NO. 11-14532

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES

Plaintiff-Appellant; Cross-Appellee,

v.

STATE OF ALABAMA & GOVERNOR ROBERT J. BENTLEY

Defendants-Appellees; Cross-Appellants

On Appeal from the United States District Court for the
Northern District of Georgia
Judge Shirley Lovelace Blackburn
Case No. 11-14532

BRIEF OF *AMICUS CURIAE* BAR ASSOCIATION OF THE CITY OF NEW YORK, COMMITTEE ON IMMIGRATION AND NATIONALITY LAW, IN SUPPORT PLAINTIFFS-APPELLANTS AND REVERSAL

Mark R. von Sternberg
Chair
Immigration and Nationality Law Committee
THE NEW YORK CITY BAR ASSOCIATION
1011 First Avenue
New York, NY 10022
(212) 419-3763
Attorney for Amicus Curiae the New York City Bar Association

On the Brief:
Daniel M. Luisi
Student Member
Immigration and Nationality Law Committee
THE NEW YORK CITY BAR ASSOCIATION
1011 First Avenue
New York, NY 1022
(212) 419-3763

<u>United States v. State of Alabama; Governor Robert J. Bentley</u>

Docket No. 11-14532

<u>CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT</u>

The undersigned attorney for *Amicus Curiae* the Bar Association of the City of New York, Committee on Immigration and Nationality hereby certifies, pursuant to 11th Cir. R. 26.1-1, that the following have an interest in outcome of this case:

Abate, Michael P., Attorney for Appellant;

Albin, Ramona C., Attorney for Appellant;

American Unity Legal Defense Fund, *Amicus Curiae*;

Bar Association of the City of New York, Immigration and Nationality Law Committee, *Amicus Curiae*;

Bentley, Robert J., Defendant/Appellee/Cross-Appellant

Blacksher, James U., Counsel for *Amicus Curiae* National Fair Housing Alliance, Inc.;

<u>United States v. State of Alabama; Governor Robert J. Bentley</u>

Docket No. 11-14532

Brinkmann, Beth S., Attorney for Appellant;

Brooks, J.R., Attorney for Appellee State of Alabama;

Chilakamarri, Varu, Attorney for Appellant;

Davis, James W., Attorney for Defendant/Appellee Bentley;

Escalona, Prim F., Attorney for Appellees Bentley and State of Alabama;

Fairbanks, Misty S., Attorney for Appellees Bentley and State of Alabama;

Fleming, Margaret L., Attorney for Appellees Bentley and State of Alabama;

Krishna, Praveen S., Attorney for Appellant;

Luisi, Daniel, Law Student Member of *Amicus Curiae* Bar Association of the City New York, Immigration and Nationality Law Committee;

National Fair Housing Alliance, Inc., *Amicus Curiae*;

Neiman, John Cowles, Jr., Attorney for Appellees Bentley and State of Alabama;

Orrick, William H., III, Attorney for Appellant;

Park, John J., Jr., Counsel for *Amicus Curiae* American Unity Legal Defense Fund;

United States v. State of Alabama; Governor Robert J. Bentley

Docket No. 11-14532

Parker, William Glenn, Jr., Attorney for Appellees Bentley and State of Alabama;

Payne, Joshua Kerry, Attorney for Appellees Bentley and State of Alabama;

Reeves, C. Lee, II, Attorney for Appellant;

Shultz, Benjamin N., Attorney for Appellant;

Sinclair, Winfield J., Attorney for Appellees Bentley and State of Alabama;

State of Alabama, Defendant/Appellee/Cross-Appellant;

Stern, Mark B., Attorney for Appellant;

Strange, Luther J., III, Attorney General, Attorney for Appellees Bentley and State of Alabama;

Tenny, Daniel, Attorney for Appellant;

United States of America, Plaintiff/Appellant/Cross-Appellee;

Vance, Joyce White, Attorney for Appellant;

Von Sternberg, Mark R., Counsel for *Amicus Curiae* Bar Association of the City of New York, Immigration and Nationality Law Committee;

United States v. State of Alabama; Governor Robert J. Bentley

Docket No. 11-14532

West, Tony, Attorney for Appellant;

Wilkenfeld, Joshua, Attorney for Appellant;

Zall, Barnaby W., Counsel for *Amicus Curiae* American Unity Legal Defense Fund.

<u>United States v. State of Alabama; Governor Robert J. Bentley</u>

Docket No. 11-14532

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for *Amicus Curiae* hereby discloses that *Amicus* has no parent corporations and that no corporation directly or indirectly holds 10% or more of the ownership interest in *Amicus*.

____

Mark R. von Sternberg

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APPLICATION FOR PRO HAC VICE ADMISSION

Application to Appear Pro Hac Vice

Court of Appeals Docket No. 11-14532

Name: Mark R. von Sternberg Phone: (212) 419-3763

Firm/Office: New York City Bar Association Fax: (212) 751-3197

Street Address: 42 West 44th Street E-mail: mark.vonsternberg@archny.org

City: New York State: NY Zip: 10036

Name of party/parties to be represented: We are submitting a brief amicus curiae

Pursuant to 11th Cir. R. 46-4, this application must be accompanied by **(1)** a certificate of good standing issued within the previous six months from the highest court of any state or another United States Court of Appeals, **(2)** proof of service on the other parties in compliance with FRAP 25(d), and **(3)** a check in the amount of $50 made payable to "U.S. Court of Appeals Non-Appropriated Fund, 11th Circuit."

Answer each question. If any answer is yes, attach a statement giving details.

