Nos. 11-14535-CC & 11-14675-CC

United States Court of Appeals for the Eleventh Circuit

HISPANIC INTEREST COALITION OF ALABAMA, *ET AL.*
Plaintiffs-Appellants & Cross-Appellees,

v.

ROBERT BENTLEY, *ET AL.,*
Defendants-Appellees & Cross-Appellants,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, CIVIL ACTION NO. 2:11-2746-SLB, HON. SHARON L. BLACKBURN

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Hispanic Int. Coalition of Ala. v. Bentley, Nos. 11-14535-CC & 11-14675

The undersigned counsel hereby certifies, pursuant to 11th Cir. R. 26.1-1, that – in addition to those previously identified as having an interest in the outcome of this case – the following additional persons have such an interest:

Eagle Forum Education & Legal Defense Fund, *amicus curiae* ("Eagle Forum"); and

Lawrence John Joseph, Counsel for *amicus curiae* Eagle Forum.

Pursuant to FED. R. APP. P. 26.1, *amicus curiae* Eagle Forum makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: January 3, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, files this *amicus* brief through the accompanying motion.[1] Founded in 1981, Eagle Forum has consistently defended American sovereignty before the state and federal legislatures and courts. Eagle Forum promotes adherence to the U.S. Constitution and has repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States. Eagle Forum supports enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens. Eagle Forum also has long defended federalism, including the ability of state and local governments to protect themselves and to maintain order. Finally, the members of Eagle Forum's Alabama chapter face elevated tax and other burdens that the challenged Alabama law seeks to redress. For these reasons, Eagle Forum has a direct and vital interest in the issues presented here.

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[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

STATEMENT OF THE CASE

This section outlines the relevant constitutional and statutory provisions. Because the various plaintiffs-appellants and cross-appellees (collectively, "Plaintiffs") brought a facial challenge before Alabama Act 2011-535 (hereinafter, "HB56") ever took effect, the litigation must focus on relevant laws: "the challenger must establish that no set of circumstances exists under which the Act would be valid," and "[t]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987).

Constitutional Background

Under Article III, appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). Parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and "the only function remaining to the court is that of announcing the fact and dismissing the cause."

Steel Co., 523 U.S. at 94 (interior quotations omitted).

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Sovereign immunity arises also from the Constitution's structure and antedates the Eleventh Amendment, *Alden v. Maine,* 527 U.S. 706, 728-29 (1999), applying equally to suits by a states' own citizens. *Hans v. Louisiana,* 134 U.S. 1 (1890). When a state agency is the named defendant, the Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993). Moreover, like jurisdiction, immunity may be raised at any time, even on appeal. *Edelman v. Jordan,* 415 U.S. 651, 678 (1974).

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three ways in which federal law can preempt state or local laws: express preemption, "field" preemption, and implied or conflict preemption.

Cipollone v. Liggett Group, 505 U.S. 504, 516 (1992). Courts rely on two presumptions to assess preemption claims. First, the analysis begins with the federal statute's plain wording, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). Under that analysis, the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Second, under *Santa Fe Elevator* and its progeny, courts apply a presumption against preemption for federal legislation in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Statutory Background

The federal Immigration and Naturalization Act ("INA") includes various roles for state and local immigration enforcement. *See, e.g.,* 8 U.S.C. §§1252c(a) ("[n]otwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual" under certain circumstances), 1357(g)(10) (making clear that nothing requires prior federal agreements to communicate with or report the

federal government regarding illegal aliens and "otherwise to cooperate … in the identification, apprehension, detention or removal" of illegal aliens). In addition, INA prohibits all levels of government from restricting government entities' communications with the federal government on individuals' immigration status and requires the federal government to respond to such government inquiries. 8 U.S.C. §1373.

SUMMARY OF ARGUMENT

Plaintiffs lack standing and a ripe controversy because their injuries are speculative (Sections I.A.1, I.B), and self-inflicted injuries cannot establish standing (Section I.A.3), particularly where the alleged injuries result from local law enforcement, not from the state defendants (collectively, "Alabama") whom Plaintiffs have sued (Section I.A.4). Moreover, Alabama is immune from suit, which neither 42 U.S.C. §1983 nor *Ex parte Young* can cure (Sections I.C-I.D).

On the merits, Plaintiffs' facial challenge cannot negate HB56's as-yet unapplied, discretionary enforcement provisions (Section II.A.2) because some – indeed most – of them expressly track INA's federal standards, which INA obviously does not preempt (Sections II.B-II.2), particularly given the presumption against preemption (Section II.A.1).

