

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

HISPANIC INTEREST COALITION)
OF ALABAMA; et al.,)
Plaintiffs,)

v.)

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

ROBERT BENTLEY, in his official)
capacity as Governor of the State of)
Alabama; et al.,)
Defendants.)

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.)

Case No.: 5:11-cv 02736-SLB

ROBERT BENTLEY, in his official)
Capacity as Governor of the State)
of Alabama; et al.,)
Defendants.)

UNITED STATES OF AMERICA,)
Plaintiff,)

v.)

Case No.: 2:11-cv-02746

STATE OF ALABAMA &)
GOVERNOR ROBERT J.)
BENTLEY)
Defendants.)

**BRIEF OF AMICI CURIAE ALABAMA STATE REPRESENTATIVES
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INTEREST OF AMICI CURIAE

Amici are members of the Alabama State Legislature who either drafted, sponsored, or voted for the Beason-Hammon Taxpayer and Citizens Protection Act, Act No. 2011-535 (signed by Governor Bentley on June 9, 2011) (“HB 56”).¹ The drafters of HB 56 took great care to ensure that it would not conflict with Congressional intent and Congressional immigration policy. “We have made it a point to make sure our language mirrors the federal government’s language...We are assisting the federal government with this subject matter. We’re not taking that away.” USA Today, June 9, 2011, *available at* http://www.usatoday.com/news/nation/2011-06-09-alabama-immigration-law_n.htm (quoting Representative Micky Hammon, House Sponsor of HB 56).

Nevertheless, Plaintiff United States (“Administration”) seeks to preempt provisions of HB 56—not because the provisions conflict with Congressional intent, but because they conflict with the current Administration’s “priorities” on enforcing the immigration laws passed by Congress. *See* Brief of United States Supporting Motion for Preliminary Injunction (“U.S. Br.”) at 47-65. In fact, many of the Administration’s given “priorities” facially conflict with Congressional intent as evidenced by statute. *Amici* fear that if this Court accepts these broad, non-statutory based preemption arguments made by the Administration, it will in

¹ *See* Exhibit A for a description of the Individual *Amici* Legislators.

effect take away any limitation on the usurpation of State Sovereignty. The resulting doctrine would require a review of each Administration's policy *de jure* to determine which State statutes may or may not be preempted. Although *Amici* believe that none of HB 56 is preempted, for the above reasons, *Amici* will focus on the Administration's claims regarding Sections 12 and 18 which, if successful, would radically alter preemption analysis.

ARGUMENT

I. THE ADMINISTRATION'S PREEMPTION CLAIMS MUST BE EVALUATED IN LIGHT OF THE UNDERLYING TENSION BETWEEN FEDERAL LAW AND THE ADMINISTRATION'S ASSERTED POLICY OBJECTIVES.

While this lawsuit involves the current Administration's objection to HB 56, it brings to light a significant conflict between the Executive and Legislative branches of the federal government. The gravamen of the Administration's Complaint is that HB 56 independently (and impermissibly) enforces federal immigration law. However, the Administration's preemption claims, at least with respect to Sections 12 and 18 of HB 56, impermissibly require that the Executive's enforcement priorities trump the intent of Congress expressed through the enactment of our nation's federal immigration laws. *See* U.S. Br. at 47-65. The preemption claims in this case must therefore be considered against the backdrop of the clash between federal statute and the Administration's policy goals. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952); *Am. Ins.*

Ass'n v. Garamendi, 539 U.S. 396 (2003) (noting that if the case had presented a conflict between federal law and presidential foreign policy objectives, *Youngstown* would control).

Youngstown established that where the Executive asserts a claim of authority (here, preemption authority) that is

incompatible with the expressed or implied will of Congress, his power is at its *lowest ebb*, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive *must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.*

Youngstown, 343 U.S. at 637-38 (Jackson, J., concurring) (emphasis added, footnote omitted); *see also Medellin v. Texas*, 552 U.S. 491, 524 (2008) (Justice Jackson's concurrence in *Youngstown* sets forth the "accepted framework" for evaluating claims of presidential power). Simply stated, "It is Congress – not the [Executive Branch]– that has the power to pre-empt otherwise valid state laws, and there is no language in the relevant statute[s] that either pre-empts [Sections 12 and 18 of HB 56] or delegates to the [Executive Branch] the power to pre-empt such state laws." *North Dakota v. United States*, 495 U.S. 423, 442 (1990).

The heart of the Administration's claims against sections 12 and 18 of HB 56 is that those provisions require Alabama law enforcement officers to verify immigration status of certain individuals with federal officials, while the current

Administration would rather Alabama officers report possible immigration violations less frequently.² U.S. Br. at 41-55. Congress requires the Department of Homeland Security (“DHS”) to “respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or

² The current Administration’s laxity toward enforcing immigration laws is well-documented. For example, in 2010 the DHS “review[ed] thousands of pending immigration cases and mov[ed] to dismiss those filed against suspected illegal immigrants who have no serious criminal records” Susan Carroll, *Feds Moving to Dismiss Some Deportation Cases*, HOUSTON CHRONICLE, Aug. 24, 2010, <http://www.chron.com/disp/story.mpl/metropolitan/7169978.html>.

