office of the Attorney General, State of Alabama
501 Washington Ave.
Montgomery, AL 36104

I further certify that on this day I placed a copy in the mail, first class, postage prepaid, to:

J.R. Brooks, Esq.
LANIER FORD SHAVER & PAYNE P.C.
P.O. Box 2087
Huntsville, AL 35804

who has represented that he is authorized to accept service for Defendants Wardynski, Warren, Blair, Fuller, Thompson, and Langham.

s/ Samuel Brooke
Samuel Brooke