IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

LOWCOUNTRY IMMIGRATION COALITION; MUJERES DE TRIUNFO; NUEVOS CAMINOS; SOUTH CAROLINA VICTIM ASSISTANCE NETWORK; SOUTH CAROLINA HISPANIC LEADERSHIP COUNCIL; SERVICE EMPLOYEES INTERNATIONAL UNION; SOUTHERN REGIONAL JOINT BOARD OF WORKERS UNITED; JANE DOE #1; JANE DOE #2; JOHN DOE #1; YAJAIRA BENET-SMITH; KELLER BARRON; JOHN MCKENZIE; and SANDRA JONES,

Plaintiffs,

v.

NIKKI HALEY, in her official capacity as Governor of the State of South Carolina; ALAN WILSON, in his official capacity as Attorney General of the State of South Carolina; JAMES ALTON CANNON, in his official capacity as the Sheriff of Charleston County; and SCARLETT A. WILSON, in her official capacity as Solicitor of the Ninth Judicial Circuit,

Defendants.

Civil Action File No.
2:11-cv-02779-RMG

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiffs move for a preliminary injunction enjoining Defendants from enforcing Senate Bill 20 ("SB 20"). If SB 20 is allowed to go into effect, it will expose all South Carolinians, and in particular both lawfully present immigrants and immigrants who lack certain immigration status, to a broad array of unwarranted and unlawful police intrusion into their daily lives. These concerns are not imaginary—in only a few weeks since the implementation of a similar state immigration law in Alabama, a crisis has gripped that state. Local officers have begun arresting individuals for new state immigration crimes, and on at least one occasion, have done so even when an individual was lawfully out of custody pending his federal immigration proceedings.[1] Individuals—both with and without lawful immigration status, and especially those of Latino ethnicity or appearance—are afraid to leave their homes, and are even leaving the state, for fear that local officials will target them for immigration violations and subject them to prolonged detention or even arrest.[2] The full impact on Alabama will not be known for some time, but the immediate and irreparable harm is self-evident.

The power to regulate immigration is exclusively federal. By enacting a comprehensive scheme of immigration, South Carolina has unconstitutionally taken control over immigration in violation of the Supremacy Clause, defeating what is constitutionally required to be a uniform national system and plan under the direction of only one authority—the federal government. Congress did not intend for states to dictate their own versions of immigration policy and allow local officials to ride roughshod over and outside of federal direction.

Moreover, the broad and unregulated scope of SB 20 is completely at odds with federal

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[1] *See infra* n.8.

[2] *See, e.g.*, Ed Pilkington, *The grim reality of life under Alabama's brutal immigration law*, The Guardian, Oct. 14, 2011, *available at* http://www.guardian.co.uk/world/2011/oct/14/alabama-immigration-law-families-trapped; Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, N.Y. Times, Oct. 3, 2011, *available at* http://www.nytimes.com/2011/10/04/us/after-ruling-hispanics-flee-an-alabama-town.html.

immigration law and policy. Plaintiff Jane Doe # 2 exemplifies the problems with SB 20. Although she is in the process of obtaining a U-Visa as a victim of crime and the federal government knows of her and has decided not to institute removal proceedings against her, under SB 20, she will be at risk of harassment by local police at every turn. Since she cannot obtain a state driver's license and has no federally-issued photo identification to demonstrate her status, if she is stopped for even the most minor traffic offense, she will be held on the side of the road for an undefined amount of time while a local officer attempts to verify her status. If an officer, untrained in the complexity of federal immigration law, believes that Jane Doe # 2 is lawfully required to carry immigration documentation, the officer could place her under arrest for violating a state-based criminal immigration registration offense. And by criminalizing the act of sheltering oneself and allowing oneself to be transported, SB 20 subjects her to the risk of arrest for being driven to the grocery store or a medical appointment, visiting a friend, or renting an apartment for her and her children. Jane Doe # 2 will face the decision of whether to uproot her family from South Carolina or live her life in constant fear that she will be criminally prosecuted and incarcerated for state immigration crimes.

SB 20 runs afoul of other constitutional protections as well, including the Fourth Amendment. In seeking to identify and punish those whom the State determines are unlawfully present, SB 20 mandates that officers prolong the detention or custody of individuals solely to attempt to verify their immigration status or transfer them to the federal government without any otherwise valid justification.

FACTUAL BACKGROUND

The South Carolina General Assembly enacted SB 20 on June 21, 2011. In an attempt to counteract a perceived failure by the federal governments to enforce immigration law, South

Carolina legislators enacted this comprehensive law, directly regulating numerous aspects of immigration. During the debate, legislators expressly stated an intent to wrest control over immigration regulation away from the federal government. For example, Senator Larry Martin stated that "the big problem that has brought us here today is the failure of the federal government to secure our borders. . . . [I]t bothers me that our borders are still not secure, and that's why we have to deal with this today." Ex. 22-A, Transcript of March 2, 2011, Senate Debate on SB 20 at 11:4-13. The intent of the legislators was clearly stated by Senator Larry Grooms, sponsor of the bill in the Senate, when talking about SB 20: "[T]his bill . . . will make South Carolina a difficult place to live. It will cause many of the illegal immigrants to self-deport." Ex. 22-B, Transcript of March 8, 2011, Senate Debate on SB 20 at 3:12-14.

As noted in the press, Senator Martin supported SB 20 "because the federal government is failing to address the issue. He hopes an increase in calls from the state's local law enforcement agencies will get the attention of federal agencies responsible for immigration enforcement. 'I want the phones of the federal government to ring off the hook.' " Noelle Phillips, *Ford: Mexicans Needed To Do Work Others Reject*, The State (Feb. 8, 2011).[3] And in signing SB 20 into law, Governor Haley acknowledged that legislators "understood how important it was to make sure that South Carolina became the state that was known across the country as one that was going to enforce our immigration laws and make sure that anyone that was illegal found another state to go to." *See* The Times-Examiner, *Gov. Nikki Haley Signs Illegal Immigration Reform Bill* (June 27, 2011).[4]

[3] *Available at* http://www.thestate.com/2011/02/08/1685334/tougher-immigration-proposal-goes.html.
[4] *Available at* http://www.timesexaminer.com/videos/807-gov-nikki-haley-signs-illegal-immigration-reform-bill (statement made at signing ceremony).

SB 20's most problematic provisions include the following.[5]

State-Based Transporting and Harboring Immigration Crimes (Section 4 & S.C. CODE § 16-9-460 (as currently in effect))

Section 4 amends a provision enacted as part of the South Carolina Illegal Immigration Reform Act of 2008 ("A280") that established state immigration crimes of transporting or concealing, harboring, or sheltering a person who has "come to, entered, or remained in the United States in violation of law . . . with intent to further that person's unlawful entry into the United States or avoiding apprehension or detection of that person's unlawful immigration status by state or federal authorities." Sec. 4, S.C. CODE §§ 16-9-460(B), (D). SB 20 amended this provision to make it a crime for those who have "come to, entered, or remained in the United States in violation of law to allow themselves to be transported" or "to conceal, harbor, or shelter themselves from detection . . . in any place, including a building or means of transportation [to] avoid apprehension or detection." § 16-9-460(A), (C).

State-Specific Alien Registration Scheme (Section 5)

Section 5 creates a state alien registration regime by criminalizing the "fail[ure] to carry in the person's personal possession any certificate of alien registration or alien registration receipt card . . . while the person is in this State." Sec. 5, S.C. CODE § 16-17-750. The federal government regulates this conduct under 8 U.S.C. § 1304, which imposes requirements that particular non-citizens carry specific registration documents.

Mandatory Investigation of Immigration Status and Prolonged Detention by State and Local Law Enforcement (Sections 6 & 7)

[5] Section 17 of SB 20 creates an "Illegal Immigration Enforcement Unit" within the South Carolina Department of Public Safety ("DPS") with the specific mandate of enforcing state immigration laws. Sec. 17, S.C. CODE § 23-6-60. Section 17, however, takes effect only upon funding of the Unit by the General Assembly, and is thus not scheduled to take effect on January 1, 2012. Sec. 20.

SB 20 mandates that South Carolina law enforcement officers effectuate prolonged detentions solely for the purpose of investigating immigration status. Section 6 requires every law enforcement officer in South Carolina to determine the immigration status of any person the officer stops if the officer develops "reasonable suspicion to believe that the person is unlawfully present in the United States." Sec. 6, S.C. CODE § 17-13-170(A). Only individuals who can produce or who are verified as having one of four state-approved identity documents receive a presumption of lawful status. § 17-13-170(B)(1). Individuals who cannot produce or do not possess such a document are subject to a lengthy and intrusive immigration verification process. Section 6 effectively requires that South Carolina law enforcement officers contact the federal government in the process of investigating immigration status. § 17-13-170(C)(1). Section 6 further authorizes peace officers to arrest without a warrant anyone they determine to be "unlawfully present" in order to transfer that person to the custody of the federal government—without any otherwise lawful state basis. § 17-13-170(C)(4).

Under Section 7, if a person is confined for *any* period in jail, law enforcement officers are required to attempt to determine whether the person is "an alien unlawfully present in the United States." Sec. 7, S.C. CODE § 23-3-1100(A). And if "the prisoner is an alien," correctional officials must "verify whether the prisoner . . . is unlawfully present in the United States" by contacting the federal government. § 23-3-1100(B). If the prisoner has been determined to be "unlawfully present" and has completed his sentence, an officer must notify DHS and securely transport the prisoner to federal custody. § 23-3-1100(E).