The Administration also limited both federal and local officers’ authority to arrest illegal aliens when discovered during traffic stops. Local law enforcement officers have the authority to arrest and detain illegal aliens when ICE confirms an alien’s are unlawfully present. *See United States v. Soriano-Jarquin*, 492 F.3d 495, 501 (4th Cir. 2007). State and local officers can perform a more expanded role in immigration enforcement after receiving permission and training from the federal government through a Memorandum of Understanding pursuant to the “287(g)” program. *See* 8 U.S.C. § 1357(g)(1); U.S. Immigration and Customs Enforcement, Fact Sheet: Section 287(g) Immigration and Nationality Act,

Aug. 16, 2006, *available at*

<http://www.ice.gov/doclib/pi/news/factsheets/060816dc287gfactsheet.pdf>; Jessica Vaughn and James R. Edwards Jr., *The 287(g) Program: Protecting Home Towns and Homeland*, Center for Immigration Studies, Oct. 2009, <http://www.cis.org/287greport>. The revised 2010 ICE policy, however, sought to limit an officer’s authority under the 287(g) program: “‘Immigration officers shall not issue a detainer unless an LEA [law enforcement agency] has exercised its independent authority to arrest the alien. Immigration officers shall not issue detainers for aliens who have been temporarily detained by the LEA (i.e. roadside or *Terry* stops) but not arrested.’” Jessica Vaughn, *ICE Chief Morton to Field: See No Illegal Aliens*, Center for Immigration Studies, Aug. 19, 2010, <http://cis.org/vaughan/see-no-illegal-aliens> (quoting ICE Draft Policy *available at* <http://www.cis.org/articles/2010/ice-draft-080110.pdf>). Jessica Vaughn of the Center for Immigration Studies summed up the policy: “[A]ll illegal aliens who violate traffic laws will get a free pass from ICE, unless they also happen to have committed other ‘real’ crimes.” *Id.*

immigration status . . . for any purpose authorized by law, by providing the requested verification or status information.” 8 U.S.C. § 1373(c). Congress placed no limits on the number of requests that state and local officials could submit to DHS and no conditions on the DHS’s obligation to respond to inquiries. Congress also enacted several other statutory provisions to ensure that state and local authorities make maximum use of this federal database.³

Despite Congress’s clear purposes, the Administration argues that the increased number of immigration status verifications from HB 56 Sections 12 and 18 would burden the Executive branch and hamper “federal priorities.” U.S. Br. 57-58, 60. What is more, the Administration argues that Sections 12 and 18 are preempted, not because it was Congress’s intent to preempt such laws, but because Alabama commanded its own officers to perform a function that they already had the authority to perform—to verify an individual’s immigration status with the federal government if the officer has reasonable suspicion that the person is unlawfully present in the United States. *See infra* at 15-20.

Because this case reflects incompatibility between Acts of Congress and Presidential policy, *Youngstown* requires the Court to scrutinize the Administration’s preemption claims with great caution. To hold Sections 12 and 18

³ *See, e.g.*, 8 U.S.C. § 1357(g)(10) (expressly reserving inherent state authority in immigration law enforcement); *Id.* §§ 1373(a)-(b), 1644 (banning sanctuary policies that interfere with the exercise of that authority).

preempted would cause a major shift in federal preemption analysis. Congressional intent is the “ultimate touchstone in every pre-emption case,” not the political whims of a given Administration. *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187, 1194 (2008) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). If the current Administration’s argument is correct—that Executive Branch “priorities” that are contrary to the Congress’s statutory language can preempt laws like HB 56—then any subsequent Administration that places a higher “priority” on immigration enforcement could cause HB 56 to no longer be preempted, by arbitrarily issuing an Executive agency memorandum or even a press release. *United States v. Arizona*, 641 F.3d 339, 380 (11th Cir. 2011) (Bea, J. dissenting) (explaining that if “priorities” could preempt state law rather than Congressional intent, “Courts would be required to analyze [state] statutes anew to determine whether they conflict with the newest Executive policy[,]” despite “no new Congressional action.”). The intent of Congress controls, and Congress has not “clear[ly]” and “manifest[ly]” shown that HB 56 should be preempted. *Medtronic*, 518 U.S. at 485.

II. PLENARY POWER OVER IMMIGRATION IS EXERCISED THROUGH CONGRESSIONAL ENACTMENTS, NOT IN THE EXECUTIVE BRANCH’S DECISION TO EXERCISE DISCRETION.

A. Congress Has Plenary Power Over Immigration, and the Executive Must Follow Congress's Direction.

Congress has plenary power to prescribe the immigration laws. *INS v. Chadha*, 462 U.S. 919, 940 (1983) (“The plenary authority of Congress over aliens . . . is not open to question”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens”) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (identifying different sources for Congress’s power over aliens). While the Executive has power to conduct United States foreign policy, federal immigration laws reflect both national domestic and foreign policy goals. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (Immigration policy “is vitally and intricately interwoven with contemporaneous policies in regard to [among other things] the conduct of foreign relations . . .”).