YES	NO		
☐	☒	1.	Have you changed your name or been known by any names or surnames other than the one appearing on this application?
☐	☒	2a.	Have you been disbarred or suspended from practice before any court, department, bureau or commission of any State or the United States, or have you received a reprimand from any of them pertaining to your conduct or fitness to practice?
☐	☒	2b.	Are any such proceedings or allegations presently pending against you?
☐	☒	3a.	Have you been a party to criminal proceedings, or to civil proceedings in which allegations of fraud, misrepresentation or other dishonesty were made against you?
☐	☒	3b.	Are you presently under investigation for any matter specified in question 3a?
☐	☒	4.	Have you previously applied to this court for pro hac vice admission in any proceeding? If so, when? ________

OATH (OR AFFIRMATION)

I, Mark R. von Sternberg, do solemnly swear (or affirm) that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States. I do further swear (or affirm) that all statements and responses in my application to appear pro hac vice, including attachments which are incorporated herein by reference, are true and correct to the best of my knowledge, information and belief.

Date: November 15, 2011 Signature: Mark R. von Sternberg

Last 4 digits of attorney's Social Security No. (for positive identification purposes): 2095

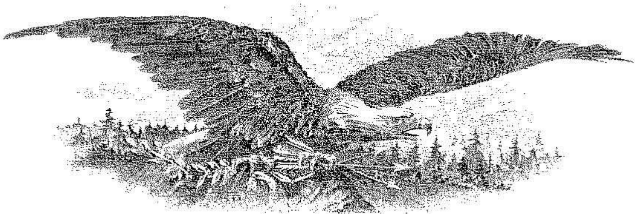
NOTE: This application accompanied by all required items noted above should be forwarded to: Clerk, U.S. Court of Appeals, Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, GA 30303.

9/09

Print Form

CERTIFICATIONS OF ATTORNEY GOOD STANDING

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT



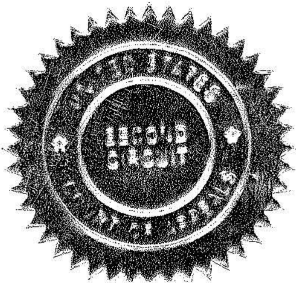
I, Catherine O'Hagan Wolfe, Clerk of the United States Court of Appeals for the Second Circuit, certify that

MARK ROBERT VON STERNBERG

of New York, New York, renewed admission as an Attorney and Counselor of the United States Court of Appeals for the Second Circuit on the 22nd day of April, 2011.

Counsel is due to renew admission next on the 22nd day of April, 2016.

In testimony whereof, I subscribe my name and affix the seal of the United States Court of Appeals for the Second Circuit on the 22nd day of April, 2011.



Catherine O'Hagan Wolfe

Clerk of Court

NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION
ATTORNEY REGISTRATION UNIT

RECEIPT

December 23, 2010

Attorney Registration #: 2047835
Batch #: IK58
Process Date: 11/18/2010
Receipt #: 3489
Next Registration: Nov 2012
* **Registration Status:** Currently registered

MARK ROBERT VONSTERNBERG
90 8TH AVE APT 3D
BROOKLYN, NY 11215-1540

This will acknowledge receipt of your 2010-2011 registration as an attorney and receipt of the $375.00 fee.

Our records contain the following information:

Name: MARK ROBERT VONSTERNBERG
First: MARK
Middle: ROBERT
Last: VONSTERNBERG
Suffix:

DOB: 11/19/1945
SSN: XXX-XX-2095
Social Security numbers are required in order to administer the collection of revenue from attorney registration fees 42 U.S.C. § 405 (c)(2)(C)(i). Your Social Security number will not be made public. The first 5 digits have been concealed to protect your identity.

Admission Data:
Year Admitted to the NYS Bar: 1974
Judicial Dept. of Admission: 2

Law School: VANDERBILT UNIVERSITY

Business Address:
CATHOLIC CHARITIES COMMUNITY SERVICES
ARCHDIOCESE OF NEW YORK
1011 1ST AVE
NEW YORK, NY 10022-4112

Home Address: (Note: Is public information if no business is listed.)
90 8TH AVE APT 3D
BROOKLYN, NY 11215-1540

Business County: New York
Business Phone: (212) 419-3763
e-mail (optional):
Note: If provided, the e-mail address will be made public.

Home County: Kings

2010-2011 CLE - Hours Completed: 129.00 / Carried Over: 6.00

Part 1200 (1.15) Affirmation: Yes

Return only if changes are required and retain a copy for your records.

Please review the information on this receipt for accuracy. The Rules of the Chief Administrator require that this office be notified of any changes in the above information within 30 days of any such change. If changes are required you may make them online or by mail.

¤ **Online** 1) Go to www.nycourts.gov and Attorney Online Services 2) Make desired changes 3) Print a corrected receipt.

- OR -

¤ **By Mail** 1) Circle the item 2) Enter the correct information directly on the receipt 3) Sign and date the receipt 4) Return to the address at the bottom of the receipt. You will receive a new receipt by mail acknowledging the changes made.

Signature: ______________________ Date: ______________________

ADDRESS: P.O. BOX 2806 CHURCH STREET STATION, NEW YORK, NY 10008
PHONE: (212) 428-2800 ¤ EMAIL: ATTREG@COURTS.STATE.NY.US ¤ WEBSITE: www.nycourts.gov

LAW STUDENT AND SUPERVISING ATTORNEY OF RECORD CERTIFICATIONS AND RELEVANT DOCUMENTS

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Law Student and Supervising Attorney of Record Certifications

Court of Appeals Docket No. 11-14532

Case Name: United States vs. Alabama

Name of party/parties to be represented: We are filing as amicus curