

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

CASE NO. 11-14535

HISPANIC INTEREST COALITION OF ALABAMA, *et al.*,
Appellants/Plaintiffs,

v.

ROBERT BENTLEY, *et al.*,
Appellees/Defendants.

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

**TIME-SENSITIVE
MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL
AND FOR EXPEDITED APPEAL**

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**CIRCUIT RULE 26.1: CERTIFICATE OF INTERESTED PERSONS &
CORPORATE DISCLOSURE STATEMENT**

The undersigned attorney for Appellants hereby certifies, pursuant to 11th Cir. R. 26.1-1, that the following have an interest in the outcome of this case:

AIDS Action Coalition, Plaintiff/Appellant;

Alabama Appleseed, Plaintiff/Appellant;

Alabama Coalition Against Domestic Violence (ACADV), *Amicus Curiae*;

Alabama Council on Human Relations, *Amicus Curiae*;

Alabama Education Association (AEA) , *Amicus Curiae*;

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

Alabama New South Coalition, *Amicus Curiae*;

Alabama NOW, *Amicus Curiae*;

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

Alianza Latina en contra de la Agresión Sexual (ALAS), *Amicus Curiae*;

American Friends Service Committee, *Amicus Curiae*;

American Immigration Lawyers Association (AILA), *Amicus Curiae*;

Argentine Republic, *Amicus Curiae*;

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Coalition to Abolish Slavery & Trafficking (CAST), *Amicus Curiae*;

Colorado Coalition Against Domestic Violence, *Amicus Curiae*;

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Jane Doe # 3, Plaintiff/Appellant;

Jane Doe # 4, Plaintiff/Appellant;

Jane Doe # 5, Plaintiff/Appellant;

Jane Doe # 6, Plaintiff/Appellant;

Jeff Beck, Plaintiff/Appellant;

Jimmerson, Ellin, Plaintiff/Appellant;

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John Doe # 2, Plaintiff/Appellant;

John Doe # 3, Plaintiff/Appellant;

John Doe # 4, Plaintiff/Appellant;

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National Association of Criminal Defense Lawyers (NACDL), *Amicus Curiae*;

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National Council of Jewish Women, *Amicus Curiae*;

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The National Dominican American Council, *Amicus Curiae*;

The Dominican Republic, *Amicus Curiae*;

The Montgomery Improvement Association, *Amicus Curiae*;

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

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

The National Fair Housing Alliance, *Amicus Curiae*;

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

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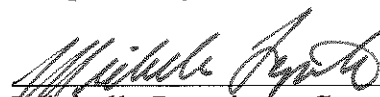
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Wisconsin Coalition Against Sexual Assault, *Amicus Curiae*; and

9 to 5, National Association of Working Women, *Amicus Curiae*.

Respectfully Submitted,



Michelle Lapointe, *Counsel for Appellants*

**TIME-SENSITIVE
MOTION FOR INJUNCTION PENDING APPEAL
AND FOR EXPEDITED APPEAL**

Appellants/Plaintiffs move for an urgently needed injunction pending appeal pursuant to Rule 8 of the Federal Rules of Appellate Procedure to prevent the implementation or enforcement of Sections 10, 12, 18, 27, 28, and 30 of Alabama Act 2011-535 / H.B. 56 (“HB56”). Appellants also move for an order expediting the appeal pursuant to 11th Cir. R. 27-1 I.O.P.-3.

INTRODUCTION

HB56 is a sweeping state immigration law designed to impose such draconian civic and legal disabilities on undocumented immigrants and their family members, undocumented or not, that they will “deport themselves” from Alabama. Governor Robert Bentley proclaimed that Alabama’s HB 56 is “the strongest immigration bill in the country,” and indeed the Alabama law contains provisions even more extreme than those enjoined by federal courts in Georgia, Arizona, and elsewhere.¹

Many of HB56’s harshest provisions took effect on September 28, 2011, when the District Court, departing dramatically from the reasoning of multiple other federal courts, denied Appellants’ motion for a preliminary injunction in

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>.

pertinent part.

Early-emerging anecdotes and reporting show that the wave of results from the failure to enjoin these provisions are just as intended and expected: parents too afraid to send their children to school, and thousands of Latino children absent;² other children appearing at school crying and afraid;³ families packing up and leaving their homes;⁴ workers too afraid to go to their jobs, leaving valuable cash crops rotting in the fields;⁵ teachers in at least one public elementary school questioning students about their and their parents' immigration status;⁶ a municipal water authority stating that customers would need to provide documents reflecting lawful immigration status to maintain their water service;⁷ the Montgomery Probate Office requiring proof of citizenship or lawful presence before any

² The impact was immediate. According to the State Department of Education, By Monday, October 3, 2011, 2,285 Latino students were "absent" statewide. Peggy Gargis, *Judge refuses to block immigration law*, Reuters, Oct. 5, 2011, available at <http://www.reuters.com/article/2011/10/05/us-immigration-alabama-idUSTRE7946BH20111005>.

³ Rena Harver Phillips, *Foley Elementary Students, Parents Afraid of Alabama's New Immigration Law*, Mobile Press-Register, Sep. 30, 2011, available at Doc. 143-2 and http://blog.al.com/live/2011/09/foley_elementary_students_pare.html.

