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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

HISPANIC INTEREST COALITION OF ALABAMA, *et al.*, Plaintiffs, v. ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama, *et al.*, Defendants.	Case Number: 5:11-cv-02484-SLB
RT. REV. HENRY N. PARSLEY, JR., in his official capacity as Bishop of the Episcopal Church in the Diocese of Alabama, *et al.*, Plaintiffs, v. ROBERT BENTLEY, in his official capacity as Governor of the State of Alabama, *et al.*, Defendants.	Case Number: 5:11-cv-02736-SLB
UNITED STATES OF AMERICA, Plaintiffs, v. STATE OF ALABAMA; GOVERNOR ROBERT J. BENTLEY, Defendants.	Case Number: 5:11-cv-02746-SLB

REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs have demonstrated that a preliminary injunction against HB 56 is necessary to prevent an unconstitutional state law from going into effect and causing harm to the Plaintiffs, and that the balance of equities and the public interest will be served by preserving the status quo. Defendants' opposition entirely fails to rebut Plaintiffs' showing.

Defendants' omissions are glaring. In responding to Plaintiffs' preemption claims, they fail even to mention the federal decisions enjoining similar laws in Arizona, Georgia and Indiana[1] and instead rely on inapposite authorities and press arguments that are contrary to settled law. Time and again, Defendants argue that HB 56 is not preempted because it "mirrors" federal law and they invent out of whole cloth a so-called "doctrine of concurrent enforcement." These arguments are contrary to settled preemption standards.

Defendants' opposition also hinges on an effort to rewrite HB 56 in ways that are contrary to the statute's plain language. For example, as to sections 5(f) and 6(f), Defendants ask the Court to accept the Alabama Code Commissioner's proposed replacement of the word "act" with the word "section," although the Commissioner does not have the authority to rewrite the statute in this fashion.

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[1] *See, e.g.*, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011); *United States v. Arizona.*, 703 F. Supp. 2d 980 (D. Ariz. 2010); *Ga. Latino Alliance for Human Rights v. Deal*, 11-CV-1804, 2011 WL 2520752 (N.D. Ga. June 27, 2011); *Buquer v. City of Indianapolis*, 11–CV–708, 2011 WL 2532935 (S.D. Ind. June 24, 2011).

This Court may not rewrite a statute when the plain language cannot sustain the Defendants' desired interpretation. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989)); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008). As written and intended by the Alabama legislature, HB 56 violates the U.S. Constitution and Plaintiffs have demonstrated that a preliminary injunction is warranted and necessary.

ARGUMENT

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS

Plaintiffs have met the standard for a preliminary injunction in this facial challenge against HB 56. Plaintiffs have demonstrated that the statute is unconstitutional on its face and that there is "no set of circumstances … under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).[2] Indeed, federal courts have enjoined or temporarily restrained similar

[2] Defendants concede that the Supreme Court itself debates the precise contours of the *Salerno* standard. *See* Opp. at 17-18. The Supreme Court has alternatively applied the *Salerno* standard and a more lenient standard requiring the plaintiff to establish that the invalid applications of the statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *see also Washington v.*

laws in facial challenges in Arizona, Utah, Georgia, and Indiana. *United States v. Arizona*, 703 F. Supp. 2d 980, 1009 (D. Ariz. 2010); *Utah Coalition of La Raza v. Herbert*, 11-CV-401 (D. Utah May 11, 2011) (Doc. No. 1-B); *Georgia Latino Alliance for Human Rights ("GLAHR") v. Deal*, 11-CV-1804, 2011 WL 2520752, at *11, 15 (N.D. Ga. June 27, 2011); *Buquer v. City of Indianapolis*, 11-CV-708, 2011 WL 2532935, at *11-13 (S.D. Ind. June 24, 2011). In addition, the Ninth Circuit has upheld the injunction against Arizona's law on appeal. *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011), *aff'g* 703 F. Supp. 2d 980, 1008.

Rather than confront HB 56 as written, Defendants attempt to delay the adjudication of the constitutional issues that are squarely presented by Plaintiffs' motion, arguing that the Court should certify unspecified questions to the Alabama Supreme Court to allow that court to appropriately "construe" HB 56. Opp. at 25-29; Ala. R. App. Proc. 18(g) (Alabama Supreme Court is not required to accept certification requests, and even if accepted, briefing takes at minimum nine weeks to complete). Under the Eleventh Circuit standard, no certification to the state supreme court is warranted, as Defendants have failed to show "substantial doubt" about a "material state law question" on which this motion turns. *See Forgione v. Dennis Pirtle Agency, Inc.*, 93 F.3d 758, 761 (11th Cir. 1996).

Glucksberg, 521 U.S. 702, 740 n. 6 & 7 (1997) (Stevens, J. concurring). In any event, Plaintiffs meet either standard.

On the merits, Plaintiffs have demonstrated that a preliminary injunction should issue.

A. Plaintiffs Are Substantially Likely To Prevail on their Preemption Claim

Defendants lead with the argument that there is a presumption against federal preemption of state laws, Opp. at 37-39, but they fail to recognize that the presumption against preemption applies only in fields "which the States have traditionally occupied," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and not in fields "where there has been a history of significant federal presence," *United States v. Locke*, 529 U.S. 89, 108 (2000). Immigration emphatically falls within the latter category, as the Constitution commits the field to the exclusive authority of the federal government. *GLAHR*, 2011 WL 2520752 at *7-9; *see also Chamber of Commerce v. Edmondson*, 594 F.3d 742, 768 n.29 (10th Cir. 2010).

As set forth in the statute's preamble and as confirmed by the Governor of Alabama and numerous legislators, HB 56 is a state immigration law, and thus trenches on an area of exclusive federal control. To evade this fact, Defendants attempt to recharacterize HB 56 as a law concerning "the regulation of business licenses, the regulation of rental housing, the distribution of public benefits, the determination of arrest protocols by local law enforcement officers, the administration of elementary and secondary schools, and the allocation of

postsecondary education benefits." Opp. at 37. But this attempt fails. Far from having "some purely speculative and indirect impact on immigration," *DeCanas v. Bica*, 424 U.S. 351, 355 (1976), HB 56 is plainly and directly concerned with immigration and the regulation of immigrants in Alabama. Moreover, even if HB 56 operated in areas of traditional state control, it would still be invalid because "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoted in *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1502 (11th Cir. 1997), *abrogated on other grounds, Sprietsma v. Mercury Maine*, 537 U.S. 51 (2002)). In any event, even if a presumption against preemption were appropriate with respect to any single provision of HB 56, it is overcome in this case.

Defendants also place heavy reliance on *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968 (2011), to argue that HB 56 is not preempted. This reliance is misplaced. *Whiting* turns on a narrow statutory preemption question that is not at issue in this case: whether an Arizona statute revoking business licenses as a penalty for employment of unauthorized immigrant workers falls within an express savings clause in the federal Immigration Reform and Control Act ("IRCA"). That clause exempts licensing laws from an IRCA provision expressly preempting state and local laws that "impos[e] civil or criminal sanctions . . . upon those who employ, or recruit or refer for a fee for employment,

unauthorized aliens."[3] *Id.* at 1975. IRCA's express saving clause narrowly applies only to certain forms of state and local regulation of employers, and has no application to the broad scope of issues regulated by HB 56.

Defendants are incorrect in their assertion that *Whiting* held that "a state statute that uses the terminology of federal immigration law and defers to the federal determination of any alien's immigration status is not conflict preempted." Opp. at 42. Such a ruling would have been a sea change in preemption law, and *Whiting* held no such thing.[4] The passage on which Defendants rely for this proposition—a passage, notably, that garnered only four votes—merely alludes to the fact that Arizona's statute regulating employers who knowingly hire unauthorized workers not only came within the scope of IRCA's *express* savings clause but also tracked the language of the federal law regulating such employers. 131 S. Ct. at 1981-82 (Roberts, C.J., joined by Scalia, Kennedy, and Alito, JJ.). Similarly, Defendants' assertion that *Whiting* "approved the doctrine of concurrent enforcement" is simply wrong. Opp. at 43. That phrase does not occur anywhere in *Whiting* and again, Defendants cite language that merely held that the Arizona

[3] *Whiting* also concerns the same Arizona law's mandate of statewide use of the federal E-verify electronic database for verification of employment authorization. While HB 56 contains a mandatory E-verify provision, section 9, that section is not at issue in this motion except to the extent Plaintiffs challenge HB 56 in its entirety as a comprehensive state law regulating of immigration.

[4] For example, if that broad statement were correct, states could enact laws providing that all aliens holding J-1 student visas should be imprisoned, as long as they defer to federal confirmation of that status.

statute fell within the express savings clause in IRCA. Nothing in *Whiting* remotely suggests that a state law that is the "mirror image" of federal law (Opp. at 44) is saved from preemption. To the contrary, even when a state law is identical to a federal law on the subject, it is preempted if it interferes with the federal government's "calibration of force." *United States v. Arizona*, 641 F.3d at 360 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000)); *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427 (2003).

1. HB 56 and Each of Its Provisions Are Impermissible State Laws Regulating Immigration

Defendants ignore the obvious: HB 56 is by design and in effect a state law regulating immigration—in the words of Governor Bentley, "the strongest immigration bill in the country."[5] *See* Pls.' Br. at 1; *see also id*. at 10-11 (citing HB 56 provisions that directly regulate immigration and immigrants); *id*. at 12-14 (citing preamble to HB 56 and legislative history on legislature's express purpose). By their plain terms, each one of HB 56's provisions is centrally aimed at regulating immigration.

[5] Defendants urge the Court to ignore the statements of the legislators who drafted and enacted HB 56, such as HB 56 sponsor Mickey Hammon's statement that HB 56 is intended to implement an Alabama state policy of "attacking every aspect of an illegal immigrant's life . . . so they will deport themselves" (Apr. 5 Debate at 9:3-8). Defendants attempt in vain to recharacterize such legislator statements as a mere "reference to the word 'immigration.'" Opp. at 48

For example, section 12(a) requires Alabama state and local law enforcement officers to inquire into the immigration status of suspected undocumented immigrants whom they stop, arrest or detain, while section 18(d) requires that any person "determined to be an alien unlawfully present in the United States . . . shall be considered a flight risk and shall be detained until prosecution or until handed over to federal immigration authorities." Sections 10, 11 and 13 create new state substantive criminal offenses relating to immigration violations. Sections 27 and 30 penalize state agencies and private parties from transacting with undocumented immigrants. And Section 28 requires Alabama public school officials to inquire into and to make reports about the immigration status of schoolchildren in grades K-12 and their parents.

Each of these provisions, and the many others in HB 56, are designed to work separately and in combination to effect the detection, punishment and eventual expulsion of non-citizens deemed to be "unlawfully present" under Alabama law, through the actions of Alabama state officials. Thus, HB 56 and each of its component provisions fall precisely within the Supreme Court's definition of a regulation of immigration; they are laws that "essentially . . . determine . . . who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas*, 424 U.S. at 355.

Indeed, Defendants concede that "the law does seek to discourage *illegal* aliens from remaining unlawfully present in Alabama," but argue that "it does not in any way discourage aliens who are lawfully present in the United States from remaining." Opp. at 48 (emphasis in original). Even if the latter assertion were true (and it emphatically is not), Defendants' argument fundamentally misconceives the case law on preemption, as well as the substance of what it means to regulate immigration. The case law, comprehensive congressional enactments, and agency actions in the field all demonstrate, as they must, that regulating immigration includes, in myriad ways, regulation with respect to unlawful immigration.

