No. 11-14532-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

STATE OF ALABAMA, et al.,
Defendants-Appellees.

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

Case No. 11-J-2746-S
Preliminary Injunction Order Dated September 28, 2011

TIME SENSITIVE MOTION FOR INJUNCTION PENDING APPEAL AND TEMPORARY INJUNCTION PENDING FULL CONSIDERATION AND FOR EXPEDITED BRIEFING AND ARGUMENT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. Rule 26.1, counsel for Defendant-Appellee the United States of America certify that the following have an interest in the outcome of this appeal:

AALDEF

Abate, Michael P.

ACHR

Alabama

Alabama Coalition Against Domestic Violence

Alabama Education Association

Alabama Legislators

Alabama NOW

American Immigration Lawyers Association

American Unity Legal Defense Fund

Anti-Defamation League

Argentina

Bentley, Robert J.

Birmingham Peace Project

Blacksher, James U.

Bolivia

Brazil

Brinkmann, Beth S.

Central Alabama Fair Housing Center

Chilakamarri, Varu

Chile

Colombia

Costa Rica

Davis, James W.

Dominican American National Roundtable

Dominican Republic

Ecuador

El Salvador

Equality Alabama

Escalona, Prim Formby

Fair Housing Center of Northern Alabama

Fairbanks, Misty S.

Federation of Southern Cooperatives/Land Assistance Fund

Fleming, Margaret L.

Gespass, David

Guatemala

Hispanic Association of Colleges and Universities (HACU)

Hispanic Federation

Honduras

Immigration Equality

Krishna, Praveen

Lawyers Committee for Civil Rights Under Law

Montgomery Improvement Association

NAACP Alabama Conference

National Asian-Pacific Bar Association

National Association of Criminal Defense Lawyers

National Association of Latino Elected and Appointed Officials

National Council of La Raza

National Education Association

National Employment Law Project

National Fair Housing Alliance, Inc.

National Guestworker Alliance

National Immigration Law Project of the National Lawyers Guild

National Lawyers Guild

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New Orleans Workers Center for Racial Justice

Nicaragua

Orrick, William H., III

Paraguay

Park, John J., Jr.

Parker, William G., Jr

Payne, Joshua Kerry

Perez-Vargas, Miguel A.

Peru

Reeves, C. Lee, II

Schoen, David I.

Sikh American Legal Defense and Education Fund

Sinclair, Winfield J.

Society of American Law Teachers

Southern Christian Leadership Conference

Southern Coalition for Social Justice

Stern, Mark B.

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APPELLANT'S TIME SENSITIVE MOTION FOR INJUNCTION PENDING APPEAL AND TEMPORARY INJUNCTION PENDING FULL CONSIDERATION

INTRODUCTION AND SUMMARY

Pursuant to FRAP 8(a) and 27, the United States of America respectfully requests that the Court enjoin, pending appeal, provisions of Alabama H.B. 56 that form part of a sweeping new state regime that imposes a host of new criminal penalties and disabilities on persons unlawfully in the United States — and, in the process, burdens those who are legally present. That state regime contravenes the federal government's exclusive authority over immigration. We also ask that the Court issue a temporary injunction pending full consideration of this motion and that it establish an expedited schedule for briefing and argument. The district court denied, in relevant part, the United States' motion for a preliminary injunction on September 28, 2011, and denied our motion for an injunction pending appeal on October 5, 2011. Attachments 1, 2.

H.B. 56 creates a comprehensive set of immigration provisions that, in the words of its sponsor, "attacks every aspect of an illegal alien's life" and "is designed to make it difficult for them to live here so they will deport themselves."[1] To this end, H.B. 56 creates a panoply of new state offenses that criminalize, among other things, an alien's failure to comply with federal registration requirements that were enacted pursuant to Congress's exclusive power to regulate immigration, an alien's attempt to solicit or perform work, and an alien's attempt to interact with state or local government. The law also invites discrimination against many foreign-born citizens and lawfully present aliens, including legal residents, by making it a crime for any landlord to rent housing to an unlawfully present alien, invalidating all contracts with unlawfully present aliens, and even targeting school-age children with an alien registration system.

To achieve maximum enforcement, H.B. 56 establishes a new state-wide mandatory immigration status-verification system to be enforced whenever practicable by every law enforcement officer who, during the course of any stop, has reasonable suspicion that a person is "unlawfully present." State and local authorities that fail to enforce the statute to the full extent are subject to suit for money damages by any lawful resident of Alabama.