⁴ "The vanishing began Wednesday night, the most frightened families packing up their cars as soon as they heard the news." Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, Otc. N.Y. Times, Oct. 3, 2011 (describing Albertville, Alabama, the evening after the law went into effect). Albertville is a town of 20,000, and is 28% Hispanic/Latino, compared to a statewide average of 4%. U.S. Census Bureau, *Hispanic or Latino by Type: 2010*. (Attached as Ex. 4).

⁵ The Associated Press, *Farmers complain about rotting crops but Sen. Scott Beason says no to immigration law changes*, Oct. 3, 2011, available at http://blog.al.com/wire/2011/10/chandler_mountain_farmers_comp.html.

⁶ Jane Doe #7 Decl. (District Court Doc. 143-1) (Attached as Ex. 5).

⁷ Dominique Nong Decl. (District Court Doc. 143-4) (Attached as Ex. 6).

transactions with the office can be conducted;⁸ a family being told by the electric company that it could not have power service restored to its home unless it could prove its qualifying immigration status, prompting the family to leave;⁹ landlords telling tenants that their rental contracts will not be renewed without proof of immigration status;¹⁰ and companies giving contractors comparable messages.¹¹

More generally, state and local law enforcement officers are now empowered and *required* to investigate a person's immigration status every time they conduct a routine stop or detention if they reasonably suspect the person is undocumented. State and local police can now arrest a person for being in Alabama without current immigration status, even if the federal government is permitting that person to remain in the United States.¹² It is now a felony—punishable by up to ten years in prison and a \$15,000 fine—for a person covered by the law to even *attempt* to enter into any “business transaction” with a state or local government entity. Primary and secondary schools are now required to

⁸ Montgomery Probate Form (District Court Doc. 143-5), *available at* <http://www.mc-ala.org/ElectedOfficials/ProbateJudge/Documents/Immigration%20Flyer.pdf>.

⁹ Evangeline Límon Decl. ¶ 6 (District Court Doc. 143-6) (attached as Ex. 7). Since this incident came to light, representatives of Alabama Power have contacted counsel for Appellants and informed them this is not their policy and it should not recur.

¹⁰ Evangeline Límon Decl. ¶ 4-5.

¹¹ The Associated Press, *Farmers complain about rotting crops but Sen. Scott Beason says no to immigration law changes*, Oct. 3, 2011, *available at* http://blog.al.com/wire/2011/10/chandler_mountain_farmers_comp.html.

¹² For example, Plaintiff Jane Doe #2 who has applied for a “U” visa based on her cooperation with law enforcement in prosecuting a violent crime, could be subject to detention under HB56 despite the fact that Congress has created a path to legalization for individuals like her. See 8 U.S.C. § 1101(a)(15)(U); Jane Doe #2 Decl., attached as Exh. ___.

determine the immigration status of schoolchildren, and their parents, upon enrollment. With limited exceptions, state courts are now prohibited from enforcing contracts between an undocumented immigrant and another party, unless the other party did not have actual or constructive knowledge of the person's undocumented status.

Alabama is in chaos. It has been brought to this point by a state immigration statute of unprecedented breadth, and by a District Court ruling that is utterly at odds with recent decisions from other federal courts, including a Court of Appeals, preliminarily enjoining similar state-law provisions in Arizona, Georgia, and Indiana. At an absolute minimum, Plaintiffs have a substantial case on the merits. But unless HB56 is enjoined while this appeal is pending, Appellants, and the class they seek to represent, will continue to suffer irreparable harms, and HB56's human toll across Alabama and neighboring states will grow. Any harm Defendants might arguably suffer from a temporary stay of the enforcement of this law is negligible in comparison. The only "harm" would be a modest delay in implementing their radical new state immigration regime. In the circumstances presented, an injunction while this appeal is being decided will plainly serve the public interest.

Appellants appreciate that such relief is not to be lightly granted, but this

case presents the type of extraordinary circumstance for which it is intended.¹³

PROCEDURAL HISTORY

HB56 was signed into law on June 9, 2011, with most of its provisions scheduled to take effect on September 1, 2011. Appellants filed their original complaint on July 8, 2011, Doc. 1, raising a facial challenge to HB56 both in its entirety and as to specific sections. Appellants filed an amended complaint on September 16, 2011, Doc. 131. In addition, two other lawsuits were filed challenging specific provisions of HB56—one brought by the United States, and the other by Alabama church groups. *See United States v. Alabama, et al.*, Case No. 11-2746 (N.D. Ala.); *Parsley, et al. v. Bentley, et al.*, Case No. 11-2736 (N.D. Ala.).¹⁴

Motions for preliminary injunctions were filed in all cases, *see* Doc. 37 (“MPI”), and the U.S. District Court for the Northern District of Alabama conducted a combined hearing on the motions on August 24, 2011. The District Court then temporarily enjoined the enforcement of HB56 until September 29, 2011, or the date of the court’s order on the preliminary injunction motions, whichever came earlier. Doc. 126. On September 28, 2011, the District Court

¹³ Enjoining the provisions at issue will have the additional salutary benefit of providing more time for Alabama residents to be educated about what the pertinent provisions of HB56 do and do not do. This education will prove a significant benefit to the public in the event that this Court were to rule against Plaintiffs in this appeal as to one or more of the provisions at issue.