State-Based False Immigration Documents Crime (Section 6)

Section 6 also creates a state criminal enforcement scheme for false identity documents relating to immigration, criminalizing the use or possession of false identification "for the

purpose of offering proof of the person's lawful presence in the United States." Sec. 6, S.C. CODE § 17–13–170(B)(2).

Immigration Enforcement Mandate (Section 1)

Section 1 requires all state and local agencies to enforce SB 20 to the maximum extent under threat of civil liability and steep monetary penalties. Section 1 creates a private right of action to sue any political subdivision that enacts any ordinance or policy that intentionally limits law enforcement "from seeking to enforce a state law with regard to immigration" or communicating with federal officials regarding an individual's immigration status. Sec. 1, S.C. CODE § 6-1-170(E)(1). Political subdivisions found guilty of such violations face steep monetary fines of $1,000 to $5,000 for each day that the policy or practice remains in effect. § 6-1-170(E)(1)(c)(3).

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 Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011); *Peter B. v. Sanford*, No. 10-767, 2011 WL 824584, *2 (D.S.C. Mar. 7, 2011).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. SB 20 Violates the Supremacy Clause

SB 20 violates the Supremacy Clause of the U.S. Constitution in three distinct ways. First, it is a state "regulation of immigration," *DeCanas v. Bica*, 424 U.S. 351, 353-54 (1976), which is categorically prohibited since immigration regulation is exclusively a federal function.

Second, it conflicts with federal law by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also United States v. Onslow County Bd. of Ed.*, 728 F.2d 628, 635 (4th Cir. 1984) (finding that although the local tuition requirement did not explicitly conflict with the federal statute, it presented an unconstitutional obstacle to Congress's goal of preventing state taxation of military personnel). Third, 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 several provisions of SB 20 are preempted as "state law[s] . . . regulating conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

The significant weight of authority lies in Plaintiffs' favor. The Ninth Circuit and district courts in Georgia, Indiana, and Arizona have enjoined laws similar to many of SB 20's provisions. *See United States v. Arizona*, 641 F.3d 339, 354-57 (9th Cir. 2011), *aff'g* 703 F. Supp. 2d 980 (D. Ariz. 2010); *Georgia Latino Alliance for Human Rights v. Deal*, No. 11-1804, 2011 WL 2520752, *9-*15 (N.D. Ga. June 27, 2011) ("GLAHR"); *Buquer et al. v. City of Indianapolis*, No. 11-00708, 2011 WL 2532935, *6-*16 (S.D. In. June 24, 2011) (finding that a provision authorizing warrantless arrests "alters [the] balance [between competing regulatory and policy objectives] by authorizing the arrest for immigration matters of individuals within the State of Indiana only whom, in many cases, the federal government does not intend to be detained"); *see also Utah Coalition of La Raza v. Herbert*, No. 11-0401, Doc. 45 (D. Utah May 11, 2011) (issuing temporary restraining order pending briefing and hearing on the matter) [6]; *but see United States v. Alabama*, No. 11-14532-CC, at 14-15 (11th Cir. Oct. 14, 2011) (enjoining

[6] Of course, the Court is not bound to follow courts outside of this Circuit when it ultimately decides the merits.

Alabama's state alien registration law pending appeal), *appealing United States v. Alabama*, 2011 WL 4469941, *19, *37-*45 (N.D. Ala. Sept. 28, 2011) (enjoining a state immigration-related harboring and transporting provision, but not a mandatory law enforcement immigration verification provision or state alien registration criminal offense).

1. SB 20 Is an Unconstitutional State Law Regulating Immigration

The "[p]ower to regulate immigration is unquestionably *exclusively* a federal power." *DeCanas*, 424 U.S. at 354 (emphasis added); *see also Hines*, 312 U.S. at 66. SB 20 constitutes a comprehensive scheme regulating immigration through state-crafted and state-controlled measures, and should be preliminarily enjoined in its entirety. Since the federal government's power to regulate immigration is exclusive, a state law regulating immigration is unconstitutional even if Congress has not exercised its power to regulate in the same area. 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. Such is not the case here. SB 20 constitutes a state law regulating immigration for three independent reasons: (1) by its operation it actually regulates immigration; (2) it creates state-based immigration classifications; and (3) it directly interferes with the core federal interests that the rule against state immigration regulation is designed to protect.

a. SB 20 Is a Comprehensive Scheme to Regulate Immigration

SB 20 is a comprehensive state effort to regulate immigration by controlling the conditions under which immigrants can remain in South Carolina—from broadly subjecting individuals to repeated seizures for immigration verification purposes, to creating state-based and state-controlled immigration criminal offenses, to criminalizing daily activities by those who are unlawfully present or who have interactions with those who are unlawfully present, to

prescribing the immigration-related documentation that certain lawfully-present immigrants must carry. *See* Secs. 4-7. These restrictions fundamentally alter the conditions under which immigrants may remain in South Carolina. *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).[7]

By mandating such a concerted immigration scheme, SB 20 runs afoul of the constitutional division of authority between the federal government and the states in regulating immigration. It is well-settled that state laws regulating immigration are unconstitutional because they tread on the federal government's exclusive power. 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 registration card); *see also Toll v. Moreno*, 458 U.S. 1, 11 (1982). And courts have repeatedly enjoined such state laws regulating the conditions under which noncitizens may remain in the country. *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

[7] *DeCanas* does not imply that a state law that neither determines who may enter nor the conditions under which lawfully present immigrants may remain is not preempted. For example, in *Henderson v. Mayor of the City of New York*, the Court found that a New York City law providing for ship owners to pay bond on landed passengers violated the Supremacy Clause, even though the law did not directly regulate who could be admitted; rather, the law operated as "in effect a tax on the passenger." 92 U.S. 259, 274 (1875). And in *DeCanas*, the Court explained that the California statute at issue addressed local concerns and that any impact it had on immigration was "purely speculative and indirect"—which would have been irrelevant if all that mattered was the statute's subject matter (*i.e.*, whether the state law directly determines who can enter or conditions under which they remain). 424 U.S. at 355.

requirements not authorized by federal law for 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*, 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 addition to the text of SB 20, the legislative debates described above make clear that SB 20 is centrally concerned with regulating immigration, and not to "further[] a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). SB 20 was enacted as South Carolina's attempt to replace federal law and policy with state-crafted solutions to the perceived problem of the federal government's failure to regulate immigration to South Carolina's liking. Its goal—and its effect—is to profoundly restrict the "entry and stay" of foreign nationals in South Carolina, *DeCanas*, 424 U.S. at 355, 359, particularly those whom South Carolina believes to be present without federal approval. By creating conditions that make life so difficult for immigrants that they remove themselves from the state, SB 20 as a whole constitutes a direct regulation of immigration.

SB 20's impact on immigration is direct, not "incidental or speculative." *Cf. id.* at 355. In only a few weeks since a similar law entered into effect in Alabama, there already have been reports of misuse of immigration enforcement by local law enforcement officers. For example, an individual in Alabama was arrested and detained under a state crime equivalent to SB 20's Section 5 for failing to have an alien registration document, even though the arresting officer knew (as documented in the police report) that the individual was currently in immigration

proceedings and had been released by the federal government on bond.[8] SB 20 will have a similar impact if it goes into effect.

b. SB 20 Regulates Immigration By Creating Alien Classifications

Sections 4, 6, and 7 of SB 20 also impermissibly regulate immigration by creating state classifications of aliens that are not (and cannot be) properly tied to any federal immigration standards setting forth who is, and who is not, entitled to be in the United States. "Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) (citing *Mathews v. Diaz*, 426 U.S. 67, 84-87 (1976)). "The States enjoy no power with respect to the classification of aliens." *Plyler*, 457 U.S. at 225 (citing *Hines*, 312 U.S. at 52). "As the Supreme Court held in *De Canas* [sic], a state cannot, on its own, determine who is or is not entitled to be present in the United States." *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 772 (C.D. Cal. 1995) ("*LULAC*") (citing *DeCanas*, 424 U.S. at 355). A state law classification of immigrants is an impermissible regulation of immigration where it is not sufficiently tied to federal standards. *See Farmers Branch*, 701 F. Supp. 2d at 855-56.