ARGUMENT

I. FEDERAL COURTS LACK JURISDICTION OVER PLAINTIFFS' CLAIMS

Because Plaintiffs' claims do not satisfy the standing and ripeness requirements for federal-court jurisdiction and because Alabama enjoys sovereign immunity from suit in federal court, this Court and the district court lack jurisdiction over Plaintiffs' claims against the Alabama defendants.

A. Plaintiffs Lack Standing to Sue Alabama

Constitutional standing presents a tripartite test: cognizable injury to the plaintiffs, causation by the defendants, and redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). In addition, courts have erected prudential standing concerns, including that the "plaintiff's complaint [must] fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (interior quotations omitted).

Because it goes to the federal courts' Article III power to hear a case, standing "is the threshold question in every federal case,

determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). The party invoking federal jurisdiction bears the burden of proof on each step of the standing analysis, *Defenders of Wildlife,* 504 U.S. at 561, and plaintiffs must establish standing *on the merits* to support injunctive relief. *Summers v. Earth Island Institute,* 129 S.Ct. 1142, 1151 (2009). Plaintiffs lack standing under these tests.

1. Plaintiffs Assert Speculative, Non-Imminent Injuries

Facial, pre-enforcement challenges require a "credible threat" of enforcement against the plaintiff. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). Future run-ins with the police are simply too speculative for standing. *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983). Significantly, when each individual plaintiff lacks a sufficiently credible threat of imminent injury, an association cannot aggregate their low-probability individual claims into a collectively higher-probability claim. *Pub. Citizen v. NHTSA,* 489 F.3d 1279, 1296 (D.C. Cir. 2007). Consequently, while it is often said that there is strength in numbers, there is not standing in numbers: an identified individual must establish standing. *Summers,* 129 S.Ct. at 1150-51.

2. Plaintiffs Cannot Base Standing on Self-Inflicted Injuries

Plaintiffs cannot establish standing through self-inflicted injuries such as their devoting resources to counteracting HB56. *Pevsner v. Eastern Air Lines, Inc.,* 493 F.2d 916, 917-18 (5th Cir. 1974); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976). Unless Plaintiffs have a legally protected right to avoid the effort in question, Plaintiffs' voluntary counseling or advocacy on HB56 cannot establish standing.

3. The Plaintiff Associations' General Interest in Immigration Cannot Manufacture Standing

Relying on *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378-79 (1982), and its Circuit progeny in voting-related cases, the Plaintiffs argue that their association plaintiffs have standing based on HB56's "forcing the organization to divert resources to counteract [HB56]." Plaintiffs' Br. at 47 (*quoting Common Cause/Georgia v. Billups,* 554 F.3d 1340, 1350 (11th Cir. 2009)). This argument overstates the scope of standing found in *Havens.*

As this Circuit recognized, the "precise issue in *Havens* was whether the organizational plaintiff had statutory standing to sue under section 812 of the Fair Housing Act." *Florida State Conference of N.A.A.C.P. v. Browning,* 522 F.3d 1153, 1165 n.14 (11th Cir. 2008). That

statute created a right – applicable to individuals *and associations* – to truthful, non-discriminatory information about housing:

> Section 804(d) states that it is unlawful for an individual or firm covered by the Act "[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," a prohibition made enforceable through the creation of an explicit cause of action in § 812(a) of the Act. Congress has thus conferred on all "persons" a legal right to truthful information about available housing.

Havens, 455 U.S. at 373 (emphasis in original, citations omitted). Moreover, because the *Havens* statute "extend[ed] to the full limits of Art. III, the inquiry into statutory standing collapsed into the question of whether the injuries alleged met the Article III minimum of injury in fact." *Browning,* 522 F.3d at 1165 (*citing Havens,* 455 U.S. at 372) (interior quotations omitted). The plaintiff associations here lack several critical elements of *Havens*.

First, the *Havens* organization had a statutory right (backed by a statutory cause of action) to the truthful information that the defendants denied to it. Because Congress can create rights, the denial of those rights can confer standing. *Warth,* 422 U.S. at 514 ("Congress

may create a statutory right…. the alleged deprivation of which can confer standing"). The plaintiff associations have no claim to any rights whatsoever under INA.

Second, and related to the first issue, the injury that the plaintiff associations claim must align with the other components of their standing, *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996), notably here the allegedly cognizable right. In *Havens,* the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information, in violation of the statute). Unlike in *Havens,* nothing in INA even *remotely* relates to the plaintiff associations' spending.