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[1] Conor Friedersdorf, *Why Alabama's Immigration Bill Is Bad for Citizens*, The Atlantic, June 13, 2011, http://www.theatlantic.com/politics/archive/2011/06/why-alabamas-immigration-bill-is-bad-for-citizens/240297/ (last visited October 5, 2011) (quoting H.B. 56 sponsor Rep. Mickey Hammon).

These provisions, individually and in concert, invade the federal government's exclusive authority over immigration. Pursuant to that authority, Congress has enacted a comprehensive statutory scheme to deal with aliens unlawfully in the United States — including procedures for their orderly removal under the law and for seeking asylum and other forms of relief from removal — and also to respect the status of aliens who are legally present in this country. Apart from the provisions for removal of aliens, Congress has imposed restrictions on employers who knowingly hire unauthorized aliens, but has not otherwise restricted contracts or commercial dealings with them.

These enactments reflect a congressional determination to bring about the removal of illegally present aliens through the process of the federal immigration laws. They also demonstrate a recognition that the means of enforcement are committed to the judgment and discretion of federal officials, and must be informed by a variety of considerations, including the impact on the rights of persons lawfully in the United States and the impact of immigration policy on the Nation's dealings with other countries. In light of these competing concerns, the federal government focuses its attention on aliens who pose a danger to national security or have committed crimes, and States do not have the authority to disregard these priorities and create a patchwork of independent immigration policies. Similarly, neither the Constitution nor the federal immigration laws permit a state scheme avowedly designed to drive aliens out of the State — a program of de facto removal and a blunt instrument that can only impede

federal law enforcement, obstruct the overall national regulation of immigration, and present new concerns for the States to which aliens "deport themselves."

As the district court recognized in enjoining certain provisions of the new Alabama law, H.B. 56 implicates the federal government's exclusive authority over immigration enforcement. The provisions that were not enjoined likewise mark a major and disruptive shift in state law that has raised widespread questions and concerns. Although it is too soon to determine with precision the effects of H.B. 56, news accounts confirm that the law is having its intended but impermissible consequences of driving aliens from the State outside of the INA's orderly system for removal, and by inducing many parents to keep their children home from school due to fear about the State's immigration policy.[2]

We therefore ask that the Court hear this appeal on an expedited basis to resolve the constitutional issues presented. In the interim, the public interest, as well as the interests of the United States, will be served by an injunction pending appeal, an exercise of this Court's authority that will result in no irreparable harm to the State.

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[2] *See, e.g.*, Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, New York Times, October 3, 2011, http://www.nytimes.com/2011/10/04/us/after-ruling-hispanics-flee-an-alabama-town.html?_r=3&hp=&pagewanted=all (last visited Oct. 6, 2011).

STATEMENT

A. The Federal Immigration Scheme

1. The "[p]ower to regulate immigration is unquestionably exclusively a federal power," and only the federal government may determine "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *DeCanas v. Bica*, 424 U.S. 351, 354, 355 (1976). Exercising this exclusive authority, Congress enacted the Immigration and Nationality Act ("INA"), 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.*, which established a "comprehensive federal statutory scheme for regulation of immigration and naturalization" and set "the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country." *DeCanas*, 424 U.S. at 353, 359. The INA establishes the grounds on which an alien is removable from the United States, *see* 8 U.S.C. §§ 1227(a), 1182(a), and establishes the exclusive procedures for removal, *id.* §§ 1227(a), 1228, 1229a.

Congress has directed the officials responsible for enforcing federal law to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, Title II, 123 Stat. 2142, 2149 (2009). Immigration and Customs Enforcement (ICE) has made "aliens who pose a danger to national security or a risk to public safety" its highest priority, including aliens engaged in or suspected of terrorism and aliens convicted of criminal activity. Ragsdale Decl. ¶ 8 (Attachment 3). In contrast,

"[a]liens who have been present in the U.S. without authorization for a prolonged period of time, but who have not been convicted of criminal conduct, present a lower enforcement priority." *Id.* ¶ 9.

Federal officials also must take into account humanitarian interests in appropriate instances, reflecting the federal government's "desire to ensure that aliens in the system are treated fairly and with appropriate respect given their individual circumstances." *Id.* ¶ 10. These humanitarian concerns "may, in appropriate cases, support a conclusion that an [otherwise removable] alien should not be detained during the removal process or removed at all." *Ibid.* Federal law thus empowers federal officials in a number of ways to exercise their discretion not to apply a specific immigration law provision to an alien who may have unlawfully entered or remained in the United States. And in all instances, the implementation of the federal immigration laws, including through removal or prosecution, requires resort to orderly federal procedures under the authority of the federal officials in which Congress has vested that authority.