Section 4 creates an undefined category of persons having "unlawful immigration status." *See* Sec. 4, § 16-9-460(A)-(D). Persons classified as having "unlawful immigration status," and others who help or assist such persons, are subject to being stopped, arrested, and prosecuted for transporting, harboring, and sheltering offenses. Similarly, Section 6 creates its own

[8] *See State v. Marquez*, Case No. MC11-00221 (Jemison Mun. Ct.) (attached as Ex. 1). The arresting officer contacted federal immigration officers, and received the following response: "I.C.E. RECORDS INDICATE THAT SUBJECT IS NOT LEGALLY IN THE UNITED STATES AND IS CURRENTLY UNDER REMOVAL PROCEEDINGS. SUBJECT APPEARS TO HAVE AN APPLICATION/APPEAL PENDING SUBJECT WAS RELEASED ON BOND WHILE WAITING FOR HEARING." *Id.* at *5. The arresting officer nevertheless arrested because Mr. Marquez did not possess an alien registration document.

particularized categories of immigrants, those lawfully present and those "unlawfully present." *See* Sec. 6, § 17-13-170. Persons classified as "unlawfully present" are to be investigated, detained, and potentially transported to the custody of State or Federal immigration authorities. § 17-13-170(C)(4). These sections do not tie the State's determination to any federal standard, and do not adopt or incorporate any federal law definition.[9]

And under Section 7, prisoners who are classified as "unlawfully present in the United States" are, on that basis, to be reported to DHS and transported to federal custody upon request. Sec. 6, §§ 23-3-1100(B), (C)-(E). Section 7 is also not adequately tied to federal standards. Though Section 7 does require a determination by the federal government that the prisoner is "unlawfully present in the United States," §§ 23-3-1100(B), (H), "unlawful presence" is neither a federal immigration status nor a mandatory ground for commencing federal removal proceedings. Thus, South Carolina has still created its own state-law classification for the purpose of making a State determination of which immigrant prisoners are not entitled to be in the United States. *Cf. Farmers Branch*, 701 F. Supp. 2d at 855-56 (use of local immigration classification that was "grounded" in federal classification for purpose of restricting who could rent residential property was an impermissible regulation of immigration because such use was

[9] The INA and other federal laws use the terms "lawfully present" and "unlawfully present" in different ways in different contexts, sometimes defining the terms, sometimes not. The various usages of the terms do not define any actual federal immigration status. Nor does the INA use the term "unlawfully present" as being coextensive with "removable." *See Plyler*, 457 U.S. at 240 n.6 (Powell, J., concurring) ("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"); *see also id.*, 457 U.S. at 226. For example, one INA provision uses the term "unlawfully present" in the context of specifying certain individuals who are, in certain narrow, defined circumstances, ineligible for visas or admission, 8 U.S.C. § 1182(a)(9)(B), and defines an alien as being "unlawfully present" "if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled," § 1182(a)(9)(B)(ii).

not authorized by federal law and "directly impact[ed] immigration").

c. SB 20's Impact On Foreign Relations as a Regulation of Immigration Requires that It Be Held Invalid

SB 20's demonstrated impact on foreign relations further requires that it be held invalid. *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 Haley signed SB 20 into law, the Mexican government expressed concern that the law will threaten the "human and civil rights of Mexicans living in or visiting South Carolina," and that its "passage ignores . . . Mexico's importance as the state's fourth largest export market" and "goes against the principles of shared responsibility and mutual trust and respect with which the federal governments of Mexico and the United States address their shared challenges in North America." Mexican Foreign Affairs Ministry, *The Government of Mexico Regrets that S20 Has Been Signed into Law in South Carolina* (July 27, 2011).[10] Unless it is enjoined, SB 20 will unacceptably strain the United States' relations with foreign nations. *See* Ex. 22-C, 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 would hinder the capacity of US 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, Georgia's

[10] Available at http://www.sre.gob.mx/en/index.php?option=com_content&view =article&id=1099:the-government-of-mexico-regrets-that-s20-has-been-signed-into-law-in-south-carolina&catid=27: archives& Itemid=322.

HB 87, and Alabama's HB 56, numerous foreign governments expressed concern that such laws will cause widespread violations of the United States' treaty obligations, which would harm their nationals living in or visiting the United States.[11] No less than other recently passed state immigration laws, SB 20 intrudes on this sensitive and exclusively federal realm and must be enjoined. *See* Ex. 22-D, Decl. of William J. Burns (Acting Deputy Secretary of State) ¶¶ 7-13, 34-49 (discussing the negative impact that similar state immigration laws, Arizona's SB 1070 and Alabama's HB 56, have had and will have on foreign relations).

Laws dealing directly with matters of immigration, such as SB 20, "belong[] to that class of laws which concern the exterior relation of this whole nation with other nations and governments." *Henderson*, 92 U.S. at 273. Such laws "ought to be[] the subject of a uniform system or plan." *Id*. By placing immigration enforcement authority directly in the hands of South Carolina officers and establishing wholly independent state immigration laws, SB 20 creates the same potential for abuse, confusion, and harm to the nation's foreign relations.

2. SB 20 Violates the Supremacy Clause Because It Conflicts with Federal Law

SB 20 is also preempted on the separate and independent ground that its provisions conflict with federal law, in that it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Columbia Venture, LLC v. Dewberry &*

[11] *See, e.g.*, Ex. 2, Brief of the United Mexican States as Amicus Curiae in Support of Plaintiffs, *Friendly House et al. v. Whiting et al*., No. 10-01061, Doc. No. 299 (D. Ariz. filed July 8, 2010); Ex. 3, Motion of the Governments of Argentina, Brazil, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Peru for Leave to Join Brief of the United Mexican States as Amicus Curiae in Support of Plaintiffs, *Georgia Latino Alliance for Human Rights, et al. v. Deal*, et al., No. 11-1804, Doc. No. 54 (N.D. Ga. filed June 15, 2011); Ex. 4, Amici Curiae Brief by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, United Mexican States, and Uruguay in Support of Plaintiffs, *Hispanic Interest Coalition of Alabama v. Bentley*, No. 11-2484, Doc. No. 95 (N.D. Ala. filed Aug. 4, 2011).

Davis, LLC, 604 F.3d 824, 829-30 (4th Cir. 2010) (quoting *Hines*, 312 U.S. at 67); *Onslow County Bd. of Ed.*, 728 F.2d at 635 ("Preemption may occur whether the conflict is explicit from the language of the federal statute or implicitly contained in its structure and purpose") (internal citations omitted). Even where the state law does not set out substantively different terms than federal law, the state law is conflict preempted where it " 'interferes with the *methods* by which the federal statute was designed to reach [its] goal.' " *Columbia Venture, LLC*, 604 F.3d at 830 (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992) (emphasis added)). 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.

In the INA, Congress has set forth a comprehensive system of immigration laws, regulations, procedures, and policies under which the federal government regulates many of the exact topics covered by SB 20. In order to meet Congressional goals and priorities with respect to immigration regulation, Congress provided the executive branch with broad authority to develop and administer immigration policy. 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . ."); *Mathews*, 426 U.S. at 84 ("it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens."); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power."). Thus, in determining whether a law creates obstacles to the accomplishment of Congressional immigration objectives,

courts must also evaluate whether the state law presents obstacles to the executive branch's scheme for achieving such goals. For example, under the INA, the federal government has the discretion to determine how to proceed with respect to an individual who entered the United States without inspection. The federal government could decide to formally prosecute the individual, to seek the civil penalty of removal from the United States, or to not initiate removal proceedings, which is particularly appropriate where the individual is *prima facie* eligible for Temporary Protected Status, status as a victim of crime or domestic violence, or other relief. SB 20 removes such options, and instead provides the State with the authority only to criminally prosecute.

Further, "the threat of 50 states layering their own immigration enforcement rules on top of the INA also weighs in favor of preemption." *Arizona*, 641 F.3d 339, 354; *see, e.g.*, *French v. Pan Am Express, Inc.*, 869 F.2d 1, 6 (1st Cir. 1989) (If the states were free to regulate in the area of aviation, "a patchwork of state laws . . . some in conflict with each other, would create a crazyquilt effect."); *Sprint Corp. v. Evans*, 818 F. Supp. 1447, 1457-58 (M.D. Ala. 1993) ("To allow each state to impose its own duties and requirements governing the interstate transmission of material by common carriers would result in precisely the type of piecemeal regulation that Congress wanted to avoid in passing the Act.").

Plaintiffs' claims against the state-specific immigration crimes created under SB 20 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)). *Whiting* underlines the fact that the Supreme Court has

only upheld state immigration-related regulations against preemption challenges where Congress affirmatively intends for states to be able to enact laws of that specific type. *See Toll*, 458 U.S. at 13 n.18 ("We rejected the preemption claim [in *DeCanas*] not because of an absence of congressional intent to pre-empt, but because Congress *intended"* to allow states to adopt regulations); *Whiting*, 131 S.Ct. at 1981 ("Given that Congress *specifically preserved* authority for the States [to pursue sanctions through licensing laws], it stands to reason that Congress did not *intend* to prevent the States from using appropriate tools to exercise that authority.") (emphases added). No such Congressional intent exists here. *GLAHR*, 2011 WL 2520752 at *14 ("[W]hereas 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.").

The South Carolina law directly conflicts with the comprehensive federal immigration scheme by: (1) superseding federal limitations on the authority of state and local officers to enforce immigration laws, (2) creating new immigration crimes defined and enforced by the state; (3) establishing a South Carolina-specific alien registration scheme; and (4) placing an impermissible burden on federal resources and creating obstacles to the accomplishment of federal priorities.

a. SB 20 Conflicts with Federal Limitations on State and Local Officers' Authority to Enforce Immigration Laws

SB 20 requires state and local law enforcement officers to investigate and enforce what the state perceives to be immigration violations. While SB 20 is preempted as a regulation of immigration because it seeks to exercise authority that is necessarily federal in nature,[12] Sections

[12] As noted above, Sections 6 and 7 constitute impermissible regulations of immigration because the authority to arrest and detain individuals for violating civil provisions of immigration law

6 and 7 also directly conflict with Congressional goals and federal limitations on immigration enforcement.