Third, the *Havens* statute statutorily eliminated prudential standing. Here, the plaintiff associations have no claim whatsoever that INA eliminates prudential standing doctrines, and it is fanciful to suggest that INA puts the plaintiff associations and their private spending in INA's zone of interests or enables these organizations to enforce the INA rights (if any) of third parties. *Coyne v. American Tobacco Co.,* 183 F.3d 488, 494 (6th Cir.1999) ("in statutory cases, the plaintiff's claim must fall within the 'zone of interests' regulated by the

statute in question").

At bottom, the plaintiff associations' diverted resources are simply self-inflicted injuries, which cannot manufacture a case or controversy. *See* Section I.A.2, *supra.* If mere spending could manufacture standing, any private advocacy or welfare organization could establish standing against any government action, which clearly is not the law. *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972) (organizations lack standing to defend "abstract social interests"); *Nat'l Taxpayers Union, Inc. v. U.S.,* 68 F.3d 1428, 1433-34 (D.C. Cir. 1995) (same). *Havens* did not – and *could not* – eviscerate Article III.

In addition to asserting injuries in their own right, membership associations can establish standing (on the merits) for at least one *identified* member, provided that the interest protected is germane to the organization and nothing requires the member's participation as a party. *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977); *Summers,* 129 S.Ct. at 1150-52. The plaintiff associations cannot meet the member-based test for the reasons outlined for individuals.

4. The Alabama Defendants Have Not Caused and Cannot Redress Plaintiffs' Injuries

Beyond cognizable injury, standing's "irreducible constitutional minimum" also requires that plaintiffs' injuries be traceable to the defendants' conduct and that it be likely, rather than merely speculative, that a favorable decision will redress the plaintiff's injury. *Lujan,* 504 U.S. at 560. In addition to their not having suffered cognizable injury, Plaintiffs also fail traceability and redressability because they have sued Alabama defendants who are not the source of the complained-of injuries. For example, HB56's §27 prohibits Alabama state courts from enforcing certain contracts with illegal aliens. ALA. CODE §31-13-26; *see also id.* §31-13-17 (§17 provides private cause of action). Even assuming *arguendo* that §27 or §17 violates federal law, Plaintiffs have not sued a defendant that can redress their injuries.

The Alabama defendants' inability to enforce provisions of HB56 is fatal to Plaintiffs' standing to challenge those provisions. As the Fifth Circuit noted *en banc,* "[t]he requirements of *Lujan* are entirely consistent with the longstanding rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute." *Okpalobi v. Foster,* 244 F.3d 405, 426 (5th Cir. 2001) (*en banc*);

cf. Bennett v. Spear, 520 U.S. 154, 169 (1997) (redressability fails if independent non-parties cause harm). Enjoining state officials does nothing to redress enforcement-based injuries when "there would still be a multitude of other prospective litigants who could potentially sue [plaintiff] under the act." *Nova Health Sys. v. Gandy,* 416 F.3d 1149, 1159 (10th Cir. 2005). The injunction does not prevent the injuries that Plaintiffs allege.

5. The Injunction Is Overbroad If It Applies Where Plaintiffs Lack Standing

Plaintiffs must establish standing for each claim raised and for each form of relief requested: "standing is not dispensed in gross." *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996). Even assuming *arguendo* that any of Plaintiffs has a justiciable case or controversy, the scope of the injunctive relief cannot exceed the scope of that case or controversy. Put another way, federal courts lack jurisdiction to enjoin facets of HB56 that do not injure *these plaintiffs* or that *these defendants* cannot redress. This Court must tailor any injunctive remedy to whatever justiciable claims its finds.

B. Plaintiffs Lack a Ripe Claim

In addition to lacking standing, Plaintiffs also bring unripe claims.

Ripeness doctrine seeks "[t]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148 (1967), *abrogated on other grounds, Califano v. Sanders,* 430 U.S. 99, 105 (1977). Like standing, "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction," and "[e]ven when a ripeness question in a particular case is prudential, [courts] may raise it on [their] own motion." *Reno v. Catholic Social Servs., Inc.,* 509 U.S. 43, 57 n.18 (1993); *In re Jacks,* 642 F.3d 1323, 1332 (11th Cir. 2011) (same). Moreover, as with standing, lack of ripeness is a jurisdictional defect, *Jacks,* 642 F.3d at 1332, which courts evaluate *sua sponte. Catholic Social Servs.,* 509 U.S. at 57 n.18. As the Supreme Court explained in dismissing a claim for lack of ripeness, "if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged." *O'Shea v. Littleton,* 414 U.S. 488, 502 (U.S. 1974). *Littleton* applies to Plaintiffs' claims here.