¹⁴ The three cases were initially consolidated. *See* Doc. 59. On September 1, 2011, after the hearing on the parties’ respective preliminary injunction motions, the District Court vacated the consolidation order, thereby severing the cases. Doc. 128.

issued an order granting the Appellants' motion and the motions of the United States and Churches in part and denying the motion as to the provisions at issue in the instant appeal. Doc. 138; *see also* Doc. 137 (district court's opinion); *see also* Docs. 93 & 94 of Case No. 11-2746 (United States); and Docs. 83 & 84 of Case No. 11-2736 (Churches).¹⁵

Despite contrary rulings by other federal courts regarding comparable provisions in several other states' laws, the district court refused to enjoin, among other provisions, Sections 10 (making it a state crime for an undocumented alien to fail to comply with federal alien registration laws) and 12 (requiring local and state officers to make immigration status inquiries and conduct status investigations). And although other courts' reasoning would also foreclose Alabama's even more extreme innovations in immigration regulation, the district court also refused to enjoin Sections 18 (authorizing arrest and immigration inquiries for driving without a license), 27 (making certain contracts involving undocumented individuals unenforceable in state courts), 28 (requiring immigration inquiries at the time of enrollment in kindergarten or any grade in elementary or secondary school), and 30 (making it a state crime for undocumented individuals to enter into

¹⁵ The District Court enjoined several provisions of HB56, including Sections 8 (prohibiting certain aliens from enrolling in public colleges and universities); 11 (making it a crime to solicit work without work authorization, or by day laborers); 13 (creating state immigration crimes of harboring, inducing/encouraging, transporting, and renting); 16 (forbidding employers from claiming business tax deductions for any wages paid to unauthorized immigrants), and 17 (establishing a civil cause of action against employers who fail to hire or discharge U.S. citizens or authorized workers if they hire or retain an unauthorized worker).

“business transactions” with state or political subdivisions).

Within twenty-four hours, on September 29, 2011, Appellants filed a notice of appeal and an emergency motion in the District Court to enjoin Sections 10, 12, 27, 28, and 30 while an appeal was pending. Doc. 140. The District Court issued an order denying Appellants’ motion on October 5, 2011. Doc. 147. Appellants filed an amended notice of appeal on October 7, 2011. Doc. 149. Like Appellants, the United States also filed a motion for a temporary injunction pending appeal in the District Court. The United States’ motion, too, was denied.

Appellants hereby request that this Court enjoin Sections 10, 12, 18,¹⁶ 27, 28, and 30 while this appeal is pending. Appellants further seek to have this appeal resolved on an expedited basis pursuant to 11th Cir. R. 27-1 I.O.P.-3, due to the severity of the harms at issue.

ARGUMENT

I. LEGAL STANDARD

An injunction pending appeal requires consideration of four factors: (1) whether the movant is likely to prevail on the merits of his appeal; (2) whether, if an injunction is not issued, the movant will suffer irreparable harm; (3) whether, if an injunction is issued, any other party will suffer substantial harm; and (4)

¹⁶ Plaintiffs did not ask the District Court to enjoin Section 18 pending appeal, but it is unnecessary to do so because the District Court has denied the United States’ request for the same injunction. *See* District Court Orders (attached as Exs. 3). Plaintiffs therefore present their Section 18 arguments directly to this Court. *See* Fed. R. App. P. 8(a)(2)(A).

whether an injunction would serve the public interest. *In re Grand Jury Proceedings*, 975 F.2d 1488, 1492 (11th Cir. 1992). The first factor is generally the most important, but where the “balance of the equities weighs heavily in favor of granting the [injunction],” the movant need only show a “substantial case on the merits,” rather than a “‘probability’ of success on the merits.” *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)¹⁷; *see also United States v. Hamilton*, 963 F.2d 322, 323 (11th Cir. 1992); *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). Both tests are satisfied here.

II. THE PROVISIONS OF HB56 AT ISSUE HERE SHOULD BE ENJOINED PENDING APPEAL

A. The Balance of Equities Strongly Favors an Injunction Pending Appeal

1. Appellants will suffer irreparable harm if these provisions are not enjoined

The 36 Appellants seeking relief comprise a broad cross-section of Alabamians. Appellants include immigrants who are currently out of status—some of whom have a path to legalization which will require time for the federal government to process—who are now made criminals because they lack alien registration papers (Section 10), are subject to prolonged detention every time they encounter law enforcement (Section 12), and are at risk of a Class C Felony for

¹⁷ The Fifth Circuit decided *Ruiz* on June 26, 1981. It is therefore binding precedent in this Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

simply engaging state or local entities for commercial transactions (Section 30).¹⁸ Appellants and members of appellant organizations include parents of school children who will face the verification requirements of Section 28.¹⁹ Appellants include tenants, landlords, attorneys, and interpreters who know or have reason to believe they know the immigration status of themselves, their tenants, and their clients, and who will be left without recourse of a future contractual breach because of Section 27. Appellants include organizations whose very purpose has been called into question by HB56, whose ability to fulfill their obligations has been critically compromised by the law, and whose membership is being directly affected by Sections 10, 12, 27, 28, and 30.²⁰ Each of these Appellants will suffer irreparable harm as long as the law remains in effect. *See Church v. City of Huntsville*, 30 F.3d 1332, 1338-39 (11th Cir. 1994) (individuals facing police