Sections 6 and 7 also conflict with the narrow authorizations for state and local police to enforce federal immigration laws. 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 non-citizen for the federal crime of illegal reentry by a deported felon into the United States, if the federal government provides "appropriate confirmation" of the suspect's status, and only for such time as may be required for the federal government to take the individual into custody. And 8 U.S.C. § 1324(c) authorizes state and local officers to make *arrests* for the *federal* immigration crimes of transporting, smuggling, or harboring certain aliens. However, the authorization for state and local officers to arrest under these specific circumstances does not provide states with authority to prosecute individuals for such crimes, much less to legislate state penalties in this area.[13]

Second, Congress has authorized state and local officers to assist with the enforcement of *civil* immigration provisions in only two specific circumstances. The U.S. Attorney General may authorize "any State or local enforcement officer" to enforce immigration laws upon certification

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stems from one source: the exclusively federal authority to remove such individuals from the United States. *See Zadvydas v. Davis*, 533 U.S. 678 (2001). Furthermore, Section 6 is the primary means through which SB 20's overall scheme to regulate immigration is implemented by mandating the investigation and verification of immigration status, making arrests, reporting suspected offenders, and transferring them to federal custody.

[13] To take just one example of this distinction, while state and local officers have the authority to arrest military deserters, states cannot establish disciplinary schemes and prosecute such individuals in state courts. 10 U.S.C. § 808 ("Any civil officer having authority to apprehend offenders under the laws of the United States or of a State . . . may summarily apprehend a deserter from the armed forces and deliver him into the custody of those forces."); *Houston v. Moore*, 18 U.S. 1, 17 (1820) ("Over the national militia, the States never had, or could have, jurisdiction [to punish a militia man's delinquency]. None such is conferred by the constitution of the United States; consequently, none such can exist.").

of "an actual or imminent mass influx of aliens," a power which 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 pursuant to which certain designated local officers may receive specialized training and perform limited, delegated immigration enforcement functions in clearly specified and carefully monitored circumstances. These officers must first be "determined by the Attorney General to be qualified to perform [such] functions, must be certified to have received special training," and "shall be subject to the direction and supervision of the Attorney General." §§ 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." § 1357(g)(5).[14]

SB 20 goes beyond any Congressional authorization by requiring officers to investigate immigration status of individuals who they have stopped and broadly detain and arrest individuals solely on the basis of the suspected civil violation of unlawful presence.[15] Section 6 requires *every* state, county, and municipal law enforcement officer to determine the immigration

[14] Section 1357(g)(10) further provides that a 287(g) agreement is not required for local police to "cooperate with the Attorney General" in certain aspects of immigration enforcement. That provision plainly does not authorize states to act unilaterally or enact their own immigration enforcement regimes. 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 unnecessary and meaningless. As the Ninth Circuit has explained regarding § 1357(g)(10), "Congress intended for state officers to aid in federal immigration enforcement only under particular conditions, including the Attorney General's supervision." *United States v. Arizona*, 641 F.3d 339, 349 (9th Cir. 2011); *see also GLAHR*, 2011 WL 2520752 at *9-10.

[15] Mere presence in the United States without lawful immigration status is not a crime. *See United States v. Madrigal-Valadez*, 561 F.3d 370, 376 (4th Cir. 2009) (no "authority . . . makes the *status* of being in the United States after entering in violation of § 1325(a) a separate crime") (emphasis in original); *GLAHR*, 2011 WL 2520752, *9 ("mere presence in this country without authorization is not a federal crime"); *Martinez-Medina v. Holder*, No. 06-75778, 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").

status of any person the officer stops if the officer develops "reasonable suspicion to believe that the person is unlawfully present in the United States." Sec. 6, § 17-13-170(A). Whenever an officer develops such "reasonable suspicion" and the person also does not possess or is unable to produce a state-approved identification, the officer is effectively required to contact the federal government in order to verify the person's immigration status. §§ 17-13-170(B)(1), (C)(1). Thus, Section 6 mandates that officers prolong detentions and undertake custodial immigration investigations solely in order to investigate a person's immigration status without any lawful state-law basis.[16] Section 6 further authorizes peace officers to arrest without a warrant anyone they determine to be "unlawfully present" in order to transfer that person to the custody of the federal government. § 17-13-170(C)(4). During the time required for the transfer, peace officers are effectively required to hold the individual under arrest with no lawful basis. But, under current law, even if a peace officer has received verification from the federal government that a person appears to lack immigration status, the officer may not detain the person solely on that basis.[17]

Similarly, Section 7 mandates that whenever a person is confined for *any* period of time in jail, officers must attempt to determine whether the person is an alien unlawfully present. Sec. 7, S.C. CODE § 23-3-1100(A). If, however, "the prisoner is an alien," correctional officials must verify whether the prisoner is unlawfully present in the United States by making a query to the

[16] *See Arizona*, 641 F.3d at 362 ("states do not have the inherent authority to enforce the civil provisions of federal immigration law"); *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *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").

[17] SB 20 is preempted even as to implementation by the South Carolina sheriff's departments in Beaufort, Charleston, Lexington, and York counties that have 287(g) agreements. For these agencies, SB 20 improperly creates a source of immigration enforcement authority distinct from the 287(g) agreement and outside of the direction and supervision of federal authorities.

federal government. § 23-3-1100(B). Section 7 further requires the continued custodial detention of individuals in South Carolina jails, even after any lawful basis for custody has expired, solely on the basis of suspected federal civil immigration violations, in order to transport individuals to federal authorities. § 23-3-1100(E).

Under SB 20, state enforcement of immigration law is detached from the control of the federal government. *See GLAHR*, 2011 WL 2520752, *11 (finding that a 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"). If, for example, the Attorney General were frustrated with or opposed to the manner in which local authorities authorized under 287(g) are enforcing immigration laws, he could rescind such delegation of power. Yet under SB 20, local police will have free rein to investigate and enforce these new state immigration laws without the need to attend federal trainings or comply with federal standards or be accountable to the federal government in any way. *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) ("When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."). Likewise, state and local officers are not authorized to enforce the federal immigration crimes of failure to carry registration documentation or the use of fraudulent identification documents for immigration purposes, much less state-based versions of these laws. *See* Sec. 5, § 16-17-750; Sec. 6, § 17-13-170(B)(2); *see, e.g.*, *Arizona*, 641 F.3d at 355 ("Congress provided very specific directions for state participation in 8 U.S.C. § 1357, demonstrating that it knew how to ask for help where it wanted help; it did not do so in the registration scheme.").

The dangers of SB 20's unconstitutional immigration scheme are particularly acute for

the many non-citizens who lack immigration status, and whose continued presence technically violates federal immigration law, yet are allowed to remain in the United States with the knowledge and consent of the federal government. For example, Plaintiff Jane Doe # 2 currently lacks lawful immigration status in the United States, but has applied to the federal government for a U-visa based on her cooperation in the criminal prosecution of her daughter's abusive husband. Decl. Jane Doe # 2, ¶¶ 3-4, attached as Ex. 5. Although federal authorities are aware that Jane Doe # 2 is undocumented, they have not elected to initiate immigration proceedings against her. Yet Plaintiff Jane Doe # 2 does not have a federal alien registration document or other document that can establish to South Carolina law enforcement officials that her presence in the country is known to the federal government. *Id.* ¶ 5. Although the federal government would have no interest in arresting her, federal agents could not, if asked, tell a South Carolina peace officer that she is in lawful status. SB 20 authorizes peace officers to investigate and detain Jane Doe # 2 on immigration grounds without a warrant and without regard to the fact that the federal government has already declined to seek her removal.

Similarly, John Doe # 1 has an Employment Authorization Document ("EAD") from the federal government, as well as a South Carolina driver's license, but both expire in early January, 2012. Decl. of John Doe # 1, ¶¶ 2-4, attached as Ex. 6. In the past it has taken him several weeks or even a month to receive his renewed EAD despite his eligibility for it, and because he cannot renew his driver's license without an up-to-date EAD, he goes for periods without current photo identification. *Id.* ¶¶ 3-4. Thus, if he is stopped by South Carolina law enforcement during these periods, John Doe # 1 will be subjected to prolonged interrogation and detention while his status is being verified with the federal government—which has repeatedly provided him with work authorization and the ability to remain lawfully in this country for over a decade.

Because of the complex structure and operation of federal immigration law, there are countless individuals in South Carolina who are presently not in lawful status, but are eligible for a form of immigration relief, such as asylum, adjustment of status, or withholding of removal—relief for which Congress has expressly provided and which is fundamental to the proper administration of federal immigration laws as Congress intended them to work. Some of these individuals are known to the federal government; others will not be identified until they are actually placed in proceedings by the federal government and their cases are adjudicated.

b. SB 20 Creates New State-Based Immigration Crimes that Conflict with Federal Law

SB 20 creates several new state offenses criminalizing immigration-related conduct. As discussed above, South Carolina previously established independent state immigration offenses criminalizing the harboring or transporting of unauthorized immigrants. *See* S.C. CODE § 16-9-460 (2008). Section 4 of SB 20 amended this provision to also criminalize the acts of allowing *oneself* to be transported or harboring *oneself*. *See* Sec. 4, S.C. CODE § 16-9-460(A), (C). Although Section 4 is constitutionally preempted as an impermissible regulation of immigration because it applies criminal sanctions to those who assist in the entry and continued presence of certain non-citizens—a core element of immigration regulation, Section 4 also impermissibly conflicts with the operation of federal law. While appearing to mirror federal law on the surface, these new state criminal offenses are specific to, and wholly administered by state and local officials in South Carolina, beyond of the federal government's control over how best to regulate such conduct to meet Congress's objectives. *See GLAHR*, 2011 WL 2520752 at *13.