2. The INA encourages States to cooperate with federal government officials in the enforcement of immigration laws, and provides state officials with express authority to take certain actions to assist federal immigration officials. For example, state officers may make arrests for violations of the INA's prohibition against smuggling, transporting, or harboring aliens. *See* 8 U.S.C. § 1324(c). Similarly, under certain circumstances, state officers may arrest and detain an alien who is illegally present in the United States and

has previously been convicted of a felony in the United States and left the country. *Id.* § 1252c. Congress has also authorized DHS to enter into agreements with States to allow appropriately trained and supervised state and local officers to perform enumerated immigration related functions "subject to the direction and supervision of the [Secretary]." *Id.* § 1357(g)(3).

A formal agreement is not required for state and local officers to "communicate with the [Secretary] regarding the immigration status of any individual," or "otherwise to cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." *Id.* § 1357(g)(10). Consistent with this provision, DHS has invited and accepted the assistance of state and local law enforcement personnel without a written agreement in a variety of contexts.

B. ALABAMA'S H.B. 56

This motion concerns the following provisions of Alabama H.B. 56:

Section 10 provides that "[i]n addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), and the person is an alien unlawfully present in the United States." This provision creates a new state misdemeanor crime for violations of the referenced provisions of federal law, which require certain aliens to register with the federal government and to carry their registration documents, under threat of federal misdemeanor penalties.

Section 12(a) requires law enforcement officers, "[u]pon any lawful stop, detention, or arrest . . . where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States," to make a "reasonable attempt . . . when practicable, to determine the citizenship and immigration status of the person, except if the determination may hinder or obstruct an investigation." A person is presumed to be lawfully present if the person provides one of six specified forms of identification. H.B. 56, § 12(d).

Immigration status verification is to be carried out by contacting the federal government pursuant to 8 U.S.C. § 1373(c). H.B. 56 § 12(a). If a person's unlawful presence is confirmed, the officer must cooperate in transferring the alien to the federal government, "if the federal government so requests." H.B. 56, § 12(e). Sections 10 and 12 were modeled on provisions of Arizona's S.B. 1070, which have been enjoined by an Arizona district court in an opinion affirmed by the Ninth Circuit. *United States v. Arizona*, 641 F.3d 339, 348-57 (9th Cir. 2011).

Section 18 of H.B. 56 complements Section 12(a) by mandating verification for all persons arrested for driving without a license. Upon such an arrest, Alabama officials must make a "reasonable effort . . . to determine the citizenship of the person and if an alien, whether the alien is lawfully present in the United States by verification with the federal government pursuant to 8 U.S.C. § 1373(c)." H.B. 56, § 18(c). A determination must be made within 48 hours, and if the person is unlawfully present, then he "shall be

considered a flight risk and shall be detained until the prosecution or until handed over to federal immigration authorities." H.B. 56, § 18(d).

Section 27 provides that no Alabama court "shall enforce the terms of, or otherwise regard as valid, any contract between a party and an alien unlawfully present in the United States, if the party had direct or constructive knowledge that the alien was unlawfully present in the United States at the time the contract was entered into," subject to limited exceptions for contracts that can be performed without remaining in the United States for 24 hours; contracts for a single night's lodging, food for the alien's consumption, medical services, or transportation out of the country; and contracts "authorized by federal law."

Section 28 requires public elementary and secondary schools to determine at the time of enrollment "whether the student enrolling in public school was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States and qualifies for assignment to an English as Second Language class or other remedial program." H.B. 56, § 28(a)(1). To this end, students must provide their birth certificate. If the birth certificate reveals that the student was born outside the United States or is the child of an unlawfully present alien (or is unavailable), the student's parent or guardian must demonstrate the student's immigration status by certain specified means. H.B. 56, § 28(a)(2)-(4). The data collected under this provision must be submitted to the State Board of Education, which in turn submits a report to

the legislature. H.B. 56, § 28(b)-(d).

Section 30 provides that an unlawfully present alien "shall not enter into or attempt to enter into a business transaction with the state or a political subdivision of the state," and others may not enter into such transactions on their behalf. H.B. 56, § 30(b). A violation of the statute is a Class C felony. H.B. 56, § 30(d). The statute defines "business transaction" to include "any transaction between a person and the state or a political subdivision of the state, including, but not limited to, applying for or renewing a motor vehicle license plate, applying for or renewing a driver's license or nondriver identification card, or applying for or renewing a business license," but the definition excludes "applying for a marriage license." H.B. 56, § 30(a).