¹⁸ For example, Jane Doe #2 is undocumented. Her child and another child in her school, were victims of sexual assault by a school official. Jane Doe #2 agreed to testify against the perpetrator, which resulted in the official being convicted and removed from the school. Congress has created a path to legalization for individuals like Jane Doe #2 who may apply for a “U” visa based on their cooperation with law enforcement. *See* 8 U.S.C. § 1101(a)(15)(U); Jane Doe #2 Decl.

¹⁹ For example, Jane Doe #3 has minor children who are not yet in school; Jane Doe #3 does not have current immigration status. Jane Doe #3 Decl. (District Court Doc. 37-27). Greater Birmingham Ministries has new members arriving in Alabama regularly who are themselves undocumented, or whose children are undocumented. Scott Douglas Aug. 15, 2011 Decl. ¶ 3 (District Court Doc. 109-4) (attached as Ex. 8).

²⁰ *See* John Pickens July 11, 2011 Decl. ¶ 11 (Alabama Appleseed) (District Court Doc. 37-6) (attached as Ex. 9); Pickens Aug. 13, 2011 Decl. ¶¶ 2-14 (Alabama Appleseed) (District Court Doc 109-2) (attached as Ex. 10); Isabel Rubio July 6, 2011 Decl. ¶¶ 13, 15 (Dist. Ct. Doc. No. 37-2); (attached as Ex. 11); Rubio Aug. 15, 2011 Decl. ¶¶ 2-7 (District Court Doc. 109-3) (attached as Ex. 12); Scott Douglas July 15, 2011 Decl. ¶ 11 (District Court Doc. No. 37-11) (attached as Ex. 13); Scott Douglas Aug. 15, 2011 Decl. ¶¶ 2-4..

action); *GLAHR*, 2011 WL 2520752 at *3-4 (same); *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009) (organizational harm); *Fl. State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008) (same).

An injunction pending resolution of this appeal will impose minimal harm on the State of Alabama because Appellants 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).

The equities tip sharply in favor of granting a preliminary injunction while the constitutionality of HB 56 is decided. *See Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010); *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

B. Appellants are Likely to Succeed and Can Show a Substantial Case on the Merits

1. HB56 § 10 is Preempted

Section 10 is an unconstitutional state-law alien registration regime, which creates a state crime of “willful failure to complete or carry an alien registration document.” HB56 § 10.²¹ Apart from the District Court’s ruling here, *every*

²¹ The statute makes it a state 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),” two federal statutes that require certain non-citizens to register with the federal government and carry registration documents. HB56 § 10.

federal court that has considered the legality of state alien registration laws has found them to be unconstitutional, including two courts which considered virtually identical provisions of Arizona’s SB-1070 law. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *United States v. Arizona*, 703 F. Supp. 2d 980, 990, 998-1000, 1008 (D. Ariz. 2010); *aff’d*, 641 F.3d 339, 354-357, 366 (9th Cir. 2011). As the three judges on the Ninth Circuit panel uniformly agreed when affirming the injunction of a virtually identical provision,²² these regulations

plainly stand[] in opposition to the Supreme Court's direction: “where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.” *Hines*, 312 U.S. at 66-6

Arizona, 641 F.3d at 355. The District Court here attempted to distinguish *Hines* by reasoning that Alabama’s Section 10 merely ““complement[s]’ the [federal]

²² Compare HB 56 §§ 10(a), (d):

(a) In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), and the person is an alien unlawfully present in the United States.

.....

(d) This section does not apply to a person who maintains authorization from the federal government to be present in the United States.

with Ariz. SB 1070 § 3, codified at Ariz. Rev. Stat. §§ 13-1509(A), (F):

(A) In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a).

.....

(F) This section does not apply to a person who maintains authorization from the federal government to remain in the United States.

registration provisions,” *see* DOJ Order at 23, 22-25, but in so doing, it ignored the plain language of *Hines* when it invalidated a Pennsylvania state alien registration law: the federal government’s “power over immigration, naturalization and deportation,” is supreme and exclusive, and

When the national government by treaty or . . . statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. *No state can add to or take from the force and effect of such treaty or . . . statute.*

Hines v. Davidowitz, 312 U.S. 52, at 62-62 (1941) (emphasis added).

Because federal courts have enjoined a nearly identical provision from Arizona, based on clear and longstanding Supreme Court precedent, Appellants have a substantial case and are likely to prevail on the merits of their appeal.