Thus, Defendants' protestation that HB 56 "in no way determines who should or should not be in admitted into the country, " Opp. at 45, does not save the law from preemption (and ignores what would happen if all 50 states were to enact regimes like Alabama's). The case law makes it clear that a state law may be an impermissible regulation of immigration even if it does not literally attempt to control admission into the United States. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 378-79 (1971) (holding that state law requiring non-citizens to have lived in United States for 15 years in order to be eligible for welfare benefits conflicted with federal power to regulate immigration); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948) (holding that a state law prohibiting issuance of fishing

licenses to Japanese nationals interfered with federal power to regulate immigration); *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835, 855 (N.D. Tex. 2010) (holding that city ordinance that uses federal immigration classifications "for purposes not authorized or contemplated by federal law" is preempted as regulation of immigration), *appeal docketed*, No. 10-10-751 (5th Cir. filed June 28, 2010).

2. Defendants' State Alien Classification Scheme Is Preempted

Defendants' argument that HB 56 is safe from preemption because it tracks a purported federal "lawfully present"/"unlawfully present" classification scheme is based on a fundamental misunderstanding about federal immigration law. Federal law does not generally define "lawfully present," and the term does not reflect or correspond to any federal immigration status. *See, e.g.*, *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 772 (C.D. Cal. 1995) (explaining that a state immigration scheme turning on a status called "lawfully present" "would not be tied to federal standards"). Each time the terms "lawfully present" or "unlawfully present" appear in federal law, they are used for a narrow and distinct purpose.[6] The INA does not generally define those terms and where they

[6] *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(i)(II) (determining inadmissibility based on prior periods of unlawful presence); 8 U.S.C. §§ 1621, 1623 (determining eligibility for certain benefits); 42 U.S.C. § 4605 (same); 42 U.S.C. § 1436a(a)(3), (5) (applying the term lawfully present to those admitted as refugees or granted asylum, or subject to withholding deportation pursuant to the Attorney General's

appear, they do not always refer to the status of being in the United States lawfully or lawfully.[7]

Federal immigration law does not use a binary "lawfully present"/"unlawfully present" or any other binary classification scheme or master list of categories to determine who is not removable and who is. *See*, *e.g.*, *Plyler v. Doe*, 457 U.S. 202, 226 (1982) ("[A] State cannot realistically determine that any particular undocumented [person] will in fact be deported until after deportation

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discretion); 26 U.S.C. § 3304(a)(14)(A) (establishing scheme to approve state laws regarding unemployment compensation). Congress did not intend for these various provisions to define a class of non-citizens who are deportable. *Cf. Villas at Parkside*, 701 F. Supp. 2d at 855 ("The federal government, which has broad authority regarding the classification of aliens, has created a variety of classifications for different purposes, including, for example, admission and removal, provision of public benefits, and eligibility for employment.").

[7] For example, although one immigration regulation cited by Defendants does define "lawfully present," the regulation explicitly states that the definition applies only in the context of applying for Social Security benefits. 8 C.F.R. § 103.12(a). In contrast, the INA defines the term "unlawful presence" only with respect to a complicated determination of the applicability of "bars" to re-admission to the United States. 8 U.S.C. § 1182(a)(9)(B). These two definitions of "lawfully present" and "unlawful presence" are entirely different from one another and serve distinct purposes, demonstrating that federal immigration law does not assign a consistent meaning to those phrases, as Defendants assume. As one article notes: The INA's use of the term "'[u]nlawful presence' [for purposes of calculating bars to re-admission] is a completely new concept that never existed before, does not exist anywhere else in the Act and is different from any other concept of improper status or status violations in the INA. . . . It has nothing to do with concepts of unauthorized employment, violations of conditions of status or failure to maintain status as defined in other parts of the Act." H. Ronald Klasko & Tammy Fox-Isicoff, *Unlawful, Illegal, Unauthorized—A Distinction with a Difference*, 2 American Immigration Lawyers Association, 1999-2000 Immigration & Nationality Law Handbook 343, 343 (1999) (footnotes omitted).

proceedings have been completed."). Instead, the INA creates a nuanced and complex system regarding the status of non-citizens in the United States, as the federal government has explained in its consolidated case. Pl.'s Mot. for Prelim. Inj., *United States v. Alabama*, No. 11-J-2746-S at 6-7 (Dkt. No. 2) ("U.S. Mot."). Far from tracking federal immigration law, HB 56 fundamentally misunderstands it.

In an attempt to disguise these clear conflicts with federal law, Defendants argue that HB 56 requires that any determination of a person's "unlawful immigration status" be "verified" by the federal government. But reliance on information from federal databases cannot substitute for the formal determination of status that occurs through a removal proceeding and judicial review. Indeed, the federal government formally stated that a response from the main immigration database available to state governments "showing no [federal immigration] record on an individual or an immigration status making the individual ineligible for a benefit *is not a finding* of fact or conclusion of law *that the individual is not lawfully present*." 65 Fed. Reg. 58301 (emphasis added); *see also Plyler*, 457 U.S. at 241 n.6 (Powell, J., concurring) ("[E]ven the [federal immigration authorities] cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course."). More fundamentally, a state law that "uses [federal] classifications for purposes not

authorized or contemplated by federal law" is preempted as a regulation of immigration. *Villas at Parkside*, 701 F.Supp. at 855.

3. Alabama's Law Enforcement Investigation and Detention Provisions Are Preempted (Sections 12, 18, 19, 20)

Defendants state that "every Circuit of the U.S. Court[s] of Appeals that has addressed this question has concluded that states have the inherent authority" to fully enforce all federal immigration laws, including arresting individuals solely on the basis of civil immigration violations, such as unlawful presence. Opp. at 55-56. This is a striking misstatement. Defendants fail to even mention the case most directly on point, *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), in which the Ninth Circuit held, with respect to a nearly identical provision to the ones at issue here, that "states do not have the inherent authority to enforce the civil provisions of federal immigration law." Id at 362; *see also 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"). Defendants also completely ignore the recent decision by a district court in this Circuit that followed the Ninth and Sixth Circuits and reached the same conclusion with respect to a similar Georgia state law. *GLAHR*, 2011 WL 2520752 at *9.

While ignoring the cases that are squarely on point, Defendants rely on cases approving arrests by state or local officers for violations of federal *criminal* laws.[8] While the Tenth Circuit, for example, has stated in *criminal* cases that state and local officers have the authority to make arrests for immigration violations, *see, e.g.*, *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999), it has never squarely addressed the question whether state and local officers have authority to make arrests for *civil* immigration violations. The Ninth Circuit has set forth in detail why such a holding would be contrary to Congress's intent. *Arizona*, 641 F.3d at 364-65. The INA provides for the specific circumstances in which state and local agencies may assist the federal government in the enforcement of immigration laws. *Id.* at 350, 364-65 (citing 8 U.S.C. §§ 1103(a)(10), 1252c, 1324a, 1357(g)). Defendants' reading of 8 U.S.C. § 1357(g)(10) as a broad authorization of state and local immigration enforcement is inconsistent with the

[8] Each of the cases cited by Defendants involved *criminal* offenses. *Davida v. United States*, 422 F.2d 528, 530 (10th Cir. 1970) (federal felony counterfeiting offense); *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983) (federal felony gun possession); *United States v. Swarovski*, 557 F.2d 40, 43-49 (2d Cir. 1977) (federal felony unlicensed exporting); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301-02 & n.3 (10th Cir. 1984) (knowing transportation of unlawfully present aliens); *Estrada v. Rhode Island*, 594 F.3d 56, 65 (1st Cir. 2010) (criminal immigration violations); *United States v. Soriano-Jarquin*, 492 F.3d 495 (4th Cir. 2007) (crime of illegal reentry and a "number of obvious infractions"); *United States v. Rodriguez-Arreola*, 270 F.3d 611, 617 (8th Cir. 2001) (same and finding individual not in custody for purposes of the Fourth Amendment). *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987), is even farther afield, as it involved state officers' direct cooperation with federal agents in the detention of "stowaways" at a harbor port. *Id*. at 1370.

rest of section 1357(g), which makes crystal clear that any state or local cooperation in immigration enforcement may only occur under the U.S. Attorney General's close supervision. *See* U.S. Mot. at 23-24. Indeed, federal courts have rejected Defendants' argument in enjoining similar provisions in Arizona's and Georgia's laws. *Arizona*, 641 F.3d at 350; *GLAHR*, 2011 WL 2520752 at *9-*10. The notion that state and local officers have "inherent authority" to enforce civil immigration laws is simply contrary to the federal statutory scheme.

4. Alabama's Alien Registration Provision Conflicts with Federal Law and Is Preempted (Section 10)

Alabama's alien registration provision (HB 56 § 10) is preempted under conflict and field preemption principles. Defendants' opposition fails again even to mention that the Arizona analog has been enjoined. As the Ninth Circuit held, "[n]othing in the text of the INA's registration provisions indicates that Congress intended for states to participate in the enforcement or punishment of federal immigration registration rules." *Arizona*, 641 F.3d at 355.

Defendants argue that section 10's registration provisions are distinct from the Pennsylvania registration scheme struck down in *Hines v. Davidowitz*, 312 U.S. 52 (1941), because Alabama does not attempt to create a state alien registry or create any new documentation requirement. Opp. at 63-64. But Defendants ignore *Hines'* clear holding that "the federal government . . . has enacted a complete scheme of regulation and has therein provided a standard for the registration of

aliens, [and] states cannot, inconsistently with the purpose of Congress, conflict or *interfere with*, curtail or *complement*, the federal law, *or enforce additional or auxiliary regulations*." 312 U.S. at 66-67 (emphases added).

Contrary to Defendants' assertion, it is irrelevant that Congress enacted a federal statute requiring the carrying of certain registration documents since the time *Hines* was decided. *Hines* did not hinge on whether the challenged state law tracked the federal law. It held far more broadly that the federal government had created a "single integrated and all-embracing" federal registration system, *id*. at 74, and that *any* state intrusion is preempted. In fact, the Court explicitly cited state involvement in the *enforcement* of registration requirements as one of the effects of such a scheme that puts it beyond states' authority to act. A state law, such as HB 56, that promises "the possibility of inquisitorial practices and police surveillance" cannot be justified. *Id.* at 65-66, 74.

In occupying the field of alien registration, Congress has tasked federal authorities with the administration and enforcement of the federal alien registration laws. *See* 8 U.S.C. § 1304 (directing Executive Branch to promulgate regulations). Balancing and prioritizing among myriad federal objectives, federal officials have opted to regard the alien registration system as obsolete, and Congress has not acted to override that decision. Through section 10, Alabama has expressed its disagreement with that federal judgment and instead has directed state and local

officers to use the obsolete federal registration rules to sweep up "unlawfully present" immigrants (as well as lawful immigrants caught in the dragnet) and to impose criminal penalties under state law. Alabama's scheme, moreover, will impose burdens on the federal government, as it explicitly depends on federal immigration agents to investigate and determine a charged individual's immigration status.[9]

Defendants cannot save section 10 from preemption by arguing that it "merely codifies federal requirements" or that it imposes a penalty lower than the maximum authorized under federal law.[10] Opp. at 65, 70. The provision is an example of the type of "auxiliary" regulation that is not allowed. *Hines*, 312 U.S. at 66-67. It creates an obligation through state penal law to register under the federal registration scheme. It makes immigrants prove their compliance with

[9] Defendants' opposition also overlooks that when Congress delegates authority and discretion to federal agencies, the power to preempt state laws runs with the delegation. Thus, for example, states may not interfere or conflict with an agency's exercise of lawful discretion in implementing a federal statute. For example, in *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000), the Supreme Court held that a state tort law that would conflict with a federal standard issued by the Department of Transportation pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 "conflict[ed] with . . . the Act itself." *Id.* at 867. The Court was addressing a situation where a state law "would stand as an 'obstacle' to the accomplishment of" an agency's objectives. *Id*. at 886; *see also Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 170 (1982) ("[f]ederal regulations have no less pre-emptive effect than federal statutes").