C. Prior Proceedings

The United States initiated this action and sought a preliminary injunction against these and other provisions of H.B. 56 based on their preemption by federal law. The district court granted the injunction with respect to other provisions of H.B. 56 that impose sanctions on unauthorized aliens who seek or perform work (Section 11(a)), Mem. Op. 36-52; make it a state crime to conceal, harbor, shield, or transport an alien unlawfully present in the United States, or to encourage such person to come into the State of Alabama, including through the mere act of leasing property to unlawfully present persons (Section 13), Mem. Op. 70-86; and impose sanctions on employers who hire unauthorized workers (Sections 16 and 17), Mem. Op. 86-97. The court denied

relief with respect to the provisions at issue here.

The court recognized that federal law provides for state assistance in enforcing the immigration laws only when the State's efforts constitute "cooperat[ion]" with federal officials, 8 U.S.C. § 1357(g)(10)(B), *see* Mem. Op. 68, but then concluded that Section 12 "reflects an intent to cooperate with the federal government," because it leaves the ultimate determination about lawful presence and removal to federal authorities. Mem. Op. 68. The district court incorporated this analysis in denying the preliminary injunction as to Section 18. Mem. Op. at 100.

The district court recognized that Section 27 "strips an unlawfully-present alien of the capacity to contract except in certain circumstances." Mem. Op. 101. The court concluded, however, that it was likely not preempted by federal law because "nothing shows Congress intended that such contracts would be enforceable." Mem. Op. 102.

The district court held that Section 28, which requires every child who enrolls in school to document his or her immigration status, "does not create an independent, state-specific registration scheme," and was therefore likely not preempted by federal law. Mem. Op. 108-09.

Finally, the district court reasoned that "Section 30 is intended to prohibit the state from issuing a license to an unlawfully-present alien," which nothing in the INA prevents the State from doing. Mem. Op. 113. The district court did not address Section 30's imposition of criminal penalties on unlawfully present aliens who attempt

to engage in business transactions with the State.

ARGUMENT

I. The United States is likely to succeed on the merits.

A. The "'power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation[;] . . . whatever power a state may have is subordinate to supreme national law.'" *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941). The regulation of immigration is intertwined with the national government's exclusive conduct of foreign policy, and "international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." *Id.* at 64. Even perceived mistreatment of aliens within the United States risks "reciprocal and retaliatory treatment of U.S. citizens abroad," thereby implicating "the ability of U.S. citizens to travel, conduct business, and live abroad." Burns Decl. ¶ 9 (Attachment 4).

Federal power over immigration does not preclude "every state enactment which in any way deals with aliens," *De Canas*, 424 U.S. at 355, or bona fide state cooperation with the federal officials responsible for enforcing the INA, *see* 8 U.S.C. § 1357(g)(10). But because the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *De Canas*, 424 U.S. at 354, any assistance rendered by state and local officers to federal officials in the enforcement of the INA is subordinate to and must remain responsive to the priorities and discretion of the federal officials who are charged with

implementing federal law and policy.

Alabama thus has no authority to directly regulate in the area of immigration. Nevertheless, the State has enacted such a scheme of regulation, and one that is at odds with the letter and spirit of federal policy. The Alabama statute "departs from our traditional policy of not treating aliens as a thing apart." *Hines*, 312 U.S. at 73. Taken together, the Alabama provisions do not merely expose aliens to "the possibility of inquisitorial practices and police surveillance," *id.* at 74, but make unlawful presence a criminal offense, and render unlawfully present aliens a unique class who cannot lawfully obtain housing, enforce a contract, or send their children to school without fear that enrollment will be used as a tool to seek to detain and remove them and their family members. Notwithstanding the State's claim that its actions will further common goals, the challenged provisions, if implemented, would institute fundamental disuniformity and serve only to undermine federal enforcement of the immigration laws and to create difficulties in the conduct of foreign policy — consequences for the whole Nation, including people of the other States. As the Supreme Court has recognized, by inserting itself into immigration matters, "a single State can, at her pleasure, embroil us in disastrous quarrels with other nations." *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

B. The provisions that are the subject of this appeal offend these principles as clearly as those that the district court has properly enjoined.