2. Sections 12 and 18 Are Preempted

Sections 12 and 18 mandate Alabama law enforcement officers to investigate the immigration status of people they encounter in the field. These provisions purport to turn state and local officers into immigration officers, who are unconstrained by the federal government’s enforcement priorities and who will instead implement Alabama’s preferred enforcement policies. The provisions are very similar to sections in Arizona’s SB 1070 law and Georgia’s HB 87 law which have been enjoined by federal courts on preemption grounds. *See Ga. Latino Alliance for Human Rights v. Deal (“GLAHR”)*, No. 11-1804, 2011 WL 2520752,

at *1, 7-15, 18 (N.D. Ga. June 27, 2011), (enjoining Ga. HB 87 § 8, codified at O.C.G.A. § 17-5-100), *appeal docketed*, No. 11-13044; *United States v. Arizona*, 703 F. Supp. 2d 980, 989, 993-998, 1008 (D. Ariz. 2010) (enjoining Ariz. SB 1070 § 2(B), codified at Ariz. Rev. Stat. § 11-1051(B)); *aff'd*, 641 F.3d 339, 346-354, 366 (9th Cir. 2011). Yet the District Court in this case departed from these rulings, rejecting Appellants' and the U.S. Department of Justice's preemption challenge. It did so in error.

Section 12 requires that during “*any* lawful stop, detention, or arrest” by a state or local law enforcement officer, if the officer has a “reasonable suspicion” that the person is “unlawfully present,” the officer *must* attempt to “determine the citizenship and immigration status” of the person. HB56 § 12(a) (emphasis added). If the person cannot produce one of the enumerated state-approved identity documents that give rise to a presumption of lawful presence, the officer must investigate the person’s “citizenship and immigration status” by contacting the federal government. §§ 12(a), (d). Similarly, Section 18 requires officers to “determine the citizenship” of any person arrested for driving without a license, and to determine, “if an alien, whether the alien is lawfully present in the United States.” § 18(c). Officers must make a “verification inquiry” to the federal government “within 48 hours.” § 18(d). If the person is deemed to be “an alien unlawfully present . . . , the person . . . shall be detained until prosecution or until

handed over to federal immigration authorities.” § 18(d).

Being present in the United States without lawful immigration status is not a crime, as the District Court acknowledged. HICA PI Order at 74; *accord Arizona*, 641 F.3d at 352; *GLAHR*, 2011 WL 2520752, *9. State and local law enforcement officers have no power to make arrests for suspected civil immigration violations such as unlawful presence.²³ They may assist the federal government in enforcing civil immigration law *only* if the federal government has chosen to delegate its authority through one of two statutory mechanisms. First, 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). Second, under 8 U.S.C. § 1357(g), the federal government may enter into written agreements (“287(g) agreements”) with state or local agencies, permitting designated officers to exercise immigration enforcement functions under certain conditions and under the supervision of the federal government.

Sections 12 and 18, like the now enjoined provision of Georgia’s HB 87, “attempt[] an end-run” around this scheme.” *GLAHR*, 2011 WL 2520752 at *11.

²³ Separately, federal law authorizes state and local officers to assist in enforcing 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.

They attempt to wrest control over immigration enforcement from the federal government, supplanting the federal government's enforcement priorities and policy judgments with the State of Alabama's. They create a scheme of *mandatory* investigation and detention on the basis of suspected violations of civil immigration law, which, "[b]y imposing mandatory obligations on state and local officers, . . . interfere[] with the federal government's authority to implement its priorities and strategies in law enforcement, turning [state] officers into state-directed DHS agents." *Arizona*, 641 F.3d at 351-52. This state enforcement scheme directly conflicts with Congress's careful limitation of the circumstances in which state and local law enforcement officials may assist in the enforcement of immigration law. By attempting to "circumvent[] Congress'[s] intention to allow the Attorney General to authorize and designate local law enforcement officers" to assist in certain immigration enforcement functions through the federally controlled 287(g) program, Sections 12 and 18 "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *GLAHR*, 2011 WL 2520752 at *3-4 (citing *Crosby*, 530 U.S. at 373).²⁴ As

²⁴ Indeed, HB 56's enforcement scheme is so broad and intrusive that it permits Alabama law enforcement officers to make warrantless civil immigration arrests in circumstances where even federal immigration agents cannot. Under 8 U.S.C. § 1357(a)(2), in order to make a warrantless arrest for a suspected civil immigration violation, a federal immigration officer must reasonably believe that the individual is likely to escape before an arrest warrant can be obtained; no such limitation applies to Alabama officers under Section 12. *See Buquer v. City of Indianapolis*, No. 1:11-CV-708, 2011 WL 2532935 at *11 (S.D.Ind. June 24, 2011) (no provision of INA

recognized in *GLAHR* and *Arizona*, Appellants have a substantial case to present on the merits.

3. Section 28 violates the Equal Protection Clause

Section 28 requires public schools in Alabama, from kindergarten to twelfth grade, to inquire into the immigration status of students and parents. It mandates 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.” HB56 § 28(a)(1). This information will be reported to the State Board of Education. § 28(b). Section 28(e) also 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.” HB 56 § 28(e).²⁵

Section 28 violates the Equal Protection Clause of the Fourteenth Amendment by creating three impermissible classifications, each of which creates

“indicat[es] that Congress intended state and local law enforcement officers to retain greater authority to effectuate a warrantless arrest than federal immigration officials.”).