Where Congress exercises plenary power to prescribe laws, the Executive must follow the direction of Congress. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696-99 (2001) (holding the Attorney General had no power to detain aliens indefinitely because that power conflicted with 8 U.S.C. § 1231(a)(6)); *Jama v. ICE*, 543 U.S. 335, 368 (2005) (Souter, J., dissenting) (“Congress itself . . . significantly limited Executive discretion by establishing a detailed scheme that the

Executive must follow in removing aliens”).⁴ Though some immigration laws grant Executive officials discretion in the treatment of specified individuals or subclassifications of aliens, the laws balance the various concerns they embody within the constraints of each statute’s text, not the Executive’s exercise of prosecutorial discretion. *Cf. Oceanic Navigation Co.*, 214 U.S. at 339-40 (Congressional authority over aliens “embraces every conceivable aspect of that subject”); *Jama*, 543 U.S. at 368 (Souter, J., dissenting) (“Talk of judicial deference to the Executive in matters of foreign affairs, then, obscures the nature of our task here, which is to say not how much discretion we think the Executive ought to have, but how much discretion Congress has chosen to give it.”).

B. Preemption Is A Matter of Congressional Intent, Not Executive Priorities and Discretion.

It is congressional intent that matters in preemption. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008). Federal agency regulation can therefore preempt state law only when the agency is acting within the scope of its congressionally-

⁴ *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), is not contrary to this principle. One issue in *Knauff* was whether Congress had unconstitutionally delegated legislative power to the President. *Id.* at 542. The Court found that it had not, noting that “[t]he exclusion of aliens is a fundamental act of sovereignty” that “stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.” *Id.* Thus, “Congress may in broad terms authorize the executive to exercise the power” *Id.* at 543. “Executive officers may be entrusted with the duty of specifying the procedures *for carrying out the congressional intent.*” *Id.* (emphasis added). *Knauff* thus presupposes that the Executive must act in accord with Congress’s wishes.

delegated authority, that is, when the agency is furthering Congress's intent. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). In other words, when Congress tells an agency to act, the agency must comply. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (agency cannot refuse to obey statutory commands in order to pursue its own priorities).

While administrative regulations which are consistent with statutes have preemptive effect, there is a strong presumption against the kind of broad implied administrative agency preemption that the United States is claiming here. *See Hillsborough County v. Automated Med. Lab.*, 471 U.S. 707, 717 (1985) (It is "inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence" to "infer pre-emption" from comprehensive agency actions).

A court may not "simply . . . accept an argument that the [agency] may . . . take action which it thinks will best effectuate a federal policy" because "[a]n agency may not confer power upon itself." *Louisiana Public Serv. Comm'n*, 476 U.S. at 374. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Id.* at 374-75.

To determine whether federal immigration laws preempt a state law such as HB 56, Congressional enactments and goals must be the focal point of the Court's inquiry, not administrative agency policy as may be dictated by the Executive

Branch's prosecutorial preferences or foreign policy objectives. *See Altria Group, Inc.*, 129 S. Ct. at 543; *De Canas v. Bica*, 424 U.S. 351, 363 (1976) (state law dealing with aliens is preempted if it “stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress”) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (emphasis added)).

C. HB 56's Provisions Are Consistent With Federal Immigration Policy That Promotes Increasingly Greater Roles For States In Enforcing Immigration Law.

A straightforward review of the federal code shows that Congress approves of statutes like HB 56 and, with respect to Sections 12 and 18, has expressly prohibited DHS from making the kind of preemption claims it makes in this case.

Congress has passed numerous acts illustrating the clear and manifest intent to welcome state involvement in immigration control. Congress has expressed its intent not to preempt state cooperation by (1) expressly reserving inherent state authority in immigration law enforcement (8 U.S.C. § 1357(g)(10)), (2) banning sanctuary policies that interfere with exercising that authority (8 U.S.C. §§ 1373(a)-(b), 1644), (3) requiring federal officials to respond to state inquiries (8 U.S.C. § 1373(c)), (4) simplifying the process for making such inquiries (Law Enforcement Support Center (“LESC”)), (5) deputizing state and local officers as immigration agents (8 U.S.C. § 1357(g)(1)), and (6) compensating states that assist (8 U.S.C. § 1103(a)(11)).

In encouraging cooperative immigration law enforcement, Congress did not displace State and local enforcement activity. *See Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) (State and local officers have “general investigatory authority to inquire into possible immigration violations.”). Instead, Congress wanted to expand state authority because it worried that “perceived federal limitation[s]” could hamper law enforcement officials. *See United States v. Vasquez-Alvarez*, 176 F.3d at 1298 (quoting 142 Cong. Rec. 4619 (1996) (comments of Rep. Doolittle)). Congress enacted 8 U.S.C. § 1252c to clarify that federal law does not preempt state and local officers from arresting an illegally present alien convicted of a felony and ordered deported. *Vasquez-Alvarez*, 176 F.3d at 1298. Section 1252c also does not preempt states from assisting in enforcement outside of those preconditions; instead Section 1252c “displace[s] a *perceived federal limitation* on the ability of state and local officers to arrest aliens . . . in violation of Federal immigration laws.” *Vasquez-Alvarez*, 176 F.3d at 1298-99 (emphasis added).