1. Section 10 imposes state criminal penalties for violations of federal law that

requires aliens to carry federal registration papers. It is not controverted that Alabama could not properly enact its own registration scheme. The Supreme Court in *Hines* considered a predecessor to the current federal registration scheme and explained that Congress had "enacted a complete scheme of regulation and ha[d] 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. The district court mistakenly concluded that Alabama had avoided the defects of the state registration requirement that was held invalid by the Supreme Court in *Hines* because Alabama is imposing new penalties for violations of federal law rather than creating an independent registration requirement. Mem. Op. 23. But the federal registration provisions in the INA are one component of Congress's exercise of its exclusive power over immigration. The State of Alabama has no authority to intrude upon and alter that comprehensive and exclusive federal scheme by adding new requirements or by imposing new penalties to supplement those enacted by Congress. A district court injunction against a virtually identical provision of Arizona law was affirmed by the Ninth Circuit, which explained that "[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.

As the Ninth Circuit recognized, it is not within a State's authority to impose

penalties for violations of federal law in addition to those deemed appropriate by Congress. That is the case even outside the areas of foreign and immigration policy in which States have no constitutional authority. *See, e.g.*, *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986) (Wisconsin could not prohibit certain violators of the National Labor Relations Act from doing business with the State because states lack authority to provide "their own regulatory or judicial remedies for conduct prohibited or arguably prohibited" by the Act). *See also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (a State could not provide a tort remedy for claims premised on fraud against the U.S. Food and Drug Administration).

The Supreme Court emphasized in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) that "'conflict is imminent'" when "'two separate remedies are brought to bear on the same activity.'" *Id.* at 380 (quoting *Gould*, 475 U.S. at 286). That the state scheme may "share the same goals" as federal law, *id.* at 379, does not legitimize the State's attempt to enact a concurrent remedial or enforcement regime.

Alabama's scheme also is contrary to longstanding federal immigration policy. The effect of the statute is to make unlawful presence in the United States a state criminal offense. But as Deputy Secretary of State William J. Burns explains, it has been the "uniform" United States policy that "the unlawful presence of a foreign national, without more, ordinarily will not lead to that foreign national's criminal arrest or incarceration, but instead to civil removal proceedings." Burns Decl. ¶ 35.

2. Section 12 requires all state and local law enforcement officers, who stop an individual for any reason, to verify his or her status whenever there is "reasonable suspicion" that the individual is "unlawfully present." Whenever the individual's status cannot immediately be verified, the officer must contact ICE. Section 12 is virtually identical to a provision of Arizona law that was enjoined by a district court and that injunction was affirmed by the Ninth Circuit. *See Arizona*, 641 F.3d at 348-54.

The district court here concluded, however, that Section 12 passes muster because it "reflects an intent to cooperate with the federal government." Mem. Op. 68. The federal government welcomes the bona fide cooperation that it regularly receives from state and local agencies and individual officers. Section 12 cannot, however, plausibly be styled as "cooperation." To the contrary, it radically curbs the discretion of state officials to tailor their efforts to respond to federal priorities. By imposing an inflexible mandate for Alabama law enforcement officers to check the immigration status of broad categories of people, Section 12 serves as an obstacle in every instance to the ability of individual state and local officers to cooperate with federal officers administering federal policies and discretion as the circumstances of the particular case require. And because reasonable suspicion of unlawful presence will often exist even for persons who have authorization to remain in the country, Section 12 impermissibly exposes even lawfully present aliens to "the possibility of inquisitorial practices and police surveillance," *Hines*, 312 U.S. at 74.

Section 12 constitutes an impermissible infringement on federal prerogatives even if considered in isolation, but its effects are exacerbated by its interaction with other provisions of H.B. 56. Because Alabama has now created state criminal provisions for federal immigration offenses, Section 12 will apply to persons stopped on suspicion of committing those offenses. In addition, H.B. 56 authorizes citizens to file suits to ensure that officers enforce the statute to the maximum extent possible. *See* H.B. 56, § 6(d).

3. Section 18 complements Section 12 by imposing additional specific requirements with respect to all stops of automobiles, and it suffers from the same defects as Section 12.

4. The other provisions at issue here lack even the appearance of efforts to cooperate in the enforcement of federal immigration laws. Section 27 renders contracts with illegal aliens unenforceable, thus putting the State's imprimatur on a broad range of exploitative practices. Section 30 compounds the Alabama criminal penalty for being unlawfully in the United States by imposing additional criminal penalties for attempting to contract with state and local entities. And Section 28 deters even children who are lawfully present in the United States from attending school by making their enrollment a tool for discovering the status of their parents and family members.