²⁵ Sections 5 and 6 of HB56 add on to these reporting requirements by forbidding 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 [HB56] to less than the full extent permitted by this act” HB56 §§ 5(a), 6(a) (emphasis added). Schools that adopt a policy of not reporting students and their parents to immigration officials are subject to the loss of state funds and financial penalties of \$1,000 to \$5,000 for each day. §§ 5(a) & (d), 6(a) & (d).

unconstitutional obstacles to the enrollment of children from immigrant families.²⁶

Of course, a child has no control over her place of birth, the immigration status of her parents, or their decision to reside in the United States. As the Supreme Court articulated in *Plyler v. Doe*, 457 U.S. 202 (1982), and in a long line of nonmarital children cases, targeting a child for a parent’s perceived misdeeds “does not comport with fundamental conceptions of justice.” *Plyler*, 457 U.S. at 220. As *Plyler* explained:

Visiting condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the child is an ineffectual—as well as unjust—way of deterring the parent.

Id. (internal citation and alterations omitted). Punishing a child by denying education is especially egregious because it would

impose[] a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure

²⁶ First, it creates a classification of children born outside the United States who are subject to additional documentation requirements of section 28; this classification is based on alienage and must satisfy strict scrutiny to be upheld. *See Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977). Second, it creates a classification of children who are presumed to be unlawfully present and who are subject to reporting requirements to both federal and state officials; this classification is based on alienage and is subject to intermediate scrutiny. *Plyler v. Doe*, 457 U.S. 202, 230 (1982). Finally, it creates a classification of children whose parent(s) are not lawfully present in the United States and who are subject to the reporting requirements of Section 28; this classification distinguishes among U.S. citizen children based on an attribute of their parents and is subject to intermediate scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Lewis v. Thompson*, 252 F.3d 567, 591 (2d Cir. 2001).

of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [such a statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

Id. at 223-24.

By requiring different documentation depending on a child’s citizenship, immigration status, place of birth, and parents’ immigration status, Section 28 facially discriminates among children along these lines. Moreover, by requiring both inquiry into and reporting of immigration status, Section 28 in conjunction with Sections 5 and 6 is designed to deter—and is already deterring—children in mixed-status families from going to school. As the U.S. Department of Justice and U.S. Department of Education recently made clear, 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.”²⁷ Section 28 blatantly violates this guidance.

The District Court avoided the merits of Appellants’ Equal Protection claim, instead holding that Appellants lacked standing to challenge Section 28. HICA

²⁷ “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>.

Order at 93-102. This reasoning was fundamentally flawed in key respects. First, the District Court misapplied *Common Cause/Ga. v. Billups*, 554 F.3d 1340 (11th Cir. 2009) and *Fl. State Conference of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008) and failed to even acknowledge the evidence Appellants Alabama Appleseed, Hispanic Interest Coalition of Alabama, and Greater Birmingham Ministries (“GBM”) provided to establish diversion of resources and harm to the organizations, as well as the fact that GBM constantly has new members with immigrant children coming into the state, who will be affected by Section 28 this year.²⁸ Second, the District Court ignored the plain language of Section 28(a)(1) requiring school officials to inquire into the immigration status of parents, and simply “assume[d]” that school officials would ignore this requirement. HICA Order at 97, 98 (using this basis to find Jane Doe #3 lacked standing). This assumption is improper because the question of Section 28’s scope and effect is precisely the matter being disputed.²⁹

²⁸ See John Pickens Aug. 13, 2011 Decl. ¶¶ 2 (diversion of resources) 7 (“at virtually every single presentation, parents and other service providers have asked questions . . . [and] for information about how to enroll their children in school; whether to enroll their children in school; what will happen to the registration information that is collected by the school when they enroll their children; [and] whether registration information will be shared with immigration authorities”) (Doc. 109-2) (attached as Ex.10); Isabel Rubio Aug. 15, 2011 Decl. ¶¶ 3 (noting 13 information sessions conducted “to give information on HB 56 and . . . specifically information on enrollment of students in Alabama public schools”), 5, 7 (harm to HICA) (Doc. 109-3) (attached as Ex. 12); Scott Douglas Aug. 15, 2011 Decl. ¶¶ 2 (noting diversion of resources to educate people about how to “enroll’ in Alabama schools”), 3 (harm to members) (Doc. 109-4) (attached as Ex. 8).

²⁹ Put differently, the District Court could have found that Jane Doe #3 is not likely to prevail on the merits because the District Court did not believe the law as written would apply to her (a

Finally, the District Court accepted a limiting interpretation of the law provided by Defendants—that immigration questions would only be asked when a child enters the Alabama public school system, and not every year during the annual registration process. HICA Order at 98. However, Defendants remain free to retract their current reading of the statute that students “enroll” in school only once, for there is no codified definition of the term in Alabama law, and Section 28(a)(1) can naturally be read to require annual inquiries. Thus, the threat of imminent harm to undocumented students and students from mixed-status families will continue absent an injunction. *See Harrell v. Florida Bar*, 608 F.3d 1241, 1267-68 (11th Cir. 2010). Moreover, Section 28(e) specifically exempts immigration status information from the privacy protections that would otherwise apply under state and federal law, expressly permitting school officials to share that information with the federal government for enforcement purposes. And, as noted above, *see supra* note 25, HB 56 Sections 5 and 6 require school officials to aid in the enforcement of federal immigration law and of HB 56 to the fullest extent allowed by law; thus, there is a very real threat that, even after enrollment, school officials will be bound to report any information they acquire about a child’s or parent’s immigration status. The risk of Section 28’s harms are thus not limited to enrollment time.

point which Plaintiffs would dispute). To instead find that Jane Doe #3 lacked standing was in error, for whether Section 28 requires this inquiry is part of the case and controversy at issue.