Congress has established several federal offenses that appear superficially similar to the new state offenses created by Section 4. *See* 8 U.S.C. § 1324. Yet, Section 4 materially differs from the federal harboring statute. First, Section 4 criminalizes those who are themselves

transported or who conceal or harbor themselves—conduct which is not subject to prosecution under the federal law and is not part of the Congressional design for defining and addressing the harboring and transporting components of unlawful immigration. To date, there is no reported case in which the federal government has prosecuted an individual for allowing him- or herself to be transported or self-harbored.[18] Fundamentally, Section 4 amounts to a scheme to use the operation of state criminal law to determine and punish unlawful presence—the responsibility for which is constitutionally exclusively reserved to the federal government. *DeCanas*, 424 U.S. at 354-55. It is difficult to imagine what sort of conduct an individual who is unlawfully present could engage in on a daily basis without allowing themselves to be transported, given South Carolina's requirement that an individual demonstrate proof of lawful presence to obtain a driver's license. For example, an individual whom the state presumes to be unlawfully present could be arrested and prosecuted under this new law for being driven to a store, school, or a medical appointment.

The law even criminalizes the act of living in South Carolina for individuals whom the state deems to be present unlawfully. Under Section 4, simply renting or living in an apartment within South Carolina could be interpreted by state authorities to constitute sheltering oneself from detection. The broad and unfettered scope of this provision authorizes officers to arrest individuals for such innocuous and omnipresent conduct. By criminalizing self-transporting and harboring, South Carolina has for all intents and purposes required those without proof of lawful status to leave the state or face criminal liability.

Fundamentally, Section 4 of SB 20 directly conflicts with federal law by creating a separate and independent state system of criminal immigration laws. These state laws will be

[18] Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 U.C.L.A. L. Rev. 1749, 1771 n.152 (2011).

enforced at the discretion of state law enforcement officers and prosecutors and will be interpreted by state judges—not by their federal counterparts. Local authorities do not have access to the full range of options provided under the INA for handling immigration crimes, including, for example, the option of imposing civil or administrative sanctions rather than criminal ones. 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." *GLAHR*, 2011 WL 2520752 at *13.

For example, under Section 4, local officers and prosecutors could arrest and convict individuals for driving family members within the state.[19] Local officials could also enforce such provisions against Plaintiff Yajaira Benet-Smith, who often drives a friend whom she knows to be undocumented from Beaufort County to Charleston to attend medical appointments. Decl. of Yajaira Benet-Smith, ¶¶ 5-6, Ex. 7. Under SB 20, Ms. Benet-Smith will be subject to arrest and criminal liability for transporting her friend—who cannot obtain a driver's license and, if he decided to drive himself, would be exposed to detection by state authorities. SB 20 includes no provision for the exercise of congressionally-delegated discretion and no mechanism to accommodate the immense complexity of federal immigration law. Section 4's surface resemblance to Section 1324 does not make it a complement of federal law, but instead, it allows the state to challenge and "undermine[] the congressional calibration of force" to be used against

[19] Federal immigration law has historically incorporated exceptions relating to offenses for transporting family members. *See* 8 U.S.C. § 1227(a)(1)(E)(iii) ("The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive [classification of an individual as deportable for encouraging, assisting, or abetting any other alien to enter the U.S. in violation of law] in the case of any alien lawfully admitted for permanent residence if the [person encouraged, assisted, or abetted] was the alien's spouse, parent, son, or daughter"); § 1101(a)(43)(N) (excluding from the definition of aggravated felony "the case of a first offense for which the alien has affirmatively shown that the alien committed the [smuggling] offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual)").

unauthorized non-citizens and those from whom they receive assistance.[20] *Crosby*, 530 U.S. at 380. The existence of such independent state immigration offenses "presents a serious danger of interference with the administration of the federal program," "hampering . . . uniform enforcement of its program by sporadic local prosecutions." *Nelson*, 350 U.S. at 505. "Should the States be permitted to exercise a concurrent jurisdiction in this area, federal enforcement would [produce not only incompatible or conflicting adjudications], but the added conflict engendered by different criteria of substantive offenses." *Id*. at 509.

Section 4 also criminalizes a broader swath of conduct than under Section 1324. Section 4 criminalizes shielding a non-citizen from detection without regard to whether South Carolina is the alien's first destination in the country or whether she entered the United States twenty 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."). Moreover, the application of Section 1324 has been the topic of extensive analysis and interpretation in the federal courts. *See, e.g.*, *United States v. Barajas-Montoya*, 223 Fed. App'x. 293, 295 (4th Cir. 2007) (interpreting "reckless disregard" to include deliberate indifference) (citing *United States v. Zlatogur*, 271 F.3d 1025, 1029 (11th Cir.2001) (defining reckless disregard in relation to transporting illegal aliens). If SB 20 goes into effect, "[State] judges will interpret [these] provisions, unconstrained by the line of federal precedent mentioned above." *GLAHR*, 2011 WL 2520752 at *13.

Notably, under Section 1324, South Carolina law enforcement officers already have the

[20] The federal government does not frequently prosecute potential Section 1324 violations. For example, from 2001 to 2005—the latest year for which plaintiffs have been able to obtain statistics— there were only 10 reported convictions in South Carolina for which a violation of Section 1324 was the lead charge. Transactional Records Access Clearinghouse, Percent of Immigration Criminal Convictions by Lead Charge (2006), *available at* http://trac.syr.edu/tracins/findings/05/criminal/district/s_car/s_carglaw05.html.

authority to arrest individuals for violation of that federal law. If South Carolina truly sought to enforce federal law in this area, it could arrest violators and turn them over to the federal government for prosecution. But the power to arrest does not imply the power to enact independent state crimes to be administered in its own state system, out of apparent dissatisfaction and disagreement with federal law. Even if a local officer made an arrest under Section 1324, decisions regarding whether to prosecute, whether to seek criminal, civil, or administrative penalties, and the ultimate disposition would remain with the federal government.

c. SB 20 Creates a State Alien Registration Scheme

Section 5 establishes a South Carolina-specific alien registration regime by creating a new state criminal offense for failure to carry certain immigration documents. Section 5 regulates the conditions under which even lawful immigrants remain in the State by imposing South Carolina-specific penalties for failure to carry alien registration documents. *See Hines*, 312 U.S. at 59-60, 68 (state alien registration law, including criminal penalties, invades a "field which affects international relations").

Under Section 5, South Carolina is attempting to legislate in an area that the Supreme Court has explicitly declared off-limits to the states and broadly preempted by federal alien registration provisions.[21] *Id.*, at 68-69, 74. Under federal law, registered aliens are required to carry their "certificate[s] of alien registration" or "alien registration receipt card[s]." 8 U.S.C. § 1304(e). Over the objection that "compliance with the state [alien registration scheme at issue in *Hines*] does not preclude or even interfere with compliance with the act of Congress," *id*. at 79

[21] Congress has provided very specific measures ranging from which aliens must register, *see* 8 U.S.C. §§ 1201, 1301; when they must register, *see* § 1302; the content of the registration forms and what special circumstances may require deviation, § 1303; the confidential nature of registration information, § 1304; the circumstances under which an already-registered alien must report her change of address to the government, § 1305; and the penalties for failing to register, § 1306.

(Stone, J. dissenting), the Court found that,

> Having the constitutional authority so to do, [Congress] has provided *a standard for alien registration in a single integrated and all-embracing system* in order to obtain the information deemed to be desirable in connection with aliens. When it made this addition to its uniform naturalization and immigration laws, it plainly manifested *a purpose to do so in such a way as to protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance. . ..*

Id. at 74 (emphasis added). For the same reasons, SB 20 is preempted.

As with Section 4 discussed above, any assertion that South Carolina's registration provision is not preempted because it is consistent with, or mirrors, federal law must fail. *Id*. at 66-67 (laws that "complement the federal [alien registration] law, or enforce additional or auxiliary regulations" are preempted); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) ("conflict is imminent when two separate remedies are brought to bear on the same activity") (punctuation and citations omitted).

SB 20 goes well beyond simply "complementing" federal registration provisions. First, Section 5 applies *additional penalties* to non-citizens in South Carolina when they are found (by South Carolina state courts) to have violated the federal registration provision. This is particularly glaring because the federal government rarely prosecutes registration violations. *See* Bureau of Justice Services Statistics, Ex. 22-E (showing only 14 prosecutions under Section 1304 in 15 years). Indeed, the statutes referenced in Section 5 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, Ex. 22-F (former General Counsel of the Immigration and Naturalization Service).

Furthermore, Section 5 will necessarily place an undue burden on lawfully present immigrants by authorizing untrained local officers to enforce federal requirements under 8

U.S.C. § 1304, which local officers are not authorized to enforce under the INA. Section 1304 is intended only to regulate the conduct of select lawfully present immigrants—*i.e.*, individuals who have registered and been issued registration documents that they must carry at all times. Under SB 20, local officers—who lack the expertise in federal immigration law—will be tasked with determining whether certain immigrants are required to carry registration documents and which documents satisfy Section 1304's requirements. This situation is exactly what the Supreme Court proscribed in *Hines*—the "[l]egal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens-such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials." 312 U.S. at 65-66. This provision ultimately places control over who is arrested and who is prosecuted for registration offenses with state and local authorities, wresting control over these complex determinations from the federal government.[22]

SB 20'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 to demonstrate their status, and thus will be subject to arrest under Section 5 of SB 20.[23] Subjecting these immigrants, whom the federal

[22] Section 5 will also result in state and local officers making arrests solely on the basis of unlawful presence, a civil offense for which local officers do not have the authority to arrest. Any individual who is unlawfully present would necessarily be a foreign national without a valid registration document. Individuals who cannot produce such a document will be treated as suspected undocumented immigrants and subject to arrest based on an untrained local officer's belief that the individual is required to carry registration documentation.