[10] Defendants' arguments based on *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011), and the fictitious "concurrent enforcement doctrine" are addressed above.

federal law to state officers and officials. It creates an entirely separate enforcement scheme, involving state procedures, prosecutors, and judges. It allows for penalties to be imposed even when not intended or desired by the federal government; when federal government actions may be responsible for individuals not having required documents; and even when a person may already have been punished by the federal government under its own scheme. As explained by the United States, where a state has no independent authority to regulate activity that a federal law regulates, states may not provide their own remedial schemes based on violations of the federal law. U.S. Mot. at 19-20 (discussing *Wisconsin Dep't of Indus., Lab. and Human Relations v. Gould*, 475 U.S. 282 (1986)).

5. Alabama's Immigrant Worker Criminal Penalty Provisions Are Preempted (Section 11)

Defendants address Plaintiffs' preemption claim against section 11 by mischaracterizing it as based on a "discredited theory of preemption by omission." In fact, Plaintiffs' claim is based on black-letter preemption law: HB 56's worker sanction provisions conflict with federal law because they "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (quoting *Hines*, 312 U.S. at 67), including Congress's intent to occupy the field exclusively. As set forth below, this is patently *not* a case of inferring preemptive

intent from nothing more than an omission to act by Congress. *Cf. Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) ("Where a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn—not from federal inaction alone, but from inaction joined with action."); *Arizona*, 641 F.3d at 359 (citing *Isla Petroleum Corp.* in support of the court's holding that Arizona's similar worker sanction law was preempted by IRCA).

Section 11, which makes it a state crime for an unauthorized immigrant to work, conflicts with Congress's deliberate decision, reflected in IRCA, *not* to make it a criminal or civil offense for "unauthorized aliens" simply to work or seek work. Section 11 is field preempted because by enacting IRCA, "Congress regulate[d] a field so pervasively [and] passe[d] a law that touches on a field implicating a dominant federal interest that an intent to preempt state law can be inferred." *Am. Mfg. Mut. Ins. Co. v. Tison Hog Market, Inc.*, 182 F.3d 1284, 1288 (11th Cir. 1999). Defendants' only response is to cite *DeCanas*, 424 U.S. at 357. But *DeCanas* was decided *before* IRCA was enacted. Congress has since done what the *DeCanas* Court allowed that it could do: "oust state authority to regulate" in the pertinent field. *Id*.

Section 11 also conflicts with IRCA by punishing unauthorized workers when Congress explicitly chose not to do so. One of Congress's overriding

purposes in enacting IRCA was to address in a "humane" way the problem of individuals coming to the United States for work without legal authorization. H.R. Rep. No. 99-682, pt. 1, reprinted in 1986 U.S.C.C.A.N. 5649, 5650. Congress implemented a statute to reflect the view that, once here in the United States, individuals—many of whom may be going through the legal processes afforded by federal immigration law—should be able to provide for themselves and their families. *See Arizona*, 641 F.3d at 357 n.17; *see also Nat'l Ctr. for Immigrants' Rights v. INS*, 913 F.2d 1350, 1368, 1369 n.14 (9th Cir. 1990), *rev'd on other grounds*, 502 U.S. 183 (1991). Another objective was to promote the ability of immigrants to assimilate. *See Nat'l Ctr. for Immigrants' Rights*, 913 F.2d at 1367. Alabama's law also obstructs federal law from achieving Congress's purpose of protecting "aliens" against exploitation by employers. *See id*. at 359; *see also* 1986 U.S.C.C.A.N. at 5656, 5662, 5746.

Section 11 of HB 56 also impedes congressional purposes and priorities that are at the core of federal immigration law. HB 56 allows Alabama to put in jail individuals who may be in the process of trying to adjust their immigration status or obtain work authorization through federally prescribed procedures. It allows Alabama to jail individuals whom Congress has expressly decided to make eligible for positive immigration status adjustments, even knowing that they have engaged in unauthorized employment. *See, e.g.*, 8 U.S.C. §§ 1255(a), (c), & (k); *see also* 8

U.S.C. § 1255a(d)(2)(A) (IRCA legalization provisions rendering inapplicable certain grounds for exclusion in the INA that might otherwise apply in the case of persons entering the country for work without proper certification).

In the face of the clear conflict between section 11 and IRCA, and the Ninth Circuit's decision enjoining a similar provision in Arizona law, Defendants suggest in vain that because IRCA contains an express preemption provision that concerns state laws penalizing employers, a state law that is directed at unauthorized workers cannot be preempted as being in conflict with IRCA. Opp. at 70-71, 73-74. Such "negative implication" arguments have been squarely rejected by the Supreme Court. *See United States v. Fleet*, 498 F.3d 1225, 1228-29 (11th Cir. 2007) (discussing *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) and *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)). It is well settled that "'a pre-emption provision, by itself, does not foreclose (through negative implication) any possibility of implied [conflict] preemption.'" *Fleet*, 498 F.3d at 1229 (alterations in *Fleet*; additional internal quotation marks omitted); *see also Geier*, 529 U.S. at 869 (an "express pre-emption provision[] . . . does not bar the ordinary working of conflict pre-emption principles"); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 767 n.1 (11th Cir. 1998) ("implied preemption is possible despite the presence of an express preemption clause").

In any event, IRCA's express preemption clause simply does not give rise to the implication suggested by Defendants. Congress chose to include an express preemption provision regarding laws targeting *employers* because before IRCA, states had enacted such laws[11] and the Supreme Court had expressly held that such laws were *not* preempted.[12] With IRCA, Congress expressly overrode that decision by statute. That Congress did not enact an express preemption clause against state laws penalizing workers for unauthorized employment has no bearing on whether such a state law, like section 11 of HB 56, otherwise conflicts with IRCA.

6. Alabama's "Harboring" and Rental Provisions Are Preempted (Section 13)

Federal law preempts section 13 of HB 56, which penalizes "harboring," "encouraging or inducing," transporting, and renting housing to unauthorized immigrants. Section 13 conflicts with the federal harboring statute, 8 U.S.C. § 1324, and also trenches in fields occupied exclusively by Congress—namely the regulation of harboring or other assistance given to aliens attempting to enter or remain in the United States without authorization. And provisions that penalize the rental of housing to non-citizens, like section 13(a)(4), go centrally to the

[11] *See, e.g.*, *DeCanas*, 424 U.S. at 353; Conn. Gen. Stat. § 31-51k (cited in *Whiting*, 131 S. Ct. at 1974 n.1); Fla. Stat. § 448.09 (same); Kan. Stat. Ann. § 21-4409 (same).
[12] *See DeCanas*, 424 U.S. at 351.

"residence of aliens in the United States or the several states," a field committed exclusively to the federal government. *DeCanas*, 424 U.S. at 358 n.6.

Defendants fail to respond to these arguments on the merits and instead attempt to create an entirely novel "doctrine of concurrent enforcement." No court has ever identified or applied such a doctrine, and Defendants' arguments fail under controlling precedents. Defendants assert that the Supreme Court has recently adopted the "concurrent enforcement doctrine" in *Chamber of Commerce v. Whiting*. Opp. at 43-44. That decision never mentions this phrase and contains no such principle. *See Whiting*, 131 S. Ct. 1968. *Whiting* applied well-settled preemption principles and held that Congress had expressly authorized the state to enact the type of law that was under review. *See id*. at 1981 ("Arizona's procedures simply implement the sanctions that Congress expressly allowed Arizona to pursue through licensing laws"); *id*. at 1984. Defendants also attempt to piece together snippets of decisions taken entirely out of context. The cited cases do not describe "concurrent enforcement" as a "doctrine" or as a legal principle, but rather use the phrase as a way of describing a *circumstance* that may result when state and local immigration enforcement activities are held not to be preempted by federal law. *See Gonzales v. Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983) ("Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized."), *overruled on other*

grounds by Hodgers-Durgin v. De la Vina, 199 F.3d 1037 (9th Cir. 1999); *Ariz. Contractors Assoc., Inc. v. Napolitano*, 07-CV-1684, 2007 WL 4570303 at *9, *12-13 (D. Ariz. Dec. 21, 2007). Defendants also cite to broadly worded dicta in *Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987) and *Gray v. City of Valley Park, Mo.*, 07-CV-881, 2008 WL 294294 (E. D. Mo. Jan. 31, 2008), neither of which describes a doctrine of concurrent enforcement, but which rather discuss a state's general concurrent jurisdiction to make arrests for federal crimes or to participate in a joint operation under the direction of federal officers.

Defendants also argue that because section 13 "mirrors" the federal alien harboring statute, 8 U.S.C. § 1324, and has the same goals, it is not preempted.[13] This argument ignores settled preemption doctrine. "[W]here the federal government, in the exercise of its superior authority in this field [immigration], has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or *complement*, the federal law, *or*

[13] Defendants' attempt to show that HB 56 is consistent with how federal courts interpret the federal harboring statute with respect to the mere provision of housing is beside the point. Whatever the present state of federal law on the question—and Plaintiffs do not agree with Defendants on this point—Alabama would be free under HB 56 going forward to interpret and enforce its law differently from how federal government and courts interpret and enforce the federal harboring statute.

enforce additional or auxiliary regulations."[14] *Hines*, 312 U.S. at 66-67 (emphasis added).

The "harboring" provisions undermine Congress's interest in the uniform interpretation, implementation, and enforcement of federal immigration law and policy. *See generally* IRCA, Pub. L. No. 99-603, § 115, 100 Stat. 3359 (1986) ("It is the sense of Congress that—(1) the immigration laws of the United States should be enforced . . . uniformly"). Alabama's Attorney General will be making decisions about how to enforce what are, substantively speaking, federal law "harboring" provisions—e.g., how to enforce them, when to prosecute, what sentences to seek. These decisions will not "mirror" or "trace" federal law. They will reflect different priorities and legal interpretations, especially if the novel rental housing component of HB 56's "harboring" law is any indication. Similarly, state court judges will be making decisions about how to interpret and apply the substantive and procedural components of Alabama's "harboring" provisions. They may take guidance from federal courts and agencies, but they will not be

[14] Defendants are mistaken in asserting that *Whiting* offers support to the proposition that conflict preemption is unlikely where a state statute traces federal law. Opp. at 83. *Whiting* provides no such support, either expressly or implicitly. *Whiting* found that Congress had expressly authorized states to enact state licensing laws imposing sanctions against employers who knowingly employ "unauthorized aliens," and that Congress must thereby have intended to allow states to enforce those specific types of law. 131 S. Ct. at 1977-81. The Court also noted that the state had adopted definitions and procedures that guaranteed that there would be no conflict between state and federal law with respect to outcomes—*e.g.*, determinations of "worker authorization." *Id*. at 1981-83.

obliged to do so, as HB 56 is state law. But even if the state applies section 13 identically to federal law, section 13 still would permit Alabama officers and prosecutors to impose penalties where the federal government refrains, and to add punishment where the federal government has already done so. Section 13 therefore impermissibly interferes with the federal government's "calibration of force." *Garamendi*, 539 U.S. at 425.

7. Alabama's Provision Invalidating Contracts When a Party Is an Unauthorized Immigrant Is Preempted (Section 27)

Defendants' response to Plaintiffs' preemption claim against section 27, prohibiting enforcement of contracts made by those "unlawfully present," entirely misses the point. As set forth in Plaintiffs' motion, section 27 is preempted not only as being part of a comprehensive and impermissible state-law regulation of immigration, but also by 42 U.S.C. § 1981, which is a federal law occupying the field with respect to aliens' rights to enter into and enforce contracts and sue on them in state courts. Section 1981 provides that all "persons"—which includes aliens, as demonstrated in Plaintiffs' opening brief—shall have the same rights in these regards as "white citizens." Section 1981 on its face makes no distinction between "aliens" who are "lawfully present" and aliens who are not "lawfully present." Moreover, section 1981 touches the regulation of immigration, which is an area of dominant federal concern and exclusive federal power. The Supreme Court has described section 1981 as being part of a "comprehensive legislative

plan for the nation-wide control and regulation of immigration and naturalization." *Takahashi*, 334 U.S. at 419.[15]

Defendants entirely fail to address the preemptive effect of 42 U.S.C. § 1981 and instead point to a handful of provisions in the INA that concern contracts *relating to* unauthorized immigrants, such as 8 U.S.C. § 1324a(a)(4), which prohibits contracts to obtain the labor of an unauthorized alien with knowledge of the worker's status. Those provisions simply have no bearing on the question whether federal law preempts a state law invalidating a contract when a party is an unauthorized immigrant.