Congress was also concerned that municipal sanctuary policies were prohibiting officers from contacting the then-INS about possible immigration violations. In response, Congress passed two statutes in 1996 to ban immigration sanctuary policies. 8 U.S.C. § 1644 forbids state or local official actions that

“prohibit[], or in any way restrict[]” a state or local government entity’s ability to “send[] to or receiv[e] . . . information regarding the immigration status, lawful or unlawful, of an alien in the United States.” 8 U.S.C. § 1373(a)-(b) expands the federal preemption of state or local sanctuary policies to those that prohibit or restrict government entities or officials from sending or receiving information regarding “citizenship or immigration status” and also preempts laws that prohibit or restrict immigration status information sharing. *See, e.g., City of New York v. United States*, 179 F.3d 29, 31-32 (2d Cir. 1999) (upholding constitutionality of federal law banning sanctuary policies).

To ensure cooperation by federal officials with immigration status investigations conducted by state or local authorities, Congress *required* immigration authorities to respond to state and local inquiries seeking to “verify or ascertain the citizenship or immigration status of any individual” 8 U.S.C. § 1373(c). Congress had already begun allocating funds to create the Law Enforcement Support Center (“LESC”), a bureau of the United States Department of Homeland Security, which is today the primary point of contact between state officers and federal immigration agents for verifying immigration status. *Infra at* 23-24.

In 1996, Congress also enacted 8 U.S.C. § 1357(g)(1), which allows state and local officers to be deputized as immigration agents. This congressionally-

delegated authority is distinct from and complementary to an officer's inherent authority to inquire into immigration status and arrest for immigration violations. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 *Geo. Immigr. L.J.* 459, 478 (2008); *see also United States v. Vasquez*, 225 *Fed. Appx.* at 831, 835 (11th Cir. 2007); *Vasquez-Alvarez*, 176 *F.3d* 1294; *United States v. Contreras-Diaz*, 575 *F.2d* 740, 743-45 (9th Cir. 1978). But Congress reaffirmed the states' inherent authority to enforce the law. 8 U.S.C. § 1357(g)(10).

Finally, Congress has used its spending power, U.S. Const. art. I, §8, cl. 1, to support cooperative immigration enforcement by appropriating federal funds for state and local governments that assist in enforcing immigration laws. 8 U.S.C. §1103(a)(11).

The Executive Branch itself has recognized and encouraged concurrent immigration enforcement. In 1996, the Justice Department's Office of Legal Counsel ("OLC") supported state and local enforcement of criminal Immigration and Nationality Act ("INA") provisions and also concluded that state and local officers could detain aliens for registration law violations. Opinion of the Office of Legal Counsel: *Assistance by State and Local Police in Apprehending Illegal*

Aliens, 20 Op. O.L.C. 26 (1996) (Exhibit B).⁵ Since 2001, the Justice Department has entered warrants (“detainers”) for civil immigration violations into the National Crime Information Center database (“NCIC”), available nationally to state and local officers. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Alb. L. Rev. 179, 191 (2005). In 2002, a revised OLC memo dropped the “criminal law enforcement only” limitation of the 1996 memorandum and analyzed the statutes and cases expressing Congress’s intent to allow broad concurrent enforcement. Mem. from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, *Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, 5-8 (Apr. 3, 2002) (Exhibit C).

Because HB 56 integrates this body of federal law, it promotes Congress’s purposes and objectives. For example, Sections 12 and 18 direct Alabama officers to verify immigration status through a statute that requires a federal response and relies upon states’ inherent authority to inquire about possible immigration violations. 8 U.S.C. §§1373(c); 1357(g)(10); *Salinas-Calderon*, 728 F.2d at 1301

⁵ Courts also recognize state and local authority to arrest aliens for violating alien registration laws. *See Estrada v. Rhode Island*, 594 F.3d 56, 65 (1st Cir. 2010); *Contreras-Diaz*, 575 F.2d at 743-745; *United States v. Damesghi*, 2009 U.S. Dist. LEXIS 66819, *22 (D. Utah July 31, 2009).

n.3.⁶ Section 10 mirrors the federal alien registration laws by relying on the existing federal registration system, 8 U.S.C. §§ 1304(e), 1306(a). Section 11 promotes federal laws that penalize employing illegal aliens, 8 U.S.C. § 1324a(a)-(c), and recognizes that Congress only preempted sanctions on *employers* employing unauthorized aliens, not unauthorized aliens' acceptance of employment. (8 U.S.C. § 1324a(h)(2)).⁷

D. Sections 12 and 18 are Not Preempted Because Those Sections Merely Require Alabama State and Local Officers to Do that which the Officers Already Have the Discretionary Authority to Do and to Perform Functions Expressly Blessed by Congress

The Administration makes the remarkable preemption claim that Sections 12 and 18 are preempted by the current Administration's priorities and lack of resources. U.S. Br. 58-61. The claim is remarkable because these two Sections only require Alabama State and local officers to do that which the Eleventh Circuit has already held they have the discretionary authority to do.