[23] These categories of foreign nationals include those travelers visiting from countries participating in the Visa Waiver Program, and individuals with temporary protected status or who have applied for visas as victims of crimes, such as Plaintiff Jane Doe # 2. *See* Decl. of Lori Scialabba ¶¶ 21, 26, 37, Ex. 22-G (Deputy Director of DHS USCIS). The number of individuals in these situations is significant. In fiscal year 2010, more than 16 million aliens were admitted under the Visa Waiver Program, Decl. of David V. Aguilar ¶ 10, Ex. 22-H (Deputy Commissioner of U.S. CBP), and DHS estimates that up to 200,000 individuals were eligible for

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. . . .").

SB 20 thus selects a single "provision that has long been obsolete and widely regarded by the federal authorities, at the very highest levels, to be practically impossible to enforce and of extremely limited value as an immigration enforcement tool," Cooper Decl. ¶ 25, and prioritizes it for systematic enforcement, which is neither intended by Congress nor approved by the Executive. Section 5 allows local officials to detain and prosecute non-citizens under state law authority for violation of federal immigration law rather than turning them over to federal authorities, by whom they would be highly unlikely to be charged for a registration crime.

d. SB 20 Impermissibly Burdens the Federal Government

SB 20 is also preempted because it imposes an impermissible burden on federal resources, creating "obstacle[s] to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67; *see Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 150 (2001) (holding that "differing state regulations affecting an ERISA plan's 'system for processing claims and paying benefits' impose 'precisely the burden that ERISA pre-emption was intended to avoid.'") (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987)). "By 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-directed DHS agents." *Arizona*, 641 F.3d at 351-52.

SB 20 will directly undermine federal immigration enforcement priorities by vastly

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temporary protected status based solely on the designation of Haiti due to last year's earthquake, Decl. of James B. Steinberg ¶ 19, Ex. 22-I (former Deputy Secretary of State).

increasing the number of undesired immigration status queries to the federal government. State and local officers will contact the federal government in the enforcement of South Carolina's alien registration scheme (Sec. 5) and the state's fraudulent identification document provision (Sec. 6). In addition to the immigration queries required during routine police encounters by Section 6, Section 7 mandates that a verification request be submitted to the federal government for every non-citizen—regardless of whether they are suspected to be unlawfully present or not—who is arrested and booked into jail. And while many foreign nationals will be unable to readily demonstrate their lawful status, Section 7 requires querying the federal government in each case. Furthermore, under the threat of civil liability set forth in Section 1, law enforcement agencies must enforce SB 20 to the fullest extent, thereby increasing the number of requests that will be submitted to the federal government. *See* Sec. 1, S.C. CODE § 6-1-170(E)(1); Decl. of George Gascón ¶ 17, Ex. 8 (District Attorney and former Chief of Police of San Francisco, CA).

By flooding the federal government with unwarranted requests for immigration status verification, SB 20 requires the federal government to divert resources to handling low-priority cases rather than focusing on the apprehension of the most dangerous aliens and exercising prosecutorial discretion in certain instances. Decl. of William M. Griffen ¶ 26, Ex. 22-J (Acting Unit Chief of LESC); Decl. of Daniel H. Ragsdale ¶ 41, Ex. 22-K (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,*

[24] *Available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

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").

Recent guidance issued by DHS setting forth the proper role of state and local officers in immigration enforcement further confirms SB 20's conflict with achieving federal goals and priorities. *See* U.S. DHS, *Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters* (Sept. 21, 2011), attached as Ex. 9 ("Federal Guidance"). In the view of the agency charged with administering the INA, "[s]tate or local laws or actions that are not responsive to federal control or direction, or categorically demand enforcement in such a way as to deprive the Federal Government—and state and local officers—of the flexibility and discretion that animates the Federal Government's ability to globally supervise immigration enforcement [are prohibited], . . . even if the state or local government's own purpose is to enforce federal immigration law." Federal Guidance at 8.

The federal Law Enforcement Support Center ("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. Griffen Decl. ¶ 19. The verification process at the LESC is time-intensive and takes, on average, over 80 minutes even for simpler cases. *Id.* at ¶ 18. In some cases, where a review of the individual's physical file is required, the review may take several days. *Id.* at ¶ 6. 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.* at ¶ 29. The additional queries created by SB 20,

[25] *Available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

combined with the already time-intensive verification process, will necessarily strain the federal government's resources.[26] Federal courts have enjoined similar provisions in 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 [those states]." *GLAHR*, 2011 WL 2520752 at *10; *see also Arizona*, 641 F.3d at 351-52. SB 20 "is inconsistent with the discretion Congress vested in the Attorney General to supervise and direct State officers in their immigration work according to federally-determined priorities." *Arizona*, 641 F.3d at 352.

Moreover, local law enforcement agencies, solicitors, and courts across South Carolina's 46 counties inevitably will interpret SB 20's vague and expansive provisions differently, leading to a patchwork of enforcement even within South Carolina. *See GLAHR*, 2011 WL 2520752, at *10. This discord in enforcement poses a serious burden on the federal government's ability to regulate immigration. This is one reason for the President of the United States' statement in response to Georgia's HB 87 that "It is a mistake for states to try to do this piecemeal. We can't have 50 different immigration laws around the country." *See* Matthew Bigg, *Obama Criticizes New Georgia Immigration Law*, Reuters, Apr. 26, 2011.[27] Janet Napolitano, the former governor of Arizona and current U.S. Secretary of Homeland Security, also publicly opposed Arizona's SB 1070, saying: "The Arizona immigration law will likely hinder federal law enforcement from carrying out its priorities of detaining and removing dangerous criminal aliens." *Divisive*

[26] As noted by DHS, it is "impermissible" for "[s]tate governments [to] mandat[e] that state or local law enforcement officers inquire into the immigration status of a specified group or category of individuals" and for "[s]tate or local government officials [to] consistently refer[] certain classes of individuals or matters to DHS for some action to such an extent as to risk burdening limited DHS resources and personnel either after being asked by DHS not to refer those matters or where such referrals fall outside of DHS priorities." Federal Guidance at 14.
[27] *Available at* http://www.reuters.com/assets/print?aid=USTRE73P7QD20110427.

Arizona Immigration Bill Signed Into Law, CBS/AP, Apr. 23, 2010.[28]

The Court should also consider the burden on the federal government due to the cumulative impact of other states passing similar legislation. *See GLAHR*, 2011 WL 2520752, at *10 (the "risk [of inconsistent civil immigration policies] is compounded by the threat of other states creating their own immigration laws") (citing *United States v. Arizona*, 641 F.3d at 354-55; *Wis. Dep't of Indus., Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 288–89 (1986) ("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.")). To date, South Carolina is one of six states that passed far-reaching immigration enforcement laws.[29] The actual implementation individually and, in particular, when aggregated, would further burden the federal government's immigration priorities. *See* Griffen Decl. ¶¶ 15-16. Rather than constituting genuine cooperation, SB 20 is a serious threat to federal primacy in setting the parameters of immigration enforcement.

3. Sections 4, 6, and 7 Are Field Preempted

Sections 4, 6, and 7 are also invalid based on field preemption principles. A Congressional intent to occupy a field exclusively may "be inferred from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where 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.' " *English*, 496 U.S. at 79 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Congress intended for the federal government to regulate exclusively in the area of unauthorized entry, presence, and abode in the United States, including the means

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

and instrumentalities for entering and remaining in the United States.

The central concerns of the INA's comprehensive scheme include regulating the entry, status, and presence of non-citizens within the United States, determining whether non-citizens must depart from the United States, and effecting such removal. *See, e.g.*, 8 U.S.C. §§ 1181-89 (admission); §§ 1222-31 (detention, entry, inspection, apprehension, detention, removal); *see also Whiting*, 131 S. Ct. at 1973 (INA is "a 'comprehensive federal statutory scheme for regulation of immigration and naturalization'" (quoting *DeCanas*, 424 U.S. at 353)); *Elkins v. Moreno*, 435 U.S. 647, 664 (1978) (INA is "a comprehensive and complete code governing all aspects of admission of aliens to the United States"). Congress has created a vast federal apparatus to administer this scheme and has entrusted federal officials with discretion in carrying out the statute's mandates. *See generally* Federal Guidance at 3-4 & n. 4.

With respect to Section 4, in accordance with the federal regulation of entry and presence, Congress has long included criminal sanctions directed at harboring or transporting unauthorized immigrants, and has repeatedly adjusted the standards and penalties relating to this activity. *See United States v. Ozcelik*, 527 F.3d 88, 97-99 (3d Cir. 2008). Thus, "Congress has expressed much more than 'peripheral concern' with the transportation, harboring, and inducement of illegal aliens." *GLAHR*, 2011 WL 2520752, at *15. The longstanding federal dominance over this area and the centrality of these provisions are evidence that federal law is "so pervasive that [the Court] can reasonably infer that Congress has left no room for the states to supplement it." *Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1068 (11th Cir. 2010).