8. HB 56 Further Conflicts With Federal Law by Placing Substantial Burdens on the Federal Government and Imposing Obstacles to Federal Policies and Priorities

Defendants argue that any burden created by HB 56, regardless of how large or onerous it may be, has no bearing on whether HB 56 is preempted by federal law. Opp. at 91. Defendants rely on a statute requiring the federal government to respond to state and local inquiries about immigration status. But in fact, that statute heightens the constitutional problem posed by HB 56, as so many of its provisions rely on such inquiries and therefore impose substantial burdens on the

[15] Defendants' identification of instances in which Congress has limited the right of certain classes of "aliens" to enter into different specific types of contracts, *see* Opp. at 85, does not undercut Plaintiffs' preemption argument. Plaintiffs do not dispute that Congress has authority to regulate in this area, subject only to constitutional constraints.

federal government by forcing federal responses when it is contrary to federal goals and objectives.

If HB 56 goes into effect, the burden on the federal government created by HB 56 will not be speculative. HB 56 contains at least 19 contexts in which state or local officials are required to make inquiries about a person's immigration status to the federal government. HB 56 §§ 7(c), 7(f), 7(j), 8, 10(b), 10(e), 11(b), 12(a), 12(b), 13(g), 13(h), 15(h), 17(e), 18(c), 19(a), 27(d), 29(l)(4), 30(c), 30(f). As stated by the federal government in its own challenge to HB 56, due to Alabama's "across-the-board requirement" that officers verify immigration status, "the number of new verification requests made to DHS will undoubtedly be significant." U.S. Br. at 58. Thus, as in Georgia and Arizona, HB 56 "will undermine federal immigration enforcement priorities by vastly increasing the number of immigration queries to the federal government" and is thus preempted. *GLAHR*, 2011 WL 2520752 at *10; *Arizona*, 703 F. Supp. 2d at 995; *see generally Buckman Co. v. Plaintiffs' Legal Cmte*, 531 U.S. 341, 349-51 (2001) (preempting state law cause of action in part because it would encourage third parties to submit a deluge of unnecessary information to the FDA, thereby burdening the agency's ability to evaluate drug applications in a timely fashion); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1057 (S.D. Cal. 2006) (expressing "serious concerns" regarding the burdens to be imposed on federal agencies and resources

by city rental dwelling ordinance requiring federal government to determine tenants' immigration statuses).

Furthermore, Congress intended for the Executive Branch to have discretion and independent authority to determine how best to fulfill congressional objectives in terms of local enforcement of immigration law. For example, "8 U.S.C. § 1357 and § 1103 clearly express Congressional intent that the Attorney General should designate state and local agents authorized to enforce immigration law." *GLAHR*, 2011 WL 2520752 at *10. Thus, "Congress has established a system providing Executive Branch discretion to establish 'immigration enforcement priorities and strategies.'" *Id*. (quoting *Arizona*, 641 F.3d at 352). As a result of the undesired obstacles and burdens imposed by HB 56, HB 56 "interferes with Congress's delegation of discretion to the Executive branch in enforcing the INA." *Arizona*, 641 F.3d at 352; *see also Crosby*, 530 U.S. at 374, 377 (where "Congress clearly intended the federal Act to provide the President with flexible and effective authority" regarding economic sanctions against Burma, state law imposing immediate and unyielding sanctions against Burma "undermine[d] the President's intended statutory authority" and was thereby preempted).

B. Plaintiffs Are Substantially Likely To Prevail on Their Fourth Amendment Claim

Defendants agree that detention or arrest without proper suspicion of criminal activity violates the Fourth Amendment, and argue that HB 56 satisfies

this standard. Opp. at 94. But they can only make this argument after re-writing the law to add new language imposing constitutional limitations that the Legislature did not include.[16] By failing to address HB 56 as enacted, Defendants effectively concede that the law on its face is unconstitutional.

1. Section 12(a) Requires Prolonged Detentions for Immigration Status Investigations in Violation of the Fourth Amendment

Section 12(a) mandates immigration verification during stops, detentions, and arrests. It thereby guarantees that routine stops, such as traffic stops, will be prolonged well past the time necessary to effectuate the original purpose of the stop. Defendants read a phantom provision into section 12(a), prohibiting immigration verification checks that prolong a traffic stop beyond the time reasonably required to write a ticket. Opp. at 97-98. To arrive at this result,

[16] Defendants also attempt to rewrite sections 5(f) and 6(f) of HB 56, which provide that every state or local employee in Alabama "shall have a duty to report violations of this act" and that failure to report is deemed to be the crime of obstructing governmental operations" under Alabama law. As Plaintiffs and the United States have pointed out, these provisions compound the unconstitutional impact of section 12's immigration status verification requirement (and every other provision in HB 56) by requiring full enforcement without permitting the exercise of discretion. Defendants assert that the Alabama Code Commissioner intends to replace the word "act" with the word "section." That exceeds the power of the Code Commissioner under Alabama law. Ala. Code § 29-7-8(a) (Commissioner "may not alter the sense, meaning, or effect of any act"); Ala. Code § 29-7-8(a)(14) (permitting correction of "*manifest* grammatical, clerical, and typographical errors, including, but not limited to, by means of the addition or deletion of language") (emphasis added). Defendants' planned revision of the plain text to change its meaning and effect is insupportable.

Defendants argue that the phrase "reasonable attempt" should be read as an attempt that comports with the Fourth Amendment. *Id*. The natural reading of this portion of section 12(a)—"a reasonable attempt shall be made, when practicable"—is that law enforcement need not verify immigration status when circumstances make it impracticable to do so, such as when an officer is called away to an emergency while making a stop. Defendants' interpretation requires that the phrase "reasonable attempt" be supplemented with the phrase, "that will not prolong a stop beyond the time it will take to effectuate the original purpose for the stop." But in light of the evidence showing that immigration verification checks take 80 minutes *on average*, Pls.' Br. at 41 (citing declarations), Defendants' reading is nonsensical. If Section 12(a) does not require detention, then officers will be required to initiate an immigration status check but will not be able to do anything with the result, as the subject will long since have gone on his way.

It is clear from the plain language of section 12(a) that the Alabama legislature intended section 12(a) to require immigration checks at routine stops, and that officers detain persons pending the results of those checks. Defendants' alternative reading of the text would make that legislatively intended operation exceedingly rare. Based on their examples, *see* Opp. at 98, Defendants' position seems to be that verification under section 12(a) will only be "reasonable" when a suspect has been arrested and is booked into a jail. Had the legislature intended

such a reading, they could have easily written it into the statute by limiting verification "upon arrest and booking," for example. *See* HB 56 § 12(b) (already requiring verification upon arrest and booking). Defendants' reliance on time limitations that are not written into the section to significantly narrow its scope is unreasonable and serves only to underscore the law's facial unconstitutionality.

2. Section 12(e) Requires Seizures of "Unlawfully Present" Individuals Without Probable Cause in Violation of the Fourth Amendment

Section 12(e) requires law enforcement to take custody of individuals if they are verified as being "unlawfully present" while state or local officials coordinate transfer to federal custody. Section 12(e) specifies no time limit on custody in that circumstance. HB 56 § 12(e); Todd Entrekin Decl. ¶ 19 (Dkt. 37-37); George Gascón Decl. ¶ 15 (Dkt. 37-39). If section 12(e) is implemented, Alabama officers will hold the suspect "as long as necessary," solely on the basis of suspected unlawful status, without regard to how long federal authorities wait to take action—or even if they never do. Entrekin Decl. ¶ 19; *see also* Gascón Decl. ¶ 15. Thus, under section 12(e) individuals will be effectively detained without probable cause to believe that they have committed any crime. *See* Pls.' Br. at 43-44.

Defendants argue, however, that section 12(e) only allows the detention of suspects who are already in lawful state custody. *Id*. at 99. This interpretation simply does not match with a plain reading of section 12(e)'s text. Once again, by

attempting to write limitations or assumptions into the text that are not there, Defendants concede that the law on its face is unconstitutional.

3. Sections 18(d), 19(b) and 20 Authorize Continuing Detentions in Jail Absent Any Basis for Custody in Violation of the Fourth Amendment

Section 19 mandates the continued detention of anyone "*confined for any period* in a state, county, or municipal jail," if the person is determined to be "unlawfully present," until he or she is handed over to federal immigration authorities or prosecuted, regardless of whether the lawful basis for their original custody has ended. HB 56 § 19(a), (b) (emphasis added).

While Defendants cite a case to support a claim that the Alabama Legislature may establish a rebuttable presumption against bail, *see* Opp. at 103 n.45, this does not address Plaintiffs' Fourth Amendment claim.[17] Under section 19(b), an individual who would normally be released from custody because, for example, a prosecutor declined to bring charges will face continued detention

[17] While not at issue in the present case, the bail provisions of sections 18 and 19 do raise constitutional concerns. *See, e.g., United States v. Salerno*, 481 U.S. 739, 746-52 (1987). The constitutionally permissible purposes of pretrial detention (or bail conditions) are to ensure the defendant's appearance for trial or, under limited circumstances, to safeguard against the commission of new crimes before trial. Because they implicate the most fundamental liberty interests, bail laws are subject to strict scrutiny. *Id.*at 749-52. If a bail statute imposes punishment, it is unconstitutional, and even if the legislature did not express a punitive intent, a bail statute violates due process if it is excessive in relation to the legitimate goals of addressing flight risk or danger to the community. *Salerno*, 481 U.S. at 746-48.

based *solely* on suspicion of federal civil immigration violations. That custody will continue until the person "is handed over to federal immigration authorities." HB 56 § 19(b). This, of course, is a situation where bail and prosecution have no relevance. The resulting continued detention violates the Fourth Amendment. Defendants' proposed addition of "whichever is sooner" to the end of section 19(b) (*See* Opp. At 104) is similarly beside the point—whether the person is detained until prosecuted or until handed over to federal authorities, the detention is unlawful when there is no state law basis for it.

Section 18 similarly requires law enforcement to continue to detain suspects arrested for driving without a license, even after the lawful basis for that arrest has expired. HB 56 § 18(d). That section mandates detention of individuals determined to be "unlawfully present" until prosecution or until handed over to the federal immigration authorities.[18] *Id*. However, section 18(a) states that no person charged with driving without a license shall be convicted if he or she can produce a valid license in court or at the police station. Thus, a driver who has left a valid license at home can be arrested, but will not be prosecuted or convicted. Nevertheless, section 18(d) requires her continued detention based *solely* on suspicion of federal civil immigration violations until federal immigration authorities pick her up, or for an undefined period if the federal authorities decide

[18] Defendants' proposed addition of "whichever is sooner" to the end of section 18(d) is once again beside the point. *See* Opp. at 105.

not to take her into custody.[19]

Similarly, section 20 requires law enforcement officials to continue to detain a person past the conclusion of lawful confinement, or upon payment of a fine as required by operation of law, solely on the basis of suspected unlawful presence in order to transfer the suspect to federal custody. Defendants argue that section 20 does not require extending detention. However, the text of section 20 plainly reads "the Alabama Department of Corrections *shall maintain custody* during any transfer [to federal authorities]." HB 56 § 20 (emphasis added). While the section directs the state to notify federal authorities within 30 days of release in the case of persons who have been incarcerated, there is no limitation on how long the transfer process can take. Instead the law requires the state Department of Corrections to extend custody, solely on the basis of suspected unlawful presence, in order to effectuate transfer to federal authorities.