Under HB 56 Section 12, when an Alabama state or local officer performs a lawful stop, detention, or arrest and the officer has reasonable suspicion to believe that the detainee is unlawfully in the country, the officer must then contact the federal government and verify the detainee's citizenship or immigration status.

⁶ See also *United States v. Cantu*, 227 Fed. Appx. 783, 785 (11th Cir. 2007); *Vasquez*, 225 Fed. Appx. at 835; *Vasquez-Alvarez*, 176 F.3d at 1297-99.

⁷ The express preemption clause (8 U.S.C. § 1324a(h)(2)) shows that Congress could have, but did not, preempt sanctions against unauthorized alien employees.

HB 56, Section 12(a). The officer must rely exclusively on the federal government's status determination. *Id.* Section 12 expressly references the provision of the INA which requires the federal government to respond to all state and local officers that make these inquiries. 8 U.S.C. § 1373(c). Section 12(d) also mandates that the officers assist ICE in transferring unlawfully present aliens into federal custody, "if the federal government so requests." Therefore, all Section 12 does is require Alabama State and local officers to contact ICE if, during an otherwise lawful stop, they develop a reasonable suspicion that the subject(s) of the stop is unlawfully present in the country and, should the federal government confirm that the alien is unlawfully present, cooperate with transferring the alien into federal custody at the federal government's request.

The Supreme Court has unanimously held that during an otherwise lawful detention, an officer can inquire into the detainee's immigration status even without a prior reasonable suspicion of unlawful immigration status. *Muehler v. Mena*, 544 U.S. 93, 101 (2005). Additionally, the Eleventh Circuit holds that local officers have the existing authority to do precisely what Section 12 requires—during a lawful stop, an officer can contact ICE after developing a reasonable suspicion of the detained person's unlawful immigration status. In *United States v. Cantu*, 227 Fed. Appx. 783, 785 (11th Cir. 2007), the Eleventh Circuit rejected a claim that an Alabama police officer violated the Fourth Amendment in verifying a

potential unlawful alien's status with ICE. In *Cantu*, the officer stopped a commercial truck for crossing a center line and became suspicious of a passenger in the truck's cabin. *Id.* at 784. The only identification that the passenger could provide to the officer was a Sam's Club Card. *Id.* After further questioning, the officer called ICE and requested information about both the driver and the passenger, and learned that the passenger was in the country unlawfully. *Id.*; see also *Vasquez*, 225 Fed. Appx. at 835; *United States v. Hernandez-Perez*, 2008 U.S. Dist. LEXIS 114962, 2-3 (M.D. Fla. Aug. 14, 2008) (after a lawful stop, officer was permitted to contact ICE upon reasonable suspicion that the van's occupants were illegal aliens). Other Appellate Courts agree with the Eleventh Circuit. *Estrada*, 594 F.3d at 61; *United States v. Alvarado-Martinez*, 255 Fed. Appx. 645, **3-4 (3d Cir. 2007); *Soriano-Jarquín*, 492 F.3d at 501; *United States v. Rodriguez-Arreola*, 270 F.3d 611, 619 (8th Cir. 2001); *Vasquez-Alvarez*, 176 F.3d 1294; *Lynch v. Canatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *Salinas-Calderon*, 728 F.2d at 1300-02; *Contreras-Diaz*, 575 F.2d at 743-745.⁸ This agreement among the Circuits is not surprising, as Congress expressly encourages concurrent

⁸ *US v. Arizona*, 641 F.3d 339, 350 n.8 (2010), does not disagree that state and local officers can assist in the enforcement of immigration laws, nor could it, given that two previous Ninth Circuit opinions already held that state and local officers recognized that authority. *Contreras-Diaz*, 575 F.2d at 743-745; *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983). The *Arizona* dissent explained that the limited scope of AZ SB 1070, Section 2, was similar to the limited scope of AL HB 56, Section 12. *Arizona*, 641 F.3d at 379-380.

enforcement. 8 U.S.C. §§ 1357(g)(10); 1373(a)-(b). To summarize, all the State of Alabama has done under Section 12 is mandate that State and local enforcement agencies more consistently use their own resources to conduct a cooperative enforcement activity for which they already have the discretionary authority to do under their state police powers.