Taken together, these provisions, in the words of the legislation's sponsor, "attack[] every aspect of an illegal alien's life" and seek "to make it difficult for [aliens] to live here so they will deport themselves." Friedersdorf, *supra* n.1. By vesting

exclusive authority over immigration in the federal government, the Constitution prohibits such conflicting state efforts to drive aliens from one locale to another without regard to the interests of the national government or other States.

Notwithstanding Alabama's aspirations to a regime of self-deportation, aliens unlawfully in the United States are, in fact, subject to removal exclusively under procedures specified by federal statute, *see* 8 U.S.C. § 1229a(a)(3), and the vast majority of aliens subject to such proceedings are not in federal custody. Rather, the federal government relies upon its ability to locate these individuals through their last known address or telephone number to give them notice of upcoming hearings and other developments in their removal proceedings. Attempts to drive aliens "off the grid" will only impede the removal process established by federal law.

Federal immigration enforcement, unlike the Alabama statute, also considers the interest in prosecuting crimes of which aliens are the victims or key witnesses. Alabama's divergent efforts can only obstruct these federal law enforcement activities.

Finally, Alabama is not in a position to answer to other nations for the consequences of its policy. That is the responsibility of the federal government, which speaks for all the States and must ensure that the consequences of one State's foray into the realm of immigration law are not visited upon the Nation as a whole.

II. The balance of harms and the public interest favor an injunction.

The balance of harms and the public interest strongly militate in favor of an

injunction pending appeal. The statute introduces a host of new criminal penalties and requires inflexible enforcement that is backed with the prospect of citizen suits.

The district court correctly recognized, when it enjoined other provisions of H.B. 56, that harms to the national interest outweigh Alabama's desire to create state-specific penalties for unlawfully present aliens that seek or perform work, for employers who hire them, or for persons who "harbor" such aliens by, for example, renting them an apartment. *See, e.g.*, Mem. Op. 50-51, ("To allow Section 11(a) to take effect would be to allow a law of Alabama to be 'supreme' over federal law; this is an irreparable constitutional injury."); *id.* at 84, 90, 97 (same).

The district court erred, however, when it failed to apply this same analysis to the other provisions of H.B. 56, which equally intrude into the federal government's exclusive control over the federal immigration laws. The statute has the purpose, and has already begun to have the effect, of driving aliens from the State of Alabama, thus imposing burdens on other States. Once these effects have been achieved, they cannot be undone by judicial order. Similarly, the sweeping scheme is highly likely to expose persons lawfully in the United States, including school children, to new difficulties in routine dealings with private persons and the State. It will likely subject lawfully present aliens to heightened scrutiny by law enforcement officers anxious to comply with the strict statutory mandates.

The impact on our dealings with other nations is similarly clear. The declaration

of Deputy Secretary of State Burns explains that enforcement of H.B. 56 "would result in lasting harm to U.S. foreign relations and foreign policy interests." Burns Decl. ¶ 5. *See generally Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727 (2010) (State Department assessment to be accorded deference).

By requiring state and local officers to report all persons without adequate credentials to ICE, the statute also unnecessarily diverts resources from federal enforcement priorities and precludes state and local officials from working in true cooperation with federal officials.

Finally, other States and their citizens are poorly served by the Alabama policy, which seeks to drive aliens from Alabama rather than achieve cooperation with the federal government to resolve a national problem in a manner consistent with the full range of national interests.

CONCLUSION

For the foregoing reasons, this Court should enjoin the operation of Sections 10, 12(a), 18, 27, 28, and 30 of H.B. 56 pending appeal. The United States also respectfully requests that the Court issue a temporary injunction against these provisions pending resolution of this motion, and asks the Court to consider this appeal on an expedited basis.

Respectfully submitted,

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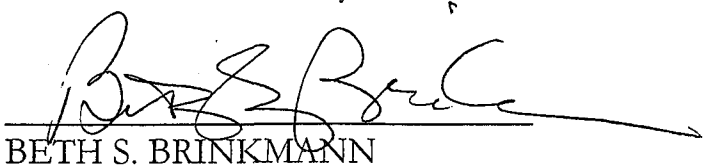

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2011, I caused an original and three copies of the foregoing motion to be sent via Federal Express, overnight delivery, to the United States Court of Appeals for the Eleventh Circuit. I also caused the foregoing motion to be sent via Federal Express, overnight delivery, to the following counsel:

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