4. HB56 § 30 should be enjoined pending appeal

Section 30 makes it a felony for an “alien not lawfully present” to enter or attempt to enter into any “business transaction” with the state or local government agency. HB56 § 30(b).³⁰ This is a direct regulation of immigration, and is invalid because the “[p]ower to regulate immigration is unquestionably exclusively a federal power.” *DeCanas v. Bica*, 424 U.S. 351, 354 (1976); *Hines*, 312 U.S. at 66. The touchstone of constitutional preemption analysis is whether the state law regulates the conditions under which immigrants may remain in the country. State laws that affect “the conditions under which a legal entrant may remain” constitute direct regulation of immigration, which is a power exclusively reserved for the federal government. *DeCanas*, 424 U.S. at 355, *Toll v. Moreno*, 458 U.S. 1, 11 (1982).

Section 30 goes far beyond the provisions enjoined by Arizona or Georgia, but its efforts to regulate and punish every aspect of an undocumented immigrant’s life in Alabama—including those who are seeking relief from the federal government like Jane Doe #2 who has an immigration petition pending—is strikingly similar to efforts by certain local municipalities to prohibit renting to undocumented individuals; such renting restrictions have been consistently

³⁰ The term “business transaction” is defined only by stating it “includes any transaction between a person and the state or a political subdivision,” with a single exception of applying for a marriage license. HB56 § 30(a).

enjoined, and indeed even the District Court in this case recognized that criminalizing *renting* would be unacceptable. *See* DOJ Order at 70-86; *Lozano v. Hazleton*, 496 F. Supp. 2d 477, 530-33 (M.D. Pa., 2007) (enjoining rental restriction ordinance); *aff'd*, 620 F.3d 170, 219-24 (3d Cir. 2010), *vacated and remanded on other grounds*, No. 10-772, 2011 WL 2175213 (U.S. June 6, 2011); *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 854-56 (N.D. Tex. 2010) (invalidating ordinance placing restrictions on renting to undocumented individuals), *appeal docketed*, No. 10-10751 (5th Cir. July 28, 2010). Section 30's express function is to control the conditions under which immigrants can remain in Alabama by prohibiting *and criminalizing* immigrants' efforts to engage in a wide range of transactions necessary for daily life, which is unacceptable because it creates a "[l]egal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens" by "subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials." *Hines*, 312 U.S. at 65-66.³¹

³¹ Section 30 is also conflict-preempted because it undermines federal immigration law by criminalizing basic life activities of individuals that Congress intended to be able to remain in the United States pending the adjudication of their immigration cases, like Appellant Jane Doe #2. *See supra* n.18. Congress has created a path to legalization for individuals like Jane Doe #2 who may apply for a "U" visa based on their cooperation with law enforcement. *See* 8 U.S.C. § 1101(a)(15)(U). Congress plainly intended that individuals like Jane Doe #2 would be able to remain in the United States while their applications were pending. Yet under Section 30 Jane Doe #2 will be committing a Class C felony for any attempt to engage in any type of transaction with Alabama or her home city of Birmingham. HB56 § 30(d). This decision by Alabama to criminalize her activities is in direct conflict with Congressional priorities and intent. *See This*

In rejecting Appellants’ and the United States’ preemption challenge to Section 30, the District Court limited the scope of the phrase “business transactions”, DOJ Order at 112-114,³² and reasoned that since courts have affirmed the ability of states to limit undocumented immigrants’ access to licenses, Section 30 therefore cannot be preempted. *See* DOJ Order at 113-14. This reasoning is erroneous. As an initial matter, the notion that a state may deny driver’s licenses to individuals who cannot provide proof of lawful immigration status does not mean that a state may also criminalize the mere *attempt* to obtain a license, which is precisely what Section 30 does. More importantly, the question of whether Section 30 impermissibly regulates immigration is not altered by a single, potentially permissible, example of the state law’s reach.³³ The question is only answered by determining whether the law regulates immigration in an

That & Other Gift & Tobacco, Inc. v. Cobb County, 285 F.3d 1319, 1322 (11th Cir. 2002) (citing *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)).

³² This interpretation is suspect. For example, the District Court found that public corporations are excluded, DOJ Order at 112 (quoting *Limestone Cnty. Water and Sewer Auth. V. City of Athens*, 896 So. 2d 531, 534 (Ala. Civ. App. 2004)), yet a decision of the Alabama Supreme Court reached a contrary conclusion by holding that “[b]ecause public corporations perform municipal functions, they have long been held to be agencies of the municipality they serve, regardless of their organizational structure.” *Water Works and Sewer Bd. of City of Talladega v. Consolidated Publ’g, Inc.*, 892 So.2d 859, 863 (Ala. 2004).