Section 18 is similar to Section 12. Section 18 adds three clarifying provisions to an Alabama statute which requires individuals to have a valid driver's license in their possession while operating a motor vehicle in the State. Ala. Code § 32-6-9. The new provisions added by HB 56 clarify that when an officer arrests a person for not possessing a driver's license and the officer cannot otherwise verify that the person has a valid driver's license, the officer must immediately take that person to a magistrate, verify with the federal government that person's citizenship or immigration status, and hold the person for prosecution or, if the person is verified to be unlawfully in the country, for transfer into ICE custody. Section 18 codifying Ala. Code § 32-6-9(b)-(d). Therefore, Section 18 only requires that when an officer validly arrests someone for a State crime, the officer must verify that person's identity with ICE and hold them for prosecution, or for immigration detention at ICE request. Local authorities consistently verify the immigration status with ICE of those lawfully arrested. *See Fla. Immigrant Coalition v. Mendez*, 2010 U.S. Dist. LEXIS 114726, **4-5 (D. Fla. Oct. 28, 2010)

(Florida Sheriff's Office had policy that it checked immigration status with ICE of every foreign born detainee at the jail); *United States v. Vasquez-Escobar*, 30 F. Supp. 2d 1364, **1-2 (D. Fla. Oct. 30, 1998) (after Florida officials arrested an alien on a probation violation, the State notified INS who issued a detainer on the alien); *Douglas v. United States*, 2011 U.S. Dist. LEXIS 66457, *3 (D. Fla. June 22, 2008) (after alien arrested by police in Florida for driving with a suspended license, ICE properly checked its database, determined the alien removable, and issued detainer).

The Administration realizes that its preemption argument is thin, and thus attempts to argue that although Alabama can authorize its officers to assist in enforcing immigration laws, it cannot mandate that its officers do so. *See* U.S. Br. at 15, n.12. In other words, the Administration's argument is that although there would be no preemption problem if every Alabama officer contacted DHS to verify the citizenship or immigration status of a lawfully detained suspected illegal alien or lawfully arrested person without a valid license, there is a preemption problem when Alabama mandates that its law enforcement agencies direct their officers to apply that authority consistently. *Id.* This argument defies logic.

The fact that Alabama is now requiring, rather than authorizing, state and local officers to "communicate...the immigration status of any individual" to the federal government and "cooperate...in the identification, apprehension, detention,

or removal of aliens not lawfully present in the United States” does not make HB 56 Section 12 preempted. *See* 8 U.S.C. § 1357(g)(10). Both Sections 12 and 18 are fully consistent with what Courts have stated that officers can do, and thus is not preempted.

E. DHS Prosecutorial Discretion and Internal Policies Cannot Preempt a State from Verifying Immigration Status

The Administration offers another novel argument as to why Alabama is preempted from exercising its Congressionally endorsed inherent authority to verify the status of lawfully detained individuals. *See* 8 U.S.C. §§ 1357(g)(10), 1373, and 1644. The Administration argues that Section 12 is preempted because ICE may have already set some internal policy about a particular group of aliens or, in its prosecutorial discretion, decided that it did not want to take custody of a certain alien. U.S. Br. at 56. However, the Administration cannot explain how any such internal priorities or its exercise of discretion preempts anything. *See* US Br. at 55-58. In fact, Section 12(e) does exactly the opposite of what the United States suggests—Section 12 expressly requires a police officer to defer to the wishes of the federal government in terms of what to do with a detained alien. *See id.* (requiring Alabama law enforcement agencies to “cooperate in the transfer of [an] alien to the custody of the federal government, *if the federal government so requests.*”) (emphasis added). In other words, Alabama officers are mandated by

HB 56 to follow the direction and discretion of the federal government, once an immigration status inquiry has been made.

But beyond the Section 12(b) requirement that Alabama police officers must follow the federal government's directions as to federal custody of a given alien, the federal government's argument that its internal policies and resource limitations can preempt Section 12 defies Congressional mandate. Congress *requires* the federal government to respond to inquiries about citizenship and immigration status. 8 U.S.C. §§ 1373(c); 1644; *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1982 (2011). Congress did not say that DHS shall respond to inquiries when it so chooses. Congress did not say that DHS shall respond to inquiries when the inquiry is consistent with some non-statutory priority. Congress said DHS shall respond to inquiries, period. 8 U.S.C. § 1373(c). Additionally, § 1373(a)-(b) expressly forbids DHS from making its preemption argument: “*Notwithstanding any other provision of Federal...law, a Federal...government entity or official may not prohibit or in any way restrict, any government entity or official from sending to...[DHS] information regarding the citizenship or immigration status...of any individual.*” 8 U.S.C. § 1373(a) (emphasis added). “*Notwithstanding any other provision of Federal...law, no person or agency may prohibit, or in any way restrict, a...State, or local government entity from [sending, requesting or receiving immigration status information from DHS].* *Id.* at (b)(1)

(emphasis added). For DHS to now argue that it does not have to respond to all inquiries and that states are *preempted* from asking DHS to perform its statutory duties defies the plain and unambiguous language of Congress. If DHS disagrees with its Congressionally mandated duty, its redress is not to sue Alabama, but to ask Congress to either (a) amend federal law, or (b) give it more money.