For constitutional ripeness, "[a] claim is not ripe when it is based

on speculative possibilities." *Jacks,* 642 F.3d at 1332. As outlined for standing in Section I.A.1, *supra,* Plaintiffs' claims are constitutionally unripe.

For prudential ripeness, courts consider "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Cheffer v. Reno,* 55 F.3d 1517, 1524 (11th Cir.1995) (*citing Abbott Labs,* 387 U.S. at 149).[2] While Plaintiffs' alleged hardships are inadequate for the same reasons outlined in Section I.A.3, *supra,* for standing, Alabama's *potential* application of HB56 in violation of INA is classic example of an unripe "uncertain event[,] which may not happen at all." *Skull Valley Band of Goshute Indians v. Nielson,* 376 F.3d 1223, 1237 (10th Cir. 2004); *City of Fall River, Mass. v. F.E.R.C.,* 507 F.3d 1, 6 (1st Cir. 2007). Given that Plaintiffs must negate every possible application of HB56 to prevail,

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[2] Citing *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 733 (1998), this Court has divided the fitness prong into two sub-prongs: (a) "whether judicial intervention would inappropriately interfere with further administrative action;" and (b) "whether the courts would benefit from further factual development of the issues presented." *Pittman v. Cole,* 267 F.3d 1269, 1278 (11th Cir. 2001); *cf. U.S. v. Rivera,* 613 F.3d 1046, 1050 (11th Cir. 2010) (restating the traditional *Abbott Labs* two-prong test).

Salerno, 481 U.S. at 745, Plaintiffs' facial challenge is unripe, at least for conflict preemption, because no one knows how HB56 enforcement will unfold. *See* Section II.1, *infra.* Plaintiffs cannot possibly show the type and level of "frustration" required for conflict preemption without a record of actual INA-HB56 conflict.

C. Federal Courts Cannot Invalidate State Laws Based on Hypothetical Situations

Jurisdiction is also lacking here because federal courts cannot invalidate state laws in hypothetical situations like those presented here. Plaintiffs here impermissibly seek to declare a state law unconstitutional based on hypothetical arguments, *e.g.,* Plaintiffs' Br. at 38, notwithstanding that the Supreme Court has rejected such a role for federal courts in enjoining state laws in the abstract.

In reversing an injunction against enforcement of a state law to the extent it was not preempted by federal law, the Supreme Court held that the district court "disregarded the limits on the exercise of its injunctive power." *Morales,* 504 U.S. at 382. The Court explained:

> In suits such as this one, which the plaintiff intends as a "first strike" to prevent a State from initiating a suit of its own, the prospect of state suit must be imminent, for it is the prospect of that suit which supplies the necessary

> irreparable injury. *Ex parte Young* thus speaks of enjoining state officers "*who threaten and are about to commence proceedings,*" and we have recognized in a related context that a conjectural injury cannot warrant equitable relief. Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable. This problem is vividly enough illustrated by the blunderbuss injunction in the present case, which declares pre-empted "any" state suit involving "any aspect" of the airlines' rates, routes, and services. As petitioner has threatened to enforce only the obligations described in the guidelines regarding fare advertising, the injunction must be vacated insofar as it restrains the operation of state laws with respect to other matters.

Morales, 504 U.S. at 382-83 (citations omitted, emphasis in *Morales*). As the quoted text makes clear, the limitation springs from Article III's requirement for a case and controversy, from equity's requirement for imminent injury as an irreparable harm, and (for state defendants like Alabama) from the limited *Ex parte Young* exception to sovereign immunity. *See* Section I.A.1, *supra;* Section I.D.2, *infra.*

D. The Eleventh Amendment Bars Plaintiffs' Suit

At the outset, it is clear that neither the INA nor the Supremacy Clause provides its own cause of action against Alabama, much less

abrogates Alabama's sovereign immunity. Given that Alabama may assert its immunity both on appeal and as the district court case proceeds, Plaintiffs' likelihood of prevailing depends on their bypassing Alabama's immunity from suit.

In general, plaintiffs seeking to enforce federal law without a statutory right of action can consider two alternate paths, 42 U.S.C. §1983 and the *Ex parte Young* exception to sovereign immunity:

> [T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young,* established the modern framework for federal protection of constitutional rights from state interference.

Perez v. Ledesma, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343(3) to protect civil rights. *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided federal-question jurisdiction under what now is 28 U.S.C. §1331, which *Ex parte Young* can extend to state actors who violate federal law. *Id.* Here, however, Plaintiffs lack the federal right needed to sue under §1983 and lack the ongoing violation of federal law needed to sue under *Ex parte Young*.

1. Plaintiffs Cannot Sue under §1983

By its terms, "§1983 permits the enforcement of '*rights,* not the

broader or vaguer 'benefits' or 'interests.'" *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119-20 (2005) (*quoting Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002) (emphasis in *Gonzaga*)). As such, "[i]n order to seek redress through §1983, ... a plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law*." *Blessing v. Freestone,* 520 U.S. 337, 340 (1997) (emphasis in original). To establish the *presumption* of an enforceable right, §1983 plaintiffs must meet a three-part test: (1) Congress must have intended the provision in question to benefit the plaintiff; (2) the alleged right is not so "vague and amorphous" that enforcing it would "strain judicial competence;" and (3) the rights-creating provision is stated in mandatory, rather than precatory, terms. *Blessing,* 520 U.S. at 340-41. Plaintiffs cannot establish any of these tests.

Most significantly, Congress could not have intended the INA to shield Plaintiffs – and especially the associations, U.S. citizens, and legal aliens – from HB56 enforcement for two reasons. First, INA allows state and local enforcement. 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c). Second, INA regulates federal agencies and state and local governments, without conferring rights to individuals: "Statutes that

focus on the person regulated rather than the individuals protected create *no implication* of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval,* 532 U.S. 275, 289 (2001) (interior quotations omitted, emphasis added); *accord Gonzaga,* 536 U.S. at 286 (applying the *Sandoval* reasoning to §1983 actions). Under *Sandoval* and *Gonzaga,* group-based *benefits* and *systemic* requirements do not create *rights.*

Further, the numerous savings clauses within INA that preserve Alabama's authority for state and local enforcement rebut the claim that INA is mandatory in the way that the *Blessing* test uses the term. *See, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c). Given that INA *allows* some state and local enforcement, Plaintiffs cannot argue that Alabama – by enacting an as-yet unenforced statute – has breached a *mandatory* federal rule sufficiently to trigger review under §1983.

2. Plaintiffs Cannot Sue under *Ex parte Young*

Under the Eleventh Amendment, Alabama enjoys immunity from Plaintiffs' claims. U.S. CONST. amend. XI. In *Ex parte Young,* 209 U.S. 123, 157 (1908), the Supreme Court held that the Eleventh Amendment's bar does not extend to suits to enjoin state officials'

enforcement of an allegedly unconstitutional statute, provided that "such officer [has] some connection with the enforcement of the act." *Id.* *Ex parte Young* is a limited exception to sovereign immunity, and that exception applies only to *ongoing violations* of federal law.

For example, *Ex parte Young* was unavailable in *Green v. Mansour,* 474 U.S. 64 (1985), where, after "Respondent … brought state policy into compliance," the plaintiffs sought "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Mansour,* 474 U.S. at 66-67. Similarly, as Justice Scalia explained in *Morales,* prospective injuries cannot be hypothetical and instead must involve "state officers '*who threaten and are about to commence proceedings.*'" *Morales,* 504 U.S. at 382-83 (*quoting Ex parte Young,* 209 U.S. at 156) (emphasis in *Morales*).

II. PLAINTIFFS CANNOT PREVAIL ON THE MERITS

After establishing the relevant rules of statutory construction, *amicus* Eagle Forum demonstrates that Plaintiffs cannot prevail on their preemption claims under any theory of federal preemption.

A. The Rules of Statutory Construction Favor Alabama

Assuming *arguendo* that federal courts have jurisdiction over Plaintiffs' claims and that Plaintiffs have a cause of action against

Alabama, this Court must consider two canons of statutory interpretation before it decides the merits. First, the Court must address the presumption against preemption for fields traditionally occupied by the states, which requires a "clear and manifest" congressional intent for preemption. Second, this Court must consider the *Salerno* requirement that pre-enforcement facial challenges negate the statute's application in all circumstances. Both canons favor Alabama and therefore support reversal of the preliminary injunction.