³³ It is not clear that the standard articulated in *United States v. Salerno*, 481 U.S. 739, 745 (1987), applies in facial challenges on preemption grounds. In three cases since *Salerno*, the Supreme Court has addressed the merits of preemption claims without applying the *Salerno* standard. *See Chamber of Commerce v. Whiting*, ___ U.S. ___, 131 S.Ct. 1968 (2011); *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Moreover, in other contexts, the Supreme Court has questioned the applicability of the *Salerno* standard. *United States v. Arizona*, 641 F.3d 339, 345-46 (9th Cir. 2011); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008). In any event, Plaintiffs meet either standard.

impermissible fashion, *DeCanas*, 424 U.S. at 355, or conflicting with federal law, both of which Section 30 does.

5. HB56 § 27 should be enjoined pending appeal

Section 27, with a few narrow exceptions, prohibits Alabama state courts from enforcing contracts between an alien “unlawfully present in the United States” and any other party, if the other party had direct or constructive knowledge that the alien was “unlawfully present” and if 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.” HB56 § 27(a). Like Section 30, Section 27 constitutes an impermissible state regulation of immigration. It is clear that the intention Section 27 is to fundamentally alter the conditions under which immigrants reside in Alabama. *DeCanas*, 424 U.S. at 355, and as the District Court recognized, “In essence, Section 27 strips an unlawfully-present alien of the capacity to contract except in certain circumstances—i.e., the other party to the agreement did not know the alien was unlawfully present and the contract could be performed in less than 24 hours.”³⁴ DOJ Order at 101.³⁵ Section 27 is a deliberate usurpation of the

³⁴ Section 27 does not, however, apply to contracts for a night’s lodging, food for the noncitizen, or medical services. HB56 § 27(b).

³⁵ In addition, this provision also affects lawfully present aliens who will invariably face myriad questions from private individuals regarding their lawful status as well as U.S. citizens and lawfully present immigrants who contract with individuals who may lack immigration status. *Límon Decl.* ¶ 7.

federal government's exclusive authority to regulate immigration by establishing new conditions under which immigrants may remain. *DeCanas*, 424 U.S. at 355; *see also Toll*, 458 U.S. at 11; *Lozano*, 620 F.3d at 219-24; *Farmers Branch*, 701 F. Supp. 2d at 854-56.

Section 27 is also preempted by 42 U.S.C. § 1981.³⁶ Although § 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.*

³⁶ 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.").

Int'l Union of Elevator Constructors, 438 F. Supp. 1121, 1136-38 (N.D. Cal. 1977). Thus Congress occupied the field regarding the right of aliens to make and enforce contracts by enacting and amending § 1981, and Section 27 conflicts with this federal law directive to ensure that all persons have equal contracting rights. 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”).

The District Court incorrectly reasoned that although Section 27 strips the ability to contract from undocumented immigrants, it nevertheless is not preempted by federal law because “nothing shows Congress intended [unlawful aliens’] contracts would be enforceable.” DOJ Order at 102. This is patently incorrect as evidenced by § 1981’s plain language. It further reasoned that Section 27 does not conflict with § 1981 because § 1981 does not require that undocumented immigrants always be treated equally—a result also in direct conflict with § 1981’s text. The District Court attempted to shore up this conclusion by noting that it would be appropriate for an employer to elect not to hire an undocumented immigrant because such discrimination is based on “noncompliance with federal law.” HICA Order at 93 (quoting *Anderson v. Comboy*, 156 F.3d 167, 180 (2d. Cir. 1998)). This reading of *Anderson* misses the central point of § 1981, and of the *Anderson* decision. *Anderson* holds that § 1981 “provides a claim against

private discrimination on the basis of alienage,” and its example of the ability of an employer to not hire an undocumented worker was used to show that this would constitute discrimination based not on *alienage* (which would be illegal) but on compliance with IRCA. *Id.* The District Court’s opinion is undermined, not supported, by *Anderson*.

III. APPEAL OF DISTRICT COURT’S PRELIMINARY INJUNCTION RULING SHOULD BE EXPEDITED PURSUANT TO 11TH. CIR. R. 27-1 I.O.P.-3.

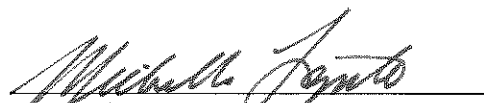
Pursuant to Internal Operating Procedure 3 of Rule 27-1 of the Eleventh Circuit Rules, Appellants seek to expedite this Court’s review of the District Court’s denial of their request for a preliminary injunction. Good cause to expedite exists because of the irreparable harm being caused to Appellants and putative class members.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court enjoin HB56 §§ 10, 12, 27, 28, and 30 pending appeal.

Dated: October 7, 2011

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that on October 7, 2011, I caused service of the foregoing Appellants' Motion for Leave to Exceed Page Limit by personal service at the following address:

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I further certify that on October 7, 2011, I caused service of the foregoing Appellants' Motion for Leave to Exceed Page Limit by overnight mail properly addressed upon:

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The original, signed Motion and three additional copies were also hand-delivered to the United States Court of Appeals for the Eleventh Circuit.

The original, signed Motion was also emailed to the Court and all counsel.

Dated: October 7, 2011


Michelle Lapointe