F. The Administration’s Argument that Sections 12 and 18 Overburden Federal Resources Ignores Congress’ Intent and Ignores the Language of HB 56

1. Federal Statute Prevents the Claim that Alabama is Preempted from Verifying the Immigration Status of Detained Individuals

In evaluating whether Sections 12 and 18 are preempted based on an agency concern over increased demands on limited federal resources, this Court must determine whether these sections are in conflict with Congress’s intent in enacting federal immigration statutes and whether the Administration’s “priorities,” which the United States today claims have a preemptive effect, are restricted by statute. *Supra at 2-10.*

The Administration argues that Sections 12 and 18 are preempted because the number of inquiries from Alabama State and local officers to the LESC may increase. U.S. Br. at 58-59. Specifically, the United States claims that a “state law is preempted where it imposes a burden on a federal agency’s resources that impedes the agency’s functions.” *Id.* at 60 (citing *Buckman Co. v. Plaintiffs’ Legal*

Comm., 531 U.S. 341, 349-51 (2001)). This argument ignores Congress’s purpose for establishing the LESC and ignores Congress’s statutory mandate on the Administration. The LESC exists to *foster* state and local police cooperation in the “apprehension, detention or removal of [illegal] aliens.” 8 U.S.C. § 1357(g)(10).⁹ The LESC’s primary users are “state and local law enforcement officers in the field who need information about foreign aliens encountered in the course of their daily enforcement activities.” U.S. Immigration and Customs Enforcement, Fact Sheet: Law Enforcement Support Center, <http://www.ice.gov/news/library/factsheets/lesc.htm> (last visited August 15, 2011). It is not a constitutional impediment or burden upon the Department of Homeland Security for Alabama to use the LESC system in a way that Congress expressly envisioned.

DHS is mandated by Congress to respond to every inquiry about citizenship or immigration status. 8 U.S.C. § 1373(c). Congress did not establish a hierarchy of inquiries for which DHS could pick and choose its priorities. If any hierarchy exists, the *Congressional* priority is for DHS to verify the citizenship and immigration status requests by government officials. *Id.* No valid basis exists to

⁹ Although the Administration is suing Alabama for requiring its officers to assist in federal immigration enforcement, “ICE has made information-sharing partnership with other law enforcement entities a key strategy in the agency’s homeland security mission.” Law Enforcement Support Center, <http://www.ice.gov/contact/lesc/> (last visited August 15, 2011).

assert that greater use of the LESC by Alabama officers threatens the Executive's enforcement priorities. If the Executive Branch thinks Congress should restrict the source or quantity of LESC inquiries or allocate more resources, it can ask Congress to do so. However, an executive agency does not have the authority to independently set priorities inconsistent with Congress's and then claim that following its own independent priorities preempts state laws. *See Hillsborough County*, 471 U.S. at 717; *Massachusetts*, 549 U.S. at 533 (agency cannot refuse to obey statutory commands to pursue its own priorities); *see also Arizona*, 641 F.3d at 380 (9th Cir. 2011) (Bea, J. dissenting) ("The power to preempt lies with Congress, not the with the Executive; as such, an agency such as ICE can preempt state law only when such power has been delegated to it by Congress.").

The Administration's argument also ignores the text of HB 56 when reviewed in light of 8 U.S.C. 1373(c). Section 18 of HB 56 (Section 12 does not mention the LESC) requires Alabama law enforcement to make verification inquiries through the LESC "or other office or agency designated for that purpose by the federal government." HB 56, Section 18(d). In other words, DHS is mandated to respond to Alabama inquiries, whether it uses the LESC, its own agents, or some other designated federal program. 8 U.S.C. 1373. If DHS is truly worried about the availability of LESC resources, DHS can direct Alabama officers to make their inquiries to DHS through some other manner.

The Executive’s power to enforce federal immigration law does not confer the power to preempt Alabama from requiring its officers to assist immigration authorities by lawfully identifying and reporting potential unlawful aliens. Only Congress’s “clear and manifest purpose” preempts state laws, *Altria Group, Inc.*, 129 S. Ct. at 543. The clear and manifest purpose of Congress is that the Executive Branch responds to all official immigration status inquiries, period. 8 U.S.C. § 1373(c).

2. *The Administration’s Preemption by Resource Limitations Theory Ignores Chamber of Commerce v. Whiting*

Absent from the Administration’s discussion of whether a claimed overburdening of federal resources for responding to immigration inquiries can preempt HB 56 is any acknowledgment of the Supreme Court’s recent skepticism of that same argument. In *Whiting*, 131 S. Ct. at 1986, the plaintiffs argued that “if the 49 other States followed Arizona’s lead, the state-mandated drain on federal resources would overwhelm the federal system...” Before factually dismissing that claim, the Supreme Court questioned the “legal significance of that argument.” *Id.* In the case under consideration, the legal significance of that claim is even more questionable given the differences between the two federal systems at play—E-Verify in *Whiting*, and DHS’s statutory duties under § 1373 here. Unlike E-

Verify, which Congress did not mandate employers to use,¹⁰ Congress did mandate that the DHS respond to state and local citizenship and immigration status inquiries and prevented federal authorities from “in any way restrict[ing]” an officer’s ability to make those inquiries. 8 U.S.C. § 1373. DHS cannot argue preemption of State authority that Congress has expressly told DHS it may not preempt.