1. The Presumption against Preemption Applies

Courts apply a presumption against preemption for fields traditionally occupied by state and local government. *Santa Fe Elevator,* 331 U.S. at 230. When this "presumption against preemption" applies, courts will not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Id.* (emphasis added). Even if a court finds that Congress expressly preempted *some* state action, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading

that disfavors pre-emption.'" *Altria Group, Inc. v. Good,* 129 S.Ct. 538, 540 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [them] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine,* 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted). For that reason, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* If states occupied the field historically, the presumption plainly applies.

Here, INA and HB56 intersect in several areas of traditional local concern under the police power, including public safety, negative impacts on employment, education, and the state fisc. *DeCanas v. Bica,* 424 U.S. 351, 354-55 (1976). The authority to combat illegality is central to the states' traditional police power: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself." *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905); *Slaughter-House Cases*, 16 Wall. 36, 62 (1873) (holding that the states have traditionally enjoyed great latitude under their police powers to legislate as "to the protection of the lives, limbs, health, comfort, and

quiet of all persons") (interior quotations omitted). Plaintiffs' view would take from Alabama the "right to protect itself" against the unlawful taking up of residency and all of the resulting ills. The lawlessness that follows is predictable and, if a community's "right to protect itself" is recognized, entirely preventable.

Plaintiffs invoke decisions under the National Labor Relations Act ("NLRA"), which plainly are inapposite. Plaintiffs' Br. at 19; US Br. at 37. Regardless of how this Court resolves the presumption *against* preemption here, NLRA cases are unique in relying on "a presumption *of federal pre-emption*" derived from the National Labor Relations Board's primary jurisdiction over NLRA cases. *Brown v. Hotel & Restaurant Employees & Bartenders Intern. Union Local 54,* 468 U.S. 491, 502 (1984) (emphasis added). In invoking NLRB cases, Plaintiffs "confuse[] pre-emption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the National Labor Relations Board." *Id.* (emphasis added). While Congress undoubtedly *could have* written immigration law as preemptively as it wrote the NLRA, Congress did not do so. If it had, *DeCanas* (for one) would have come out differently: "absent an

expression of legislative will, we are reluctant to infer an intent to amend the Act so as to ignore the thrust of an important decision." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.,* 470 U.S. 116, 128 (1985). At least with respect to saddling Alabama with NLRA-style preemption, this Court must show the same reluctance.

2. Facial Challenges Cannot Succeed against State Laws that Have Not Taken Effect and Make the Allegedly Unconstitutional Conduct Optional

Under *Salerno,* a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 481 U.S. at 745. "The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.; accord Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n.5 (1982). For statutes with enforcement discretion on whether and how to enforce their provisions, the "most difficult challenge" becomes *even more* difficult.

As the Supreme Court recently emphasized, facial invalidation is counter to the judicial preference not to "nullify more of a legislature's

work than is necessary." *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). Facial challenges also interfere with canons of statutory construction for avoiding constitutional questions based on how narrowly a law is applied. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973); *New York v. Ferber,* 458 U.S. 747, 767 (1982) ("a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court").

Under well-known standards of statutory construction, courts may construe statutes to avoid unconstitutionality by adopting sensible constructions that avoid absurd or unlawful consequences. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 574 n.8 (1942); *City of Bessemer v. McClain,* 957 So.2d 1061, 1074-75 (Ala. 2006). Unfortunately for Plaintiffs, their chosen forum lacks the authority to adopt such narrowing constructions of *state* law: "Federal courts do not sit as a super state legislature, [and] may not impose [their] own narrowing construction ... if the state courts have not already done so." *United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.,* 857 F.2d 422, 431 (8th Cir. 1988) (interior quotations omitted,

alterations in original); *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972). If Plaintiffs wanted to resolve their legal concerns about HB56's scope, they chose the wrong forum for their facial challenge.[3]

B. Federal Law Does Not Preempt HB56

Nothing in INA expressly preempts state and local enforcement. Quite the contrary, INA preserves state and local authority in several savings clauses. *See, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c). To prevail, Plaintiffs require conflict or field preemption. Before addressing those two possibilities however, amicus Eagle Forum first addresses three background issues that distinguish several of the arguments that Plaintiffs attempt to make.

Plaintiffs cite *DeCanas v. Bica,* 424 U.S. 351, 354-55 (1976), for the obvious point that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." Plaintiffs' Br. at 11; US Br. at 3. That is as undeniably true as it is undeniably irrelevant. The question is not whether Congress *could have* preempted HB56. The

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[3] Under the doctrine of concurrent jurisdiction, §1983 suits are available in state courts, *Haywood v. Drown,* 129 S.Ct. 2108, 2114 (2009), as are *Ex parte Young* suits. *Martinez v. California,* 444 U.S. 277, 284 (1980); *Musgrove v. Georgia Railroad & Banking Co.,* 204 Ga. 139, 157, 49 S.E.2d 26, 36 (1948).

question is *whether* Congress *did* preempt HB56.