Furthermore, in the case of a person found guilty in court and assessed only a fine, section 20 requires that he or she be taken into custody even after that fine is paid, if he or she is suspected of civil immigration violations. Arguing there is

[19] Defendants make the argument that given the prioritization of federal government resources it is unlikely that the federal government would seek custody of someone for whom it would not issue a federal detainer. *See* Opp. at 101-02. But given Section 18(d)'s requirement that individuals be detained regardless of whether a detainer is issued until handed over to federal authorities, this compounds the constitutional violations resulting from such prolonged detentions.

ambiguity in the text of section 20 regarding fines, Defendants assert that section 20 must be referring only to instances where individuals are already being held in lawful custody. Opp. at 101-02. This claim is at odds with section 20's actual text, but in any event does nothing to cure the Fourth Amendment violation. An individual's prior custody in no way permits the state to re-take or extend custody solely for alleged civil immigration violations in the case where fines were paid and any state sentence discharged. Yet section 20 requires the Alabama Department of Corrections to *maintain custody* during transfer even though no lawful basis for custody persists.

C. Plaintiffs Are Substantially Likely To Prevail on Their Equal Protection Challenge to Section 28

Section 28 violates equal protection by deterring immigrant families from enrolling their children in public schools. As the Supreme Court made clear in *Plyler v. Doe*, 457 U.S. 202 (1982), deterrence to education is tantamount to denial,[20] and the State must satisfy a high standard of proof to justify any such burden. "The 'American people have always regarded education and the acquisition of knowledge as matters of supreme importance.'" *Id.* at 221 (quoting

[20] Defendants assert wrongly that *Plyler* was about "denial," not "deterrence." Opp. at 119. *Plyler* involved discriminatory treatment between two classes of innocent children—undocumented children who would have to pay tuition to attend, and citizens and lawful alien children who would be permitted to enroll at no cost. 457 U.S. at 206 n.2, 209. Section 28 does not require payment of a fee, but it exacts an even higher toll through the risk that by attending school, a child will have her family torn apart through deportation.

Meyer v. Nebraska, 262 U.S. 390, 400 (1923)). Undocumented children are "innocent . . . victims" of regulations like section 28, and "many of the undocumented children disabled by this classification will remain in this country indefinitely, and . . . some will become lawful residents or citizens of the United States." *Id.* at 224, 230. Deterrence from education would

> impose[] a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [such a statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

Id. at 223-24.[21] And section 28 does not limit its harm to undocumented children; it also targets families of mixed statuses, particularly targeting U.S. citizen children who have undocumented parents. HB 56 § 28(a)(1).

To justify section 28, Defendants must show it "furthers some substantial goal of the State." *Plyler*, 457 US at 224. They have failed to do so. The Legislature has stated explicitly that section 28's purpose is to measure the fiscal

[21] *See also id.* at 220 ("Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.").

impact on the State's school systems of aliens "not lawfully present."[22] As the Supreme Court explained in *Plyler*, this goal standing alone cannot justify a policy that will have a clear deterrent effect on enrollment.[23] Defendants also suggest a goal of deterring undocumented children from attending public schools. Opp. at 124-25. This is exactly what *Plyler* and the Equal Protection Clause prohibit: It is impermissible to have enrollment policies that chill students from gaining access to the classroom by asking about immigration status. *See* "Dear Colleague" Letter from the U.S. Dep't of Justice and U.S. Dep't of Educ., May 6, 2011, at 1 ("U.S. Letter"); Decl. of Tony Miller, ¶ 8 (*United States v. Alabama*, 2:11-CV-02746 (N.D. Ala filed Aug. 1, 2011)).[24]

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[22] HB 56 § 2 ("Because the costs incurred by school districts for the public elementary and secondary education of children who are aliens not lawfully present in the United States can adversely affect the availability of public education resources to students who are United States citizens or are aliens lawfully present in the United States, the State of Alabama determines that there is a compelling need for the State Board of Education to accurately measure and assess the population of students who are aliens not lawfully present in the United States, in order to forecast and plan for any impact that the presence such population may have on publicly funded education in this state.").

[23] *Plyler*, 457 U.S. at 227 ("Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating these resources.") (citation omitted).

[24] Moreover, as explained by *amici curiae* the National Education Association (NEA) and the Alabama Education Association (AEA), every state department of education that has addressed the issue has interpreted *Plyler* to bar inquiries into immigration status in the enrollment process. *See* Br. of Amici Curiae NEA and AEA (Doc. No. 66-1), at 12-14 (citing state guidances). Indeed, the Alabama State Department of Education has taken this position. *See* Equal Education

As the Court in *Plyler* explained, "[i]n terms of educational cost and need, . . . undocumented children are basically indistinguishable from legally resident alien children." *Id.* at 229 (citation omitted).[25] And as the Court went on to explain:

> The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

Id. at 230. *Plyler* does not permit a "show-me-your-papers" requirement at enrollment that will impede children's access to school, as that would allow a "State [to] deny access to a basic public education to [a] child residing in the State" based on "whether present in the United States legally or otherwise." U.S. Letter at 1.[26]

Opportunity and Non-Discrimination Statement, *available at* http://alex.state.al.us/ell/node/58 (last visited Aug. 9, 2011).

[25] For example, a guestworker may enter on an H-1 visa and remain in the United States for up to six years. His child may also enter on an H-4 visa. There is no obvious reason why a child who enters or remains in the country unlawfully would cause any more of a strain on school resources than would the child who enters lawfully on the H-4 visa.

[26] Furthermore, section 28(a)(1)'s requirement to that officials about the immigration status of parents can hardly be in furtherance of any goal related to undocumented children since that information would reveal nothing about the

Defendants attempt to minimize the harm section 28 inflicts by: (1) issuing an advisory that section 28 applies only to students seeking to enroll after September 1, 2011 and (2) stating that section 28 will be applied only to students "enrolling for the first time" in an Alabama public school, and not to returning students who are enrolling at the start of a new school year or who are changing schools. *See* Opp. at 120-21. Yet Defendants concede that section 28 will apply to students enrolling during the middle of the coming year and next September. Regardless, Defendants' enforcement plans have no bearing on whether an injunction should issue. *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (courts do not "uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly.").

Defendants further try to minimize the impact of section 28 by ignoring the other provisions in HB 56 requiring full enforcement of the law and full reporting of anyone who is in the State without immigration status. Section 28 does not exist in a vacuum, and sections 5, 6, and 10 make the reporting of children and families to the immigration authorities mandatory. *See* HB 56 §§ 28(e) (prohibiting public disclosure *except* to federal immigration officials through 8 U.S.C. § 1373); 5(a) &

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immigration status of the child, and will have a direct impact on U.S. citizen children whose parents are undocumented, like Jane Doe #2's children. *See McGowan v. Maryland*, 366 U.S. 420, 425 (1961) ("The [Fourteenth Amendment] is offended only if the classification [between citizens] rests on grounds wholly irrelevant to the achievement of the State's objective.").

6(a) (forbidding school officials from adopting policy of not reporting students and parents to ICE and local police); 5(b) & 6(b) (requiring school officials to fully enforce HB 56 and federal immigration law to deter presence of undocumented immigrants); 5(d) & 6(d) (establishing draconian financial penalties for not fully enforcing HB 56); 5(f) & 6(f) (creating criminal penalties if any State official does not report a violation of HB 56, which would include knowledge learned by a school official that an undocumented parent is in violation of HB 56 § 10). Defendants' attempt to rewrite sections 5(f) and 6(f) is improper and addressed more fully above at note 16, but this change, if permitted, in no way alters the effect of these provisions. Indeed, as individual and organizational Plaintiffs have attested, section 28 has already deterred Alabamian families from accessing public education.[27]

[27] *See* Compl. ¶¶ 50, 56, 87, 120, 124, 135, 140, 148-49; *see also* Mohammad Abdhollahi Ali-Beik Decl. ¶ 8(h) (Dreamactivist.org) (Doc. No. 37-10); Scott Douglas Decl. ¶ 11 (GBM) (Doc. No. 37-11); Decl. of Christopher Barton Thau ¶¶ 12-13 (Doc. No. 37-17); Decl. of Jane Doe #2, ¶ 9 (Doc. No. 37-26); Decl. of Jane Doe #3, ¶ 8 (Doc. No. 37-27); Decl. of Jane Doe #5, ¶ 6 (Doc. No. 37-29); Decl. of Jane Doe #6, ¶ 8 (Doc. No. 37-30); Decl. of John Doe #2, ¶¶ 3-9 (Doc. No. 37-32).

Defendants suggest that their new policy position casts doubt on the justiciability of Plaintiffs' claims. *See* Opp. at 120-21, 126-27. However, Defendants' interpretation in response to this litigation cannot strip the Court of jurisdiction, particularly since, absent an injunction, Defendants remain free to retract their policy. *See Harrell v. Florida Bar*, 608 F.3d 1241, 1267-68 (11th Cir. 2010). Moreover, as clarified in the attached declarations, Plaintiff Alabama Appleseed will certainly be harmed and has organizational standing to challenge section 28's enrollment procedures. *See* John Pickens Aug. 13, 2011 Decl. ¶¶ 2-14 (attached as Ex. 2). The same is true for Plaintiff Hispanic Interest Coalition of

Deterring children from school based on immigration status is section 28's central purpose. Indeed, Defendants do not even mention, much less address, the statements by HB 56's sponsors confirming that the law aims to deter undocumented children and the children of undocumented parents from enrollment. *See* Pls.' Br. at 52-53. Nor do Defendants even attempt to justify section 28's requirement that schools determine the immigration status of students' *parents*—a requirement clearly intended to intimidate mixed-status families from student enrollment. *See id.*

D. Plaintiffs Are Substantially Likely To Prevail on Their Equal Protection Challenge to Section 8

HB 56 section 8 violates the Equal Protection Clause of the Fourteenth Amendment by excluding lawful noncitizens from public colleges and universities. *See* Pls. Br. at 46-48; *see also Nyquist v. Maucelet*, 432 U.S. 1, 7 (1977); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Pena v. Bd. of Educ. of City of Atlanta*, 620 F. Supp. 293, 299-300 (N.D. Ga. 1985). Defendants do not even attempt to

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Alabama (HICA). *See* Isabel Rubio July 6, 2011 Decl. ¶¶ 13, 15 (Doc. No. 37-2); Isabel Rubio Aug. 15, 2011 Decl. ¶¶ 2-7 (attached as Ex. 3). Finally Greater Birmingham Ministries has members who will be harmed by section 28 after it is implemented. Scott Douglas July 15, 2011 Decl. ¶ 11 (Doc. No. 37-11); Scott Douglas Aug. 15, 2011 Decl. ¶¶ 2-4 (attached as Ex. 4).

defend section 8's exclusion of lawful noncitizens. Instead, Defendants' sole argument is that the Court should rewrite section 8 and delete its second sentence, which requires aliens attending state colleges to "possess lawful permanent residence or an appropriate nonimmigrant visa." Opp. at 115. The plain text of section 8 cannot bear this reading.[28] "It is [the Court's] duty to give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Defendants perceive a "tension" between the first and second sentences, Opp. at 116, but their proposed solution of simply ignoring the second sentence would make "wholly superfluous" text that is mandatory, explicit, and unambiguous. *Duncan*, 533 U.S. at 174. This Court may not accept such an interpretation. The legislative intent of section 8 is clear: only green card and nonimmigrant visa holders may enroll in public postsecondary schools.[29]

[28] Defendants contend their interpretation is entitled to deference under *Chapman v. Gooden*, 974 So. 2d 972, 988 (Ala. 2007). *See* Opp. at 117 n.50. They are in error. *Chapman* was an as-applied challenge, where of course the Attorney General's interpretation can bind the State. The Attorney General possesses no such power when the text of the statute is clear. The other case cited, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) is also inapplicable as that case and the cases it cites involved an overbreadth and vagueness analysis. There is nothing vague about section 8.