G. DHS’s claim that 8 U.S.C. § 1357(g)(10) Requires States to “Cooperate With” DHS Changes the Plain Meaning of the Statute.

As explained *supra* at 15-20, State and local officers have the inherent authority to assist in the enforcement of federal laws, including immigration laws. This authority is one of comity—one sovereign assisting another sovereign in the enforcement of immigration laws. *See In re Andrews*, 236 F. 300, 301 (1916) (it is a matter of comity that allowed the federal government to delay defendant’s deportation and permit the state to imprison her for failing to enter her recognizance in state court); *Dean v. Ohio*, 107 F. Supp. 937, *8 (N.D. W.V. 1952) (explaining that a separate sovereign may assist a sister state in the prosecution of a prisoner through comity by voluntarily surrendering the prisoner to the sister state prior to prosecution) (citing *Ponzi v. Fessenden*, 258 U.S. 254 (1922)); *In re Andrews*, 236 F. 300; *Wing v. Stewart*, 77 F. Supp. 257, 258-59 (1948). Congress

¹⁰ *See* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 110 Stat. 3009-655, note following 8 U.S.C. § 1324a.

expressly recognized a state's previously existing authority by including paragraph 8 U.S.C. § 1357(g)(10), and acted to protect it, not restrict it.

Congress drafted § 1357(g)(10) to ensure that no argument could be made that a State loses its inherent authority to assist in the enforcement of federal immigration laws (i.e. preempted) as a result of enactment of 8 U.S.C. § 1357(g)(1), more commonly known as the 287(g) program. *Vasquez-Alvarez*, 176 F.3d at 1300. Under § 1357(g)(1), a State or local government agency may enter into an agreement with the federal government, and have its officers trained and deputized as immigration agents. *See United States v. Sosa-Carabantes*, 561 F.3d 256, 260 (4th Cir. 2009) (“[T]he acts of [] a 287(g) Program [state] officer are the acts of ICE.”). A State officer's authority under the 287(g) authority goes beyond using a State's traditional police powers in assisting the federal government “in the identification, apprehension, detention, [and] removal” of unlawfully present aliens, which State and local officers may do absent any agreement. 8 U.S.C. § 1357(g)(10); *United States v. Nunez-Betancourt*, 766 F. Supp.2d 651, 660 (D.N.C. Feb. 4, 2011); *Santos v. Frederick County Board of Commissioners*, 2010 U.S. Dist. LEXIS 88449, *5, 10-11 n.9 (D. Md. Aug. 25, 2010). Congress merely drafted 8 U.S.C. § 1357(g)(10) to reaffirm the importance that States play in assisting the federal government in immigration enforcement. *Vasquez-Alvarez*,

176 F.3d at 1300 (Congress has extended a “clear invitation . . . for state and local agencies to participate in the process of enforcing federal immigration laws.”).

The Administration makes a murky argument that § 1357(g)(10) prevents Alabama from requiring its officers to assist the federal government in immigration enforcement because doing so might interfere with its objectives and priorities. U.S. Br. at 53-54. The Administration’s argument appears to be that HB 56 is problematic because the Administration believes it prevents an Alabama officer from following the direction of DHS, requires Alabama officers to seek status determinations by DHS, and denies officers their discretionary ability to follow federal officials’ direction and priorities. *Id.* at 54. This argument ignores the statutory text of HB 56 and the mandate Congress has placed on DHS.

As explained, Congress requires DHS to respond to all inquiries made by State and local officers, not only to the inquiries that DHS chooses to respond, and Congress expressly prohibits DHS from “in any way restrict[ing]” a State or local officer’s ability to verify someone’s immigration status. *See supra* at 21-22 (discussing 8 U.S.C. §§ 1373). Therefore, DHS’ claim that HB 56 is preempted because it requires Alabama officers to verify status information is incorrect. *Id.*

The other two arguments—both of which essentially argue that Alabama Alabama officers must follow federal direction—ignore that Sections 12 and 18 do exactly that. These two provisions (1) require state and local officers to make

status inquiries to the federal government about certain individuals as contemplated by Congress, and (2) require officers to follow federal government agents' directives on what to do with individuals who the federal government identifies as unlawfully present aliens. *See* HB 56, Section 12(e) (requires state and local law enforcement to cooperate in transferring an unlawfully present alien to the federal government, "if the federal government so requests."); Section 18(d) ("If the person is determined to be an alien unlawfully present in the United States, the person...shall be detained until [state] prosecution or until handed over to federal immigration authorities."). If the federal government informs the Alabama officer that it does not wish to take custody of the alien for his or her federal immigration violations, the Alabama officer merely releases the alien.

Sections 12 and 18 expressly require officers to follow federal directives when assisting in the identification, apprehension, detention and removal of unlawfully present aliens and thus are not preempted.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request this Court to deny the Administration's Motion for Preliminary Injunction.

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Respectfully submitted,

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