On that question, moreover, Plaintiffs' citing cases that found states preempted from regulating *legal* aliens is – while perhaps not always entirely irrelevant – not very compelling: "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" *Plyler v. Doe,* 457 U.S. 202, 223 (1982). Similarly, citing cases that prohibit states' regulating immigration also is not very compelling because the States retain authority in the area:

> Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.

Plyler, 457 U.S. at 229. In any event, HB56 simply does not regulate "immigration" in the sense of "determin[ing] who should or should not be admitted into the country." Plaintiffs Br. at 11 (quoting *DeCanas,* 424 U.S. at 355). While it may discourage illegal aliens from remaining *in Alabama,* HB56 is indifferent to their relocating *within the U.S.*

1. INA Does Not Conflict Preempt HB56 Generally

Conflict preemption includes both "conflicts that make it

impossible for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because nothing prevents compliance with both federal law and HB56, Plaintiffs necessarily invoke conflict preemption's "prevent-or-frustrate" prong.

Amicus Eagle Forum respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth,* 555 U.S. at 583 (characterizing this prong as "'purposes and objectives' pre-emption") (Thomas, J., concurring). Instead, federalism's central tenet permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth,* 555 U.S. at 583 (interior quotations and citations omitted) (Thomas, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role.

Notwithstanding federal primacy in *regulating immigration,* mere overlap with immigration does not necessarily displace state actions in areas of state concern. *DeCanas,* 424 U.S.at 354-55 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). With respect to "prevent-or-frustration" preemption, Plaintiffs cannot conflate federal administrative inaction with *congressional* intent. Even if Congress in the INA had not saved state and local enforcement authority, the Executive's non-enforcement could not preempt state and local enforcement. *Cf. Wyeth,* 555 U.S. at 576-81 (Federal Register preamble statement cannot preempt state law). Moreover, because HB56 tracks the federal guidelines, it cannot

frustrate congressional purpose in the INA because the Supremacy Clause does not require *identical* standards. It is enough for state law to "*closely* track[] [federal law] in all *material* respects." *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1981 (2011) (emphasis added). In areas of dual federal-state concern and *a fortiori* in ones of traditional state and local concern, Plaintiffs' arguments do not rise to the level of preemption.

2. INA Does Not Field Preempt HB56 Generally

Given its numerous clauses that save state and local authority over immigration-related enforcement, *see, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c), INA cannot *field preempt* state and local involvement. Plaintiffs would be not merely wrong but "*quite wrong* to view [the] decision [not to regulate] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 65 (2002) (emphasis added). While "an authoritative federal determination that the area is best left *un*regulated … would have as much pre-emptive force as a decision *to* regulate," *id.* at 66 (emphasis in original), *Geier,* 529 U.S. at 881, INA does not do so.

To foreclose state and local regulation, courts require that Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. For example, *Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Sprietsma,* 537 U.S. at 67 (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans. Ass'n,* 128 S.Ct. 989, 993, 996 (2008) (Airline Deregulation Act intended "to leave such decisions, where federally unregulated, to the competitive marketplace" to enable "maximum reliance on competitive market forces"). In place of an ostensibly door-shutting congressional determination, however, INA includes door-opening savings clauses. If INA does not conflict preempt HB56, INA plainly does not field preempt it, either.[4]

3. HB56's Specific Provisions Do Not Trigger Preemption

The lack of preemptive intent or language suffices to establish

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[4] "[T]he categories of preemption are not 'rigidly distinct,' [and] 'field pre-emption may be understood as a species of conflict pre-emption.'" *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000) (*quoting English v. Gen'l Elec. Co.,* 496 U.S. 72, 79, n.5 (1990)).

that federal law does not preempt HB56 generally. In this section, *amicus* Eagle Forum establishes that HB56 does not warrant preemption under Plaintiffs' arguments unique to specific HB56 provisions.

Plaintiffs argue that the comprehensive federal regulation of aliens' eligibility for benefits preempts Section 28's provisions for schools. Plaintiffs' Br. at 53-54. By its terms, however, the statute provides that it "may [not] be construed as *addressing* alien eligibility for a basic public education as determined by the Supreme Court of the United States under *Plyler v. Doe*." 8 U.S.C. §1643(a)(2) (first emphasis added). If the statute does not *address* eligibility under *Plyler,* the statute neither preempts nor authorizes any deviation from *Plyler*. While this Court must follow *Plyler,* §1643(a)(2) adds nothing.