[29] If, as Defendants contend, the Legislature meant to exclude *only* aliens who are not lawfully present, they would not have inserted the second sentence, which provides a definite list of aliens who are qualified for postsecondary enrollment. There is already a general definition of lawful presence in the act. *See* section 3(10). The legislature clearly intended to narrow this general definition for section 8 by inserting the second sentence.

Nor do Defendant Chancellor Hill's assurances that she will not enforce the plain text of section 8 resolve this issue. Courts do not "uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly." *Stevens*, 130 S. Ct. at 1591. There is no guarantee that Chancellor Hill will continue to ignore section 8's plain text in the future.[30]

Defendants' attempts to narrow section 8 cannot be reconciled with the plain text of the statute, which provides that "[a]n alien attending any public postsecondary institution in this state must either possess lawful permanent residence or an appropriate nonimmigrant visa under 8 U.S.C. § 1101, *et seq*." Section 8 thus excludes a host of lawfully residing noncitizens who do not have a green card or "nonimmigrant visa"—including asylees and refugees—from higher education. Because the plain text of section 8 is not susceptible to Defendants' interpretation, and because Chancellor Hill is free to issue a new memorandum at any time, the Court should enjoin section 8 as unconstitutional. *See Price v. Time, Inc*., 416 F.3d 1327, 1342 (11th Cir. 2005) (explaining that "[c]ourts do not use [the canon of constitutional avoidance] when the text of the statute is unambiguous") (citation omitted).

E. Plaintiffs Are Substantially Likely To Prevail on Their First Amendment Challenge to Section 11

[30] Notably, Chancellor Hill's memorandum does not specifically address refugees such as Plaintiffs Haile and Tesfamariam. *See* Hill Mem. (Doc. No. 82-4).

Section 11(a), (f) and (g) are content-based restrictions on speech that must withstand heightened scrutiny. *See Sorrell v. IMS Health*, 131 S. Ct. 2653, 2659, 2664 (2011) (citing, *inter alia*, *City of Cincinnati v. Discov. Network*, 507 U.S. 410, 428-29 (1993).[31] Defendants do not dispute that these subsections of section 11 are content-based regulations of speech. *See* Opp. at 128-43. Nor can they, given that section 11 "disfavors . . . speech with a particular content," namely, the solicitation of work. *Sorrell*, 131 S. Ct. at 2663; *Solantic v. City of Neptune Beach*, 410 F.3d 1250, 1265-66 (11th Cir. 2005) (same standard).

[31] *Sorrell*, 131 S. Ct. at 2659 ("Speech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont's statute must be subjected to heightened judicial scrutiny."). Plaintiffs will show section 11 fails under either heightened or intermediate scrutiny, as the Court found in *Sorrell*. *Id.* at 2663-65 (heightened scrutiny analysis); 2667-72 (intermediate analysis). Plaintiffs do not concede that labor solicitation constitutes commercial speech. As an initial matter, after *Sorrell* it is not evident that commercial speech is any less protected than non-commercial speech when a regulation is content discriminatory or intended to suppress disfavored speech. *Id.* at 2672. In addition, workers gathering in public places to solicit work convey political and economic messages about the state of the economy and their need for work. Because day labor solicitation is "inextricably intertwined with otherwise fully protected speech," it should not be considered commercial speech. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988); *see also Sorrell*, 131 S. Ct. at 2665-66; *Lopez v. Cave Creek*, 559 F. Supp. 2d 1030, 1035-36 (D. Ariz. 2008) (day labor solicitation fully protected); *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993) (panhandler solicitation fully protected because conveys message beyond simple request for money). Plaintiff John Doe #5 has also worked as an organizer in the day laborer community, further underscoring that day labor speech has broader political and social dimensions and should therefore not be classified as purely "commercial." John Doe #5 Decl. ¶ 6 (Doc. No. 37-35).

1. Sections 11(f) and (g) Fail Strict and Intermediate Scrutiny

Because subsections (f) and (g) single out speech soliciting work, they are "directed at certain content and . . . aimed at particular speakers," and heightened scrutiny is required. *See Sorrell*, 131 S. Ct. at 2665; *see also Discov. Network*, 507 U.S. at 418 (applying heightened scrutiny to "categorical prohibition on the use of newsracks to disseminate commercial messages"); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid"). Defendants offer no argument that subparts (f) and (g) pass strict scrutiny.

Moreover, because subparts (f) and (g) forbid the solicitation of work not regulated under federal immigration law, Defendants' argument that Plaintiffs do not have standing is erroneous.[32] John Doe #5 and John Doe #6 do not engage in illegal activity, as Defendants contend. They do engage in day labor activity and they both lack work authorization, but this does not violate the federal employer verification requirements. *See* 8 U.S.C. § 1324a. Under federal law, an employer must verify work authorization of every employee. *Id.* § 1324a(a). Yet "[t]he term employee . . . does not mean independent contractors . . . or those engaged in

[32] Section 11(f) and (g) restricts the speech of *all* individuals soliciting work or soliciting workers, including those with work authorization.

casual domestic employment . . . ." 8 C.F.R. § 274a.1(f).[33] "Congress . . . intentionally excluded independent contractors from verification obligations." *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 769 (10th Cir. 2010). The suggestion that by soliciting day labor work John Does #5 and #6 are engaging in impermissible activity is in error, for the kind of work performed by day laborers is precisely the kind of work meant to be exempt from federal employment verification and penalties.

Finally, even under the intermediate scrutiny analysis, subparts 11(f) and (g) fail. To satisfy this standard, Defendants must establish either that the regulated speech is misleading or related to unlawful activity, or else that (1) the government has a substantial interest; (2) the restriction directly advances that interest, and (3) the interest could not be served as well by a more limited restriction on speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980); *see also Sorrell*, 131 S. Ct. at 2667-68. Defendants cannot satisfy this burden. As discussed above, John Does #5 and #6 do not engage in unlawful or misleading

[33] *See also* §§ 274a.1(h) ("[E]mployment does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent."); (g) (excluding "person or entity using . . . contract labor" from definition of "employer"). It was Congress's specific intent to exclude employment verification requirements and to preclude penalties regarding the hiring of these casual workers or independent contractors. H.R. Rep. No. 99-682(I), at 57 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5649, 5661 ("It is not the intent of this Committee that sanctions would apply in the case of casual hires (i.e., those that do not involve the existence of an employer/employee relationship).").

activity. Defendants have not identified any interest protected by section 11—much less a substantial one. Assuming *arguendo* that subparts (f) and (g) were intended to regulate traffic safety, they would nevertheless fail the third requirement because Alabama's existing traffic laws already address these issues without burdening speech.[34] "[T]here are numerous and obvious less-burdensome alternatives to" subparts (f) and (g), and Defendants have not established a need for a statewide regulation of solicitation of employment. *Discov. Network*, 507 U.S. at 417 n.13.

2. Section 11(a) Fails Strict and Intermediate Scrutiny

Section 11(a) singles out work solicitation speech and targets a particular subgroup of non-citizens. Consequently, because this provision is "directed at certain content and . . . aimed at particular speakers," it must be subject to strict scrutiny. *Sorrell*, 131 S. Ct. at 2665. Defendants offer no argument that Section 11(a) is content-neutral or that it meets strict scrutiny.

Defendants' only argument in response is that the speech prohibited by section 11(a) is unlawful under federal law. But even Defendants concede that Plaintiff Black Romero's work solicitation speech is consistent with federal law.

[34] *See*, *e.g.*, Ala. Code §§ 32-5A-136, -137, -138 (regulating stopping, standing, or parking vehicles on or along roadway).

Opp. at 134.[35] Yet Plaintiff Romero would clearly be subject to state prosecution under section 11(a). Moreover, as explained above, Plaintiffs John Doe #5 and #6 solicit work that is exempt from federal employment verification requirements and penalties but would be subject to state prosecution under section 11.

In addition, section 11(a) cannot meet the intermediate scrutiny test under the First Amendment. Under the first requirement of the test, Defendants can have no substantial interest in banning work solicitation speech that federal law permits, particularly in the immigration context. *Harrell v. Fla. Bar*, 608 F.3d 1241, 1269 (11th Cir. 2010); *see* Pls.' Br. at 29 (explaining IRCA's broad scope). Similarly, section 11(a) cannot be "narrowly drawn" since it prohibits work solicitation speech even when the speech is consistent with federal law, and explicitly penalizes the solicitation speech of independent contractors, which goes beyond what is prohibited under federal law. *See Cent. Hudson*, 447 U.S. at 565.

3. Subparts (a), (f) and (g) Are Overbroad

Defendants contend that because intermediate scrutiny is the proper standard, the overbreadth doctrine does not apply. Opp. at 137-38. Again,

[35] Under section 3(16), HB 56's definition section, "unauthorized alien" is defined as "[a]n alien who is not authorized to work in the United States as defined in 8 U.S.C.§ 1324a(h)(3)." As a student visa holder, Plaintiff Romero does not have work authorization and is not admitted for permanent residence under 8 U.S.C. § 1324a(h)(3) and, therefore, is an "unauthorized alien" as defined by HB 56 even though he is currently on a valid visa. HB 56 § 3(16). Thus, on its face, section 11(a) prevents him from soliciting work.

Plaintiffs dispute that intermediate scrutiny is the proper analysis. But assuming *arguendo* that intermediate scrutiny applies, the overbreadth analysis still invalidates these subparts. The Supreme Court has "declared the overbreadth doctrine to be inapplicable in *certain* commercial speech cases." *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) (emphasis added). In those cases, the Court declined to apply the overbreadth doctrine because the commercial speech at issue was "more hardy" and "less likely to be 'chilled'" than non-commercial speech. *Bd. of Trs. v. Fox*, 492 U.S. 469, 481 (1989).[36] That rationale, and the limitations on the overbreadth doctrine that stem from it, are inapplicable to the solicitation of work by day laborers who are a vulnerable category of mostly low-wage workers who seek temporary work to sustain themselves and their families. *See* John Doe # 5 Decl. (Doc. No. 37-35); John Doe # 6 Decl. (Doc. No. 37-36).

The overbreadth of section 11 is "substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Dean*, 635 F.3d 1200, 1204 (11th Cir. 2011) (internal quotation marks and emphasis omitted). The sweep of subparts (f) and (g) is not limited to "unauthorized aliens," but also to U.S. citizens and lawful permanent residents—clearly, a substantial

[36] *See also Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977) (declining to apply overbreadth analysis "to professional advertising, a context where it is not necessary to further its intended objective").

overreach. Similarly, subpart (a) applies to people who solicit lawful work, including independent contractors and students on visas, and is thus overbroad.

F. Plaintiffs Are Substantially Likely To Prevail in Their Sixth Amendment Challenge to Sections 10, 11, and 13

Plaintiffs' motion sets forth why the new state immigration crimes created by sections 10, 11 and 13 violate the Sixth Amendment's Confrontation and Compulsory Process Clauses by mandating that core criminal elements of unlawful presence and lack of work authorization are to be proven solely by inquiry to the federal government. *See* Pls.' Br. at 57-61. Defendants do not address the merits of this claim and respond only by questioning Plaintiffs' standing and proof of irreparable harm. Opp. at 143-50.[37] This is addressed *infra* in Part II.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY IF HB 56 IS NOT ENJOINED AND THEREFORE HAVE STANDING

Defendants contend that Plaintiffs lack standing and have failed to establish irreparable harm on every claim except preemption. *See* Opp. at 21-24 (standing

[37] Defendants appear to suggest that there is a conflict between the Sixth Amendment and federal supremacy in the regulation of immigration, and that the latter trumps the former. Opp. at 145 ("In fact, these provisions bow to a countervailing constitutional principle: the role of the federal government in the regulation of immigration."). This argument is clearly in error; if one constitutional priority could simply trump the other, there would be no need for immigration agents to provide live testimony in illegal reentry cases either. *See* Pls.' Br. at 59-60 & n.41.

generally), 107-13 (Fourth Amendment), 125-27 (Equal Protection), 141-43 (First Amendment), 145-50 (Sixth Amendment). These arguments are meritless; Plaintiffs have fully established standing to bring each of these claims.