With respect to Sections 6 and 7, Plaintiffs have already demonstrated how Congress has carefully defined the narrow ways in which states may participate in immigration enforcement. Those limited authorizations are simply incompatible with any argument that Congress meant to

allow states to create their own, separate enforcement authorizations. Furthermore, the INA limits even *federal* officers' authority to enforce its investigation and arrest provisions. *See, e.g.*, 8 U.S.C. § 1357(a)(2) (limiting federal officials' warrantless arrest authority for immigration violations). If the State were correct, and Congress had left room for state supplementation of federal law in this area, it would lead to the absurd result that local police would have more freedom to enforce federal civil immigration law than federal agents.

Section 6 of SB 20 is also field preempted by regulating the use or possession of false, identification, including federal picture identification, for the purpose of trying to prove compliance with federal immigration laws regarding "lawful presence." It is clear that Congress intended the Federal Government to exclusively regulate in the area of false and fraudulent immigration and citizenship documents, and even more particularly with respect to the use of such documents to commit other immigration law related infractions.[30] And the limited

[30] *See, e.g.*, 8 U.S.C. § 1324c (document fraud for purposes of satisfying a requirement of or obtaining a benefit under 8 U.S.C. Ch. 12); 18 U.S.C. § 1015 (use of documentary evidence of naturalization or citizenship knowingly procured by fraud or false evidence, and false claim to citizenship); § 1028 (false federal identification documents); § 1423 (unlawfully issued or made certificate of naturalization or citizenship); §§ 1426, 1427 (false or fraudulent naturalization, citizenship, or alien registration papers); § 1541 (unlawful granting, issuance, or verification of a passport or other instrument in the nature of a passport); § 1542 (passport obtained by false statements); § 1543 (false, forged, counterfeited, mutilated, altered, or void passport, or instrument purporting to be passport); § 1544 (use of passport issued or designed for use of another and furnishing a passport for use to a person other than the person for whose use it was originally issued and designed); § 1546 (false or fraudulent immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay in U.S.); 8 C.F.R. §§ 270.3, 270.4 (enforcement procedures and penalties for violations of immigration document fraud under 8 U.S.C. § 1324c); *see also* 18 U.S.C. § 506(b) (forgery, counterfeiting, mutilation, alteration, use, possession, use, sale, furnishing, or other provision of forged, counterfeited, or altered seal of a federal department or agency with intent or effect of facilitating an alien's application for or receipt of a federal benefit to which the alien is not entitled). Congress has also enacted other regulations relating to the falsification, forgery, counterfeiting, alteration, misuse, possession, sale, and acquisition of actual or purported federal identification documents. *See, e.g.*, 18 U.S.C. § 499 (naval, military, or official passes issued by or under federal authority); § 506 (seals of

authority provided by Congress for states to aid in immigration enforcement does not include state legislatures enacting laws that criminalize the use or possession of false identification for the purpose of proving lawful presence.

B. SB 20 Violates the Fourth Amendment

SB 20 requires state and local law enforcement officers to unlawfully detain and arrest individuals solely for the purpose of verifying immigration status without any further suspicion of criminal conduct. Sections 6 and 7 unlawfully mandate prolonged seizures or custodial detentions of individuals based only on a perceived violation of federal civil immigration law.

1. Unlawfully Prolonged Detention During Stops

As described above, Section 6 mandates that upon any lawful stop an officer shall attempt to verify that an individual's immigration status if the officer develops reasonable suspicion that the person is unlawfully present in the United States. Sec. 6, S.C. CODE § 17-13-170(A). Given the amount of time required to verify lawful status, the mandate in Section 6 ensures that stops will be unlawfully prolonged well beyond the time needed to effectuate the original purpose of the stop.[31]

Prolonged stops based solely on "reasonable suspicion" of undocumented immigration status violate the Fourth Amendment, which requires that "Terry" stops, for example, "may not be extended beyond the time *reasonably* necessary to effectuate the stop, absent reasonable suspicion justifying further detention." *United States v. Mason*, 628 F.3d 123, 132 (4th Cir. 2010); *see also Terry*, 392 U.S. at 30. An individual's "consent or reasonable suspicion of a

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federal department or agencies; § 701 (badges, identification cards, or other insignia prescribed by head of federal department or agency for use by the agency's officers or employees).

[31] The verification requirement applies to all stops, even the most minor, such as those that do not require probable cause of wrongdoing (*e.g.*, *Terry* stops requiring only suspicion). Gascón Decl. ¶ 18; Decl. of Eduardo Gonzalez ¶ 16, Ex. 10 (former Tampa, Florida Chief of Police and Director of the U.S. Marshals Service).

crime is necessary to extend a traffic stop for investigatory purposes" once the original purpose of the stop has been completed. *United States. v. Branch*, 537 F.3d 328, 337 (4th Cir. 2008). While an officer may question a person who has been lawfully stopped on unrelated subjects, such questioning may not unreasonably prolong the stop. *See Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009); *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005).

By requiring officers to prolong a traffic stop well beyond the time needed to address the original basis for the stop to contact the federal government—by an average of 80 minutes, under the best-case scenario—SB 20 will result in Fourth Amendment violations. Section 6 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 present unlawfully. § 17-13-170(A). However, "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.15, 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 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); *United States v. Rodriguez-Diaz*, 161 F. Supp. 2d 627, 633 (D. Md. 2001).

SB 20's attempts to place guidelines on the manner in which stops may be conducted do not shield it from constitutional scrutiny. While Section 6 loosely defines the time frame for detaining individuals whose lawful status is being verified as "a reasonable amount of time as allowed by law," SB 20 provides no guidance as to which standard officers shall use to

determine what length of time is reasonable given Section 6's mandate to investigate and determine an individual's status. § 17-13-170(C)(2). Officers will necessarily look to this statute for guidance. And, in fact, Section 6 goes on to specify the actions an officer must take prior to releasing an individual suspected of unlawful presence—an officer must attempt to verify the status of such individual with the federal government and only after being unable to verify the person's status is the officer required to discontinue the detention. *Id*. Thus, before releasing the person, the officer must attempt and be unable to verify the individual's lawful status—a process that will, by definition, unlawfully prolong the stop.

If, however, a person is found to be unlawfully present, Section 6 requires that the officer determine whether ICE shall assume custody and grants officers the authority to transport the person to a federal facility. § 17-13-170(C)(4). Thus, officers will be detaining individuals, who would normally be released from custody (because, for example, charges against them were dismissed), without any lawful basis other than a federal civil immigration violation. And SB 20 provides no time limit for custody in the case of a transfer. It is well established that holding an individual in custody after he or she is entitled to release, or after any lawful basis for detention has expired, violates the Fourth Amendment. In such circumstances " 'when the purpose justifying the stop is exceeded, the detention becomes illegal unless a reasonable suspicion of some other crime exists.' " *United States v. Jackson*, 280 F.3d 403, 405 (4th Cir. 2002) (citing *United States v. Sullivan*, 138 F.3d 126, 131 (4th Cir. 1998)).

Fourth Amendment violations arising out of SB 20 are not speculative. Supporters of the law were cognizant of the fact that the law authorized the unlawfully prolonged detention of an individual. Representative Leon Stavrinakis warned that Section 6 will "add[] a second amount of time, a second block of time for the government to grab you and hold you, search you, find a

reason to arrest you." Ex. 22-L, Transcript of May 24, 2011, House Debate on SB 20, 36:7-10. And he noted that the restraint of such an individual will be based only upon "a suspicion that . . . [an individual] might be here illegally or that maybe you can't prove that you're here illegally." *Id*. at 36:17-19. Although ultimately voting in favor, Representative Stavrinakis admitted that SB 20 would "double [the] intrusion into your Constitutional rights." *Id.* at 37:15-19.

2. Unlawfully Prolonged Detention in State and County Jails

Section 7 violates the Fourth Amendment by mandating the continued custodial detention of individuals in jail, even after they have completed their sentence, solely on the basis of federal civil immigration violations, until they are transported and handed over to federal immigration authorities. Sec. 7, S.C. CODE § 23-3-1100(E). Courts have regularly found that the Fourth Amendment is violated where plaintiffs who are initially placed in custody on a lawful basis are held in custody after they were entitled to release, or after any lawful basis for detention has ended. *See, e.g. Ringuette v. City of Fall River*, 906 F. Supp. 55, 57 (D. Mass. 1995) (holding that plaintiff's placement into protective custody for second time, after he was eligible for release, was a seizure because the continuation of detention constituted an unreasonable seizure in violation of the Fourth Amendment); *Jones v. Cochran*, 1994 U.S. Dist. LEXIS 20625, at *14-17 (S.D. Fla. Aug. 8, 1994); *cf. Berry v. Baca*, 379 F.3d 764, 766-67 (9th Cir. 2004) (reversing grant of summary judgment to county sheriff on Fourth Amendment claims where plaintiffs alleged they were detained for extended periods after the court authorized their release). Thus, holding individuals beyond their sentence only for federal civil immigration violations constitutes an unlawful detention in violation of the Fourth Amendment.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS NOT GRANTED

Plaintiffs and class members will suffer irreparable harm if SB 20 is not enjoined. *See*

Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365, 375 (2008). Courts have ruled that irreparable harm may result from the enforcement of a law that violates the Supremacy Clause. S*ee e.g. Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992); *Arizona*, 641 F.3d at 366; *GLAHR*, 2011 WL 2520752 at *18. Similarly, courts have ruled that constitutional violations inflict irreparable harm. *Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993) (affirming district court did not abuse its discretion in entering preliminary injunction to prevent irreparable harm to plaintiff during pending litigation of equal protection claim).