Plaintiffs also argue that federal non-enforcement decisions preempt Alabama's inconsistent enforcement. Plaintiffs' Br. at 18-19, 29, 31, 36, 38; US Br. at 7. The cases that Plaintiffs cite (Plaintiffs' Br. at 31) belies the baseless nature of their federal-deference argument. First, Plaintiffs cite instances where federal courts deferred to federal prosecutorial discretion under the separation-of-powers doctrine. *See*

Haswanee v. U.S. Atty. Gen., 471 F.3d 1212, 1218-19 (11th Cir. 2006); *U.S. ex rel. Knauff v. Shaughnessy,* 338 U.S. 537, 543 (1950) (same). Second, Plaintiffs cite *Heckler v. Chaney,* 470 U.S. 821, 831 (1985), which stands for the proposition that the Administrative Procedure Act (which in this particular instance simply codifies separation-of-powers doctrine) does not provide judicial review of agency enforcement discretion where federal courts would lack a meaningful standard to judge the discretion. 5 U.S.C. §701(a)(2); *cf. Knauff,* 338 U.S. at 543 (Congress has authority to align immigration enforcement with executive discretion). In these cases, the federal judiciary acquiesced to the federal political branches on separation-of-power grounds, which is wholly inapposite to the "dual sovereignty" under which the States entered the federal union "with their sovereignty intact." *Fed'l Maritime Comm'n v. South Carolina State Ports Auth.,* 535 U.S. 743, 751-52 (2002). Plaintiffs even go so far as to complain that state laws like HB56 "flood[] the federal immigration system indiscriminately with status requests," Plaintiffs' Br. at 29, but their complaint lies with 8 U.S.C. §1373(c), not HB56, and so belongs in Congress, not here.

In several instances, Plaintiffs cite the burdens that HB56's

various provisions impose on lawful aliens and citizens. Plaintiffs' Br. at 40, 42, 43-44, 66. Although the citizen and legal-alien members of Plaintiffs favor illegal aliens, the people of the sovereign State of Alabama have decided – through their elected officials – to bear nominal burdens to help reduce the negative impact that the people of Alabama perceive from illegal aliens. Plaintiffs need not share the views that inspired HB56, and they accordingly resent the burdens because they do not favor HB56. Where (as here) the challenged law is neither preempted nor unlawfully discriminatory, Plaintiffs' proper course is to work through the electoral process to change the law.

Plaintiffs also raise equal-protection arguments, suggesting that HB56 is discriminatory. Plaintiffs' Br. at 43, 66.[5] The Fourteenth Amendment – not federal immigration law – prohibits Alabama's discriminating on the basis of race or national origin. This familiar standard applies to action taken "at least in part *because of,* not merely

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[5] Plaintiffs cite federal administrative interpretations of *Plyler* to show that HB56 discriminates, Plaintiffs' Br. at 58, but courts "are not obligated to defer to an agency's interpretation of Supreme Court precedent," *Univ. of Great Falls v. N.L.R.B.,* 278 F.3d 1335, 1341 (D.C. Cir. 2002), or the Constitution. *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997).

in spite of, its adverse effects" on a protected class. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979) (emphasis added). Targeted against those popularly known as "illegal aliens," HB56 "discriminates" based on illegality, not on race or national origin. *Plyler,* 457 U.S. at 223 ("[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy'"). Even assuming *arguendo* that HB56's impacts fall disproportionately on Hispanics, that disproportion would not be actionable in its own right. In *Feeney,* the passed-over female civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring constituted sex discrimination. Because women then represented less than two percent of veterans, *Feeney,* 442 U.S. at 270 n.21, men were more than *fifty times* more likely to benefit from the state law challenged in *Feeney*. Nonetheless, Massachusetts did not discriminate *because of sex* when it acted because of another, permissible criterion (veteran status). *Id.* at 272. Like Massachusetts, Alabama acted *because of* permissible criteria, which is not unlawful discrimination.

CONCLUSION

For the foregoing reasons and those argued by Alabama, this Court should vacate the preliminary injunction.

Dated: January 3, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

U.S.A. v. State of Alabama, Nos. 11-14532-CC & 11-14674-CC

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 6,994 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Century Schoolbook 14-point font.

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