A. All Organizational Plaintiffs Have Established Direct Standing to Challenge all of HB 56

Each Plaintiff organization has clearly established that it will be harmed if an injunction does not issue. *See Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (legal standard); Pls.' Br. at 68 (citing to organizational declarations).[38] For example, Alabama Appleseed, whose mission is to identify and address injustices and inequality in Alabama, has already been harmed by HB 56; passage of the law has "substantially diverted the attention and time of [its] immigrant policy staff away from the requisite, funded activities of [its] outreach projects" as Appleseed has had to devote significant staff time to the law both before and after passage, which has included fielding constant community inquiries about the law, averaging 15 calls a week. John Pickens Decl. ¶¶ 3, 11 (Doc. No. 37-6). Several core Appleseed projects have been materially harmed already. For

[38] *See also* Compl. ¶¶ 10-13 (Hispanic Interest Coalition of Alabama or "HICA"); 14-19 (AIDS Action Coalition); 20-21 (Huntsville International Help Center); 22-27 (Interpreters and Translators Association of Alabama or "ITAA"); 28-30 (Alabama Appleseed Center For Law & Justice, Inc.); 31(Service Employees International Union); 32-39 (Southern Regional Joint Board of Workers United or "Joint Board"); 40 (United Food and Commercial Workers International Union); 41-45 (United Food and Commercial Workers Union Local 1657 or "UFCW Local 1657"); 46-51 (Dreamactivist.org); 52-58 (Greater Birmingham Ministries); and 59-61 (Boat People SOS).

example, in connection with a project documenting the experiences of poultry workers, surveys of workers now take 50% longer to complete due to inquiries about HB 56, and Appleseed has been forced to reduce the number of surveys they planned to conduct as a result. *Id.* ¶ 11.b. Another Appleseed project, Welcoming Alabama, encourages immigrants to integrate into the social fabric of their adopted hometowns; the key to their approach is to have open dialogue and discussions on a personal level, and to keep the conversations away from major policy or political issues. *Id.* ¶ 11.c. HB 56 has greatly complicated this work because it infuses these discussions with the hot political issue of immigration reform; many meetings have already been cancelled and postponed because of HB 56, and this problem will only grow if the law goes into effect. *Id.* Indeed, the harm HB 56 poses to Appleseed could not be starker: "If HB 56 were go to into effect, [Appleseed] would have to substantially curtail or stop [its] immigration . . . work." *Id.* ¶ 12.

The Hispanic Interest Coalition of Alabama ("HICA") is also already feeling the brunt of this law, and the harms will only become worse if it goes into effect. HICA's mission is to "facilitate the social, civil, and economic integration of Hispanics into Alabama as well as to help Alabamians understand the diverse Hispanic culture," and it operates numerous programs to achieve these goals, including ESL classes, Volunteer Income Tax Assistance programs, a job bank, an

immigration legal clinic, community education classes, and various forms of assistance to victims of crime. Isabel Rubio Decl. ¶¶ 2, 5-15 (Doc. No. 37-2). The passage of HB 56 has already frustrated and undermined this mission by forcing HICA to divert staff resources away from these critical activities. Moreover, HICA expects continued and increased harm to its projects if the law goes into effect. *Id.* HICA has been inundated with requests for assistance related to instructions on the impact of the K-12 education provisions, how to obtain birth certificates and passports, and how to complete powers of attorney to protect individuals' children in case they are arrested under HB 56. *Id.* ¶ 15. At the same time, HICA is seeing a decline in attendance and has been forced to cancel programming because of HB 56. *Id.* ¶ 13. These and other concrete harms will only increase if HB 56 goes into effect. *See id.* ¶¶ 13, 15.[39]

[39] Defendants "offer a word of caution" regarding whether Plaintiffs' declarations are sufficient to establish harm, Opp. at 29-32, though they raise no complaints about the Pickens and Rubio declarations. Plaintiffs' declarations are sufficient as they are based on personal knowledge as to how the individuals and organizations have been affected to date and, as *required* for a facial challenge lawsuit, the declarations also set forth anticipated future harms. *See Fl. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (establishing organization that "reasonably anticipate[s it] will have to divert personnel and time" is sufficient); *Common Cause/Ga.*, 554 F.3d at 1350-51 (same). In any event, "[a]t the preliminary injunction stage, a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is appropriate given the character and objectives of the injunctive proceeding." *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995) (internal quotation marks omitted).

Appleseed and HICA, as well as the other Plaintiff organizations, have established standing and irreparable harm under all of HB 56. *See GLAHR*, 2011 WL 2520752 at *4-5, 18; *Fl. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008) (finding standing where organization canceled specific projects in response to allegedly unconstitutional statute). Based on this evidence alone, Plaintiffs have established standing to challenge HB 56. *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (once one plaintiff has standing, Court need not consider standing of remaining plaintiffs).

B. Several Organizational Plaintiffs Have Established Standing on Behalf of Their Members to Challenge All of HB 56

In addition to the harms that the Plaintiff organizations will suffer on their own behalf, a number of the Plaintiff organizations have standing to raise claims based on the harm their members will suffer under HB 56. *See Friends of the Earth v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999). Several Plaintiff organization members are at high risk of suffering specific harms from HB 56's unconstitutional provisions, including arrest and prosecution, and restrictions on attending primary, secondary, and postsecondary institutions, for all the reasons described in Part I above.[40] Some organizational Plaintiff members also lack access to the identity

[40] *See* Isabel Rubio Decl. ¶ 3 (Doc. No. 37-2) & Compl. ¶ 11 (HICA); Harris Raynor Decl. ¶¶ 5-7 (Doc. No. 37-8) & Compl. ¶¶ 34-35 (Joint Board); Jemise Ray

documents prescribed by HB 56, even though they are lawfully present in the United States.[41] In addition, Plaintiff SEIU, through its local affiliate, the Joint Board, represents more than 1,000 employees in the state, about 10 percent of whom are Latino. Harris Raynor Decl. ¶ 2 (Doc. No. 37-8). Members of all these organizations are at imminent risk of unconstitutional prolonged detention, denial of access to K-12 and postsecondary institutions, and prosecution under HB 56's sweeping provisions. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2713, 2714 (2010) (finding standing to bring pre-enforcement challenge to criminal law where Plaintiffs "claimed that they wished to provide support for the humanitarian and political activities" of two organizations, "but that they could not do so for fear of prosecution" under challenged law).

C. Standing and Harm Related to Fourth Amendment Claims

In addition to the organizational standing described above, individual Plaintiffs and members of organizational Plaintiffs will be subject to unlawful

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Decl. ¶¶ 2, 6-11 (Doc. No. 37-5) & Compl. ¶¶ 22-27 (ITAA); Joseph Hansen Decl. ¶¶ 9-10 (Doc. No. 37-9) & Compl. ¶ 44 (UFCW Local 1657); Mohammad Abdollahi Ali-Beik Decl. ¶¶ 5-9 (Doc. No. 37-10) & Compl. ¶¶ 47-50 (DreamActivist.org); Scott Douglas Decl. ¶¶ 11-12 (Doc. No. 37-11) & Compl. ¶¶ 55-56 (GBM).

[41] Harris Raynor Decl. ¶ 7 (Doc. No. 37-8) & Compl. ¶ 35 (Joint Board members lack prescribed identity documents); Mohammad Abdollahi Ali-Beik Decl. ¶¶ 5, 6, 8.d (Doc. No. 37-10) & Compl. ¶ 47 (Dreamactivist.org. members have lawful status but lack identity documents).

stops and improper extension of stops by law enforcement for the purposes of questioning about their immigration status under sections 12, 18, 19 and 20 of HB 56. Defendants raise two issues related to standing. They first assert that as a matter of law, Plaintiffs cannot establish a "genuine threat of enforcement" under HB 56, *Steffel v. Thompson*, 415 U.S. 452, 475 (1974), because Plaintiffs are "a step removed" from any harm. Opp. at 109. They next argue that several (though not all) of Plaintiffs' declarations are too conditional to establish harm. Neither proposition withstands scrutiny.

Defendants ignore the plain purpose of section 12: to include as part of routine and virtually unavoidable encounters with state and local law enforcement—*i.e.*, traffic stops—an investigation of an individual's immigration status. HB 56's immigration verification provision constitutes a departure from law enforcement norms, as immigration investigations do not normally occur during traffic stops, and its effects on Plaintiffs are far from speculative. For example, Plaintiffs such as Jane Doe #1 and Jane Doe #2 have immigration petitions pending or approved, but should they be stopped for a minor traffic violation, they are at great risk of being detained and arrested because they do not have one of the forms of identification set forth in section 12 and therefore will be deemed to be unlawfully present, even though the federal government is aware

they are in the country and has not elected to remove them.[42] Plaintiffs Jane Doe #1 and #2 are also subject to arrest under section 10, and prolonged detention under sections 18-20. Plaintiff Maria D. Ceja Zamora faces a similar risk. She is authorized to be in the United States through the Family Unity Program, but she lacks a driver's license or other document required by section 12 to prove to Alabama police that she has lawful status.[43] These and other Plaintiffs are at risk of unlawful detention any time they encounter a police officer.[44]

Under Eleventh Circuit case law, Plaintiffs have standing to present constitutional challenges to HB 56, and particularly sections 12, 18, 19 and 20. *Cf. Church v. City of Huntsville*, 30 F.3d 1332, 1338-39 (11th Cir. 1994) (finding involuntarily homeless individuals can challenge citywide policy that authorizes constitutional deprivations). When a policy is clear, when it will result in a constitutional deprivation, and especially where it targets individuals based on characteristics that cannot easily be changed, the risk of harm is sufficient to

[42] *See* Jane Doe #1 Decl. ¶¶ 3-5 (Doc. No. 37-25) & Compl. ¶¶ 111-15; Jane Doe #2 Decl. ¶¶ 3-5 (Doc. No. 37-26) & Compl. ¶¶ 116-21.
[43] Maria Ceja Zamora Decl. ¶¶ 2-5 (Doc. No. 37-14) & Compl. ¶¶ 68-71.
[44] *See* Jane Doe #4 ¶¶ 1, 6-7 (Doc. No. 37-28) & Compl. ¶¶ 128-29; Jane Doe #5 Decl. ¶¶ 2, 10 (Doc. No. 37-29) & Compl. ¶¶ 131, 133, 136; Jane Doe #6 Decl. ¶¶ 1, 7, 10-11 (Doc. No. 37-30) & Compl. ¶¶ 137, 142; John Doe #1 Decl. ¶¶ 1, 11-12 (Doc. No. 37-31) & Compl. ¶ 145; John Doe #2 Decl. ¶¶ 1, 11-12 (Doc. No. 37-32) & Compl. ¶¶ 147, 150; John Doe #3 Decl. ¶¶ 6, 11 (Doc. No. 37-33) & Compl. ¶¶ 151, 153-54; John Doe #4 Decl. ¶¶ 8-9 (Doc. No. 37-34) & Compl. ¶¶ 156, 158-59.

satisfy standing and irreparable injury. *See id.*; *see also GLAHR*, 2011 WL 2520752 at *3-4.