If SB 20 goes into effect, it will subject plaintiffs, as well as members and clients of plaintiff organizations, to the risk of unconstitutional and extended detention while police officers investigate immigration status. Decl. of Kanuck ¶ 14, attached as Ex. 11; Decl. of McCandless ¶ 13, attached as Ex. 12; Decl. of Robinson ¶¶ 11, 13, attached as Ex. 13; Decl. of Swain Kunz ¶ 14, attached as Ex. 14; Decl. of Torrales ¶ 8, attached as Ex. 15; Decl. of Baird ¶ 9, attached as Ex. 16; Decl. of Raynor ¶¶ 5, 7, 8, attached as Ex. 17; Decl. of Jane Doe # 1 ¶¶ 4, 8, attached as Ex. 18; Decl. of Jane Doe # 2 ¶¶ 5, 7-11; Decl. of John Doe #1 ¶¶ 5, 9; Decl. of Benet-Smith ¶¶ 3, 6, 7, 9; Decl. of McKenzie ¶ 9, attached as Ex. 19; Decl. of Jones ¶¶ 11, 13, attached as Ex. 20. *See also* Gascón Decl. ¶ 18; Decl. of Eduardo Gonzalez ¶ 16. Plaintiffs are a diverse group of individuals and organizations who represent and provide services to racial minorities, national origin minorities, and individuals who speak foreign languages, have accents when speaking English, and lack the qualifying identity documents enumerated in SB 20. McCandless Decl. ¶¶ 4, 6; Robinson Decl. ¶¶ 4, 7, 12, 13; Swain Kunz Decl. ¶¶ 5, 7; Torrales Decl. ¶ 3; Baird Decl. ¶¶ 4, 6, 11; Raynor Decl. ¶¶ 3, 7-10; Jane Doe # 1 Decl. ¶¶ 1-3; Jane Doe # 2 Decl. ¶¶ 2-5, 9, 12; John Doe # 1 Decl. ¶ 8; Benet-Smith Decl. ¶ 9.

If SB 20 takes effect, Plaintiffs and their members or clients will be at risk of

discriminatory treatment, unwarranted police scrutiny, prolonged detentions, and arrest every time they come into contact with South Carolina law enforcement. *See id.*; *see also* Gascón Decl. ¶ 12, 13; Gonzalez Decl. ¶¶ 15, 16. Some Plaintiffs and plaintiff organization members have experienced racial profiling in the past and many are worried that if SB 20 goes into effect they will be subjected to repeated stops, questioning, detention, arrest, and criminal prosecution. *See* Baird Decl. ¶ 9; Raynor Decl. ¶ 7; Jane Doe # 2 Decl. ¶ 7; John Doe # 1 Decl. ¶¶ 8-9. In addition, some Plaintiffs who possess immigration documents but may not have such documents on their persons at all times that they could show to avoid detention by local police are at heightened risk of unlawful detention. *See* Raynor Decl. ¶ 8; John Doe # 1 Decl. ¶ 10; Benet-Smith Decl. ¶ 3; John Doe # 1 Decl. ¶ 10. These harms are inherently intangible and unquantifiable and cannot be remedied adequately after the fact. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (describing liberty of person as "sacred" right); *Hardy v. Fischer*, 701 F. Supp. 2d 614, 619 (S.D.N.Y. 2010) ("unlawful deprivations of liberty and the threat of unlawful detention . . . would violate plaintiffs' constitutional rights and therefore constitute quintessential irreparable harm"); *Grodzki v. Reno*, 950 F. Supp. 339, 342 (N.D. Ga. 1996) (unlawful detention irreparable).

Plaintiffs and their members or clients also face the threat of unlawful criminal prosecutions. McCandless Decl. ¶¶ 11, 13, 14; Robinson Decl. ¶¶ 6, 10, 12, 13; Swain Kunz Decl. ¶¶ 11-13; Kanuck Decl. ¶ 14; Baird Decl. ¶¶ 9-10; Raynor Decl. ¶¶ 5, 8, 10; Jane Doe # 1 Decl. ¶¶ 2, 4, 8; Jane Doe # 2 Decl. ¶¶ 5, 7-10; John Doe # 1 Decl. ¶¶ 4, 5, 9, 10; Benet-Smith Decl. ¶¶ 3, 6-9; Decl. of Barron ¶ 7, attached as Ex. 21; McKenzie Decl. ¶¶ 5, 8, 9; Jones Decl. ¶¶ 7, 11. Because of the threat of criminal prosecution or arrest, Plaintiffs and their members will curtail their public activities if SB 20 takes effect due to fear that they will be subject to

questioning, arrest, or detention. Robinson Dec. ¶ 13; Baird Decl. ¶ 10; Raynor Decl. ¶¶ 6, 10; Jane Doe # 1 Decl. ¶ 7; Jane Doe #2 Decl. ¶¶ 7-9, 11; Barron Decl. ¶ 7. Plaintiffs will abandon or lose business opportunities and social service activities due to SB 20. Kanuck Decl. ¶¶ 13-15; McCandless Decl. ¶¶ 11, 13-14; Robinson Decl. ¶ 13; McKenzie Decl. ¶ 6.

In addition, due to the threat of unreasonable searches and seizures and the threat of unlawful criminal prosecutions under SB 20, Plaintiffs and other community members fear any contact with law enforcement and will avoid reporting crimes to the police or acting as witnesses, thus making them vulnerable targets for criminals and undermining public safety in their neighborhoods. *See* Robinson Decl. ¶¶ 7, 13; Swain Kunz Decl. ¶¶ 14, 16; Jane Doe # 2 Decl. ¶¶ 6, 13; *see also* Gascón Decl. ¶¶ 8-11; Gonzalez Decl. ¶¶ 11-13.

Finally, the organizational Plaintiffs will suffer and are suffering already irreparable harm because they must divert organizational resources away from core mission activities to address their members', clients', and patrons' concerns about the law and repercussions from its enforcement. *See* Kanuck Decl. ¶¶ 8, 11-13, 15; McCandless Decl. ¶¶ 11-14 ; Robinson Decl. ¶¶ 8-9; Swain Kunz Decl. ¶¶ 11, 15-17; Torrales Decl. ¶ 6; Raynor Decl. ¶ 11. Further, they will face diminished membership and clients if SB 20 goes into effect. *See* Kanuck Decl. ¶ 14; McCandless Decl. ¶¶ 11, 13; Robinson Decl. ¶¶ 7, 9, 11; Swain Kunz Decl. ¶ 17; Torrales Decl. ¶ 7; Baird Decl. ¶ 10; Raynor Decl. ¶¶ 8-9. *See, e.g.*, *Friends of the Earth v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *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 meetings, and engage in other service, advocacy and organizing activities that might bring them into contact with law

enforcement. *See* Kanuck Decl. ¶¶ 13-14; McCandless Decl. ¶¶ 11-14; Robinson Decl. ¶¶ 7, 11, 13; Baird Decl. ¶ 10; Raynor Decl. ¶¶ 6, 10. None of these harms can be compensated after the fact. Thus, each harm is an irreparable injury that justifies an injunction. *Multi-Channel TV Cable Co.*, 22 F.3d at 551.

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

A preliminary injunction will impose only minimal harm on the State of South Carolina because Plaintiffs ask that the status quo be maintained while serious questions about the law's constitutionality are adjudicated. This is, in fact, the purpose of a preliminary injunction. A preliminary injunction "protect[s] the status quo . . . to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *Z-Man Fishing Products, Inc. v. Renosky*, 2011 WL 1930636 at *4 (D.S.C. May 17, 2011) (citing *In re Microsoft Corp. Antitrust Litigation*, 333 F.3d 517, 525 (4th Cir. 2003)). The equities tip sharply in favor of granting a preliminary injunction while the constitutionality of SB 20 is decided. *Legend Night Club v. Miller*, 637 F.3d 291, 302-03 (4th Cir. 2011) ("the State . . . is in no way harmed by issuance of an injunction that prevents the state from enforcing unconstitutional restrictions."); *see also Hodges v. Abraham*, 253 F. Supp. 2d 846, 874 (D.S.C. 2002) ("[T]he public interest is best served when an injunction is granted in favor of the party suffering the most harm by the denial or grant of the injunction.").

IV. A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST

The interests of Plaintiffs and the general public favor a preliminary injunction in this case. The public interest is not served by allowing an unconstitutional law to take effect. Particularly where civil rights are at stake, an injunction serves the public interest. *Newsom ex rel. Newsom v. Albemarle County School Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) ("upholding

constitutional rights serves the public interest"); *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("upholding constitutional rights surely serves the public interest"). And courts have held specifically 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*, 701 F. Supp. 2d at 859 (granting permanent injunction).

The harms that will be caused by implementing SB 20 extend well beyond South Carolina's borders and are 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 against SB 20, as discussed above. Strained diplomatic ties, such as those resulting from SB 20, 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 without question in the public's interest. *Hodges*, 253 F. Supp. 2d at 866 ("Any adverse national security or foreign policy consequences are accorded great weight when balancing the equities of the parties."). *See also 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 these reasons, the balance of equities favors issuing a preliminary injunction while the Court fully considers the constitutionality of SB 20.

CONCLUSION

Because the equities tip sharply in Plaintiffs' favor, and because Plaintiffs have

established a likelihood of success on the merits, they respectfully request this Court maintain the status quo and preliminarily enjoin SB 20 in its entirety, and particularly Sections 1, 4, 5, 6, and 7, until a request for permanent injunction can be fully considered.

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