D. Standing and Harm Related to First Amendment Claims

In addition to the organizational standing described above, individual Plaintiffs John Doe #5, John Doe #6, and Juan Pablo Black Romero will have their First Amendment rights unlawfully restricted by section 11. Defendants purport to challenge the standing and injury these Plaintiffs are facing, but do not actually question these Plaintiffs' claims that HB 56 will inhibit their willingness to seek work, or cause them harm. *See* Opp. at 141-43. John Doe #5 Decl. ¶¶ 8-10 (Doc. No. 37-35); John Doe #6 Decl. ¶ 6 (Doc. No. 37-36); Juan Pablo Black Romero Decl. ¶¶ 3, 7 (Doc. No. 37-16). Instead, Defendants argue that the activity in which John Doe #5 and John Doe #6 is engaging is itself illegal. Opp. at 141-43. This is wrong as a matter of law. As discussed above, this argument is based on a mistaken view of the federal law. Casual labor of the sort sought by John Doe #5 and John Doe #6 is not unlawful under IRCA.

Regarding Plaintiff Romero, Defendants have no response at all. Indeed, they concede it would be improper to criminalize his efforts to find work even though he lacks federal work authorization, Opp. at 134-35, 140, and they go on to state that "it is not clear he is making [a claim] and he has not supported it." *Id.* at 142. This is incorrect. Plaintiff Romero is presenting a First Amendment

challenge (as well as a preemption claim). *See* Compl. ¶¶ 78-79 ("If HB 56 is implemented, however, Plaintiff Romero will be subject to criminal prosecution for being an 'unauthorized alien' who applies for or solicits work."); Pls.' Br. at 57 (describing how section 11 will "cause great harm to lawful residents like Plaintiff Romero, who has a student visa but plans to solicit work while waiting for his employment authorization to be approved); *see also* Juan Pablo Black Romero Decl. ¶¶ 3, 7 (Doc. No. 37-16).

E. Standing and Harm Related to Equal Protection Claims

In addition to the organizational standing described above, Plaintiffs Haile and Tesfamariam have standing to pursue their equal protection claims against section 11. Defendants do not dispute that Haile and Tesfamariam would be harmed if section 11 is implemented as written; they simply seek to ignore section 8's plain text. *See* Opp. at 126. This argument is in error.

In addition to the organizational standing described above, several organizations have suffered acute harm specifically because of the K-12 school provisions, and Greater Birmingham Ministries' members will be affected by section 28 after it goes into effect. *See supra* at 42 n.27. In addition, several Doe Plaintiffs have standing to pursue their equal protection claims against section 28. *See* Pls.' Br. at 65-66; *see also supra* 41-42 n.27.

F. Standing and Harm Related to Sixth Amendment Claims

In addition to the organizational standing described above, every individual Plaintiff except for Plaintiffs Haile, Tesfamariam, and Zamora has standing to pursue the Sixth Amendment claim because each one is at risk of criminal prosecution under HB 56. Defendants challenge Plaintiffs' ability to pursue these claims because, they contend, (i) Plaintiffs speculate without a basis they will be arrested; and (ii) Plaintiffs presume that state courts will not protect Plaintiffs from a violation. Opp. at 148. These arguments are without merit.

Under HB 56, these Plaintiffs are at risk of arrest and criminal prosecution under sections 10, 11, and/or 13.[45] Prosecution for these crimes is mandatory

[45] *See* Matt Webster Decl. ¶¶ 6, 12 (Doc. No. 37-13) & Compl. ¶ 67 (§ 13(a)(1)-(3) for harboring, encouraging, and transporting undocumented sons); Pamela Long Decl. ¶¶ 8-9, 12-13 (Doc. No. 37-14) & Compl. ¶¶ 74-75 (§ 13(a)(1)-(3) for harboring, encouraging and transporting undocumented individuals in her ministerial capacity); Juan Pablo Black Romero Decl. ¶¶ 3, 7 (Doc. No. 37-16) & Compl. ¶ 79 (§ 11 for soliciting work as student visa holder); Christopher Barton Thau Decl. ¶¶ 6-10, 22 (Doc. No. 37-17) & Compl. ¶¶ 82-84 (§ 13(a)(1)-(3) for harboring, encouraging and transporting undocumented congregants); Ellin Jimmerson Decl. ¶¶ 2, 4, 6-8, 14 (Doc. No. 37-18) & Compl. ¶ 90 (§ 13(a)(1)-(3) for harboring, encouraging and transporting undocumented individuals); Robert Barber Decl. ¶¶ 5-9, 22 (Doc. No. 37-19) & Compl. ¶¶ 92-93 (§ 13(a)(1)-(3) for harboring, encouraging and transporting his undocumented clients); Daniel Upton Decl. ¶¶ 7-9, 11-12 (Doc. No. 37-20) & Compl. ¶ 99 (§ 13(a)(1)-(3) for harboring, encouraging and transporting undocumented clients and congregants); Jeffrey Allen Beck Decl. ¶¶ 3-4, 6-7 (Doc. No. 37-21) & Compl. ¶ 102 (§ 13(a)(4) for renting to undocumented individuals); Michelle Cummings Decl. ¶¶ 3-5, 7 (Doc. No. 37-22) & Compl. ¶¶ 107-08 (same); Jane Doe #1 Decl. ¶¶ 4-5, 10-12 (Doc. No. 37-25) & Compl. ¶¶ 112-14 (§ 10 for failing to carry alien registration document); Jane Doe #2 Decl. ¶¶ 2, 4-5, 15 (Doc. No. 37-26) & Compl. ¶¶ 117-18

under HB 56. HB 56 §§ 6(a), (b). The Sixth Amendment violations at issue are also mandatory because of the explicit language of the statute, requiring proof of immigration status by a paper verification rather than in-person testimony. *See* Pls.' Br. at 57-61. HB 56 applies statewide and will deprive Plaintiffs of their constitutional rights. The Eleventh Circuit has instructed that anyone who is at risk under such a policy (or, *a fortiori*, state law) may challenge its constitutionality without awaiting its enforcement against them in particular. *Church*, 30 F.3d at 1338-39; *see also GLAHR*, 2011 WL 2520752 at *3-4. Thus, Defendants' arguments that Plaintiffs' injuries are "speculative" rather than imminent, and in fact inevitable, are meritless.

Defendants' second argument—that Plaintiffs will be saved from harm by a state court—fails on the plain language of the statute. This is a facial challenge that must turn on "the statute's facial requirements," not the possibility that a state

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(same); Jane Doe #3 Decl. ¶¶ 3, 5, 7, 13 (Doc. No. 37-27) & Compl. ¶¶ 122-23 (§ 13(a)(1)-(3) for harboring, encouraging and transporting her undocumented husband); Jane Doe #4 Decl. ¶¶ 6-7 (Doc. No. 37-28) & Compl. ¶ 129 (§ 10 for failing to carry alien registration document); Jane Doe #5 Decl. ¶¶ 2-3, 10 (Doc. No. 37-29) & Compl. ¶¶ 131-33(same); Jane Doe #6 Decl. ¶¶ 1, 7, 11 (Doc. No. 37-30) & Compl. ¶¶ 131, 142 (§ 10 for failing to carry alien registration document); John Doe #1 Decl. ¶¶ 2, 9-12, 14 (Doc. No. 37-31) & Compl. ¶ 145 (same); John Doe #2 Decl. ¶¶ 1, 5, 11, 13 (Doc. No. 37-32) & Compl. ¶¶ 147, 150 (same); John Doe #3 Decl. ¶¶ 6-7, 11 (Doc. No. 37-33) & Compl. ¶ 151 (same); John Doe #4 Decl. ¶¶ 3-4, 8-10 (Doc. No. 37-34) & Compl. ¶ 159 (same); John Doe #5 Decl. ¶¶ 2-3, 6-10 (Doc. No. 37-35) & Compl. ¶¶ 160-62 (§ 11 for soliciting work); John Doe #6 Decl. ¶¶ 2, 4-6 (Doc. No. 37-36) & Compl. ¶¶ 163-65 (same).

court would intentionally defy the plain text of HB 56. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

G. Defendants' "Prudential Standing" Argument Is Contrary to the Law

In addition to the constitutional dimensions discussed above, a court may also consider prudential standing concerns when a litigant is "raising another person's legal rights," is seeking "adjudication of generalized grievances more appropriately addressed in the representative branches," or if the issues being raised "fall [outside] the zone of interests protected by the law invoked." *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). These enumerated concerns are inapplicable to the instant case, yet Defendants take the position that this Court should ignore the constitutional harms of some John and Jane Doe Plaintiffs because their immigration status is not current. *See* Opp. at 24. Were Defendants to have their way, the courthouse doors would be closed to anyone who lacked status, including Plaintiffs Jane Doe #1 who has an approved immigration petition but is without status until a visa becomes available, Jane Doe #2 who has an immigration visa petition pending, and John Doe #1 who entered the United States as a child and who must wait two years after his adoption by U.S. citizen parents before he can obtain current status.

Defendants' attempt to deny judicial access to people based on immigration status is consistent with the tenor of HB 56, but it has no basis in law save a lone

unpublished opinion, *Nat'l Coal. of Latino Clergy v. Henry ("NCLC")*, No. 07-613, 2007 WL 4390650 (N.D. Okla. Dec. 12, 2007). *NCLC's* purported standard has never been followed by another court, and for good reason: The Supreme Court and other federal courts have repeatedly held that individuals without federal immigration status may raise constitutional claims, even though "compliance with federal law" would have absolved their "constitutional dilemma." 2007 WL 4390650, at *9. *See, e.g.*, *Plyler*, 457 U.S. at 210; *Hawa Abdi Jama v. Esmor Corr. Servs., Inc.*, 577 F.3d 169, 171 (3d Cir. 2009) (ruling on fee award to counsel of undocumented alien who was *inter alia* "subjected to unnecessary strip searches" while in detention); *Perales v. Thornburgh*, 967 F.2d 798 (2d Cir. 1992); *Boe v. Wright*, 648 F.2d 432, 433 (5th Cir. 1981). As the Third Circuit explained, *NCLC* is problematic "both in substance and tone, [because it] fails to appreciate that whatever a person's immigration status, 'an alien is surely a "person"' entitled to Due Process Clause protections." *Lozano v. City of Hazelton*, 620 F.3d 170, 194 (3d Cir. 2010)(quoting *Plyler*, 457 U.S. at 210; *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.")).

The Doe Plaintiffs in this action respectfully submit that whatever else may be at issue in this case, they are nevertheless persons entitled to a fair day in court

under the Due Process Clause of the U.S. Constitution. Any argument to the contrary is "particularly troubling" and should be rejected out of hand. *Lozano*, 620 F.3d at 193 n.18; *see also Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (citing cases noting Due Process Clause applies to "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent.").

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH IN FAVOR OF A PRELIMINARY INJUNCTION

Defendants do not directly dispute that the balance of equities is in the Plaintiffs' favor, and that an injunction is not adverse to the public interest. *See* Opp. at 9-12. Instead they question the Eleventh Circuit's holding that a plaintiff need show only that an injunction would not be adverse to the public interest, arguing that the Supreme Court would require more. Opp. at 10-11. This argument obviously fails as the Eleventh Circuit's ruling is binding until it is overruled or abrogated by the Supreme Court or the Eleventh Circuit sitting *en banc*. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (citations omitted). In any event, Plaintiffs have clearly satisfied either articulation of the standard by showing that issuance of an injunction is in the public interest.

CONCLUSION

For the reasons set forth in support of Plaintiffs' motion, the Court should issue an order preliminarily enjoining Defendants from enforcing any of the

provisions in HB 56 and in particular, should issue a preliminary injunction against sections 5, 6, 7, 8, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 27, 28, and 30. Each of those sections is an impermissible regulation of immigration, conflicts with a federal statute, regulates in a field occupied by federal law, burdens the federal government by imposing demands for immigration status verifications at odds with federal priorities, and/or violates the Fourth, First, or Sixth Amendments or the Equal Protection Clause.

Dated August 15, 2011

Respectfully Submitted,

/s/ Cecillia D. Wang
Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record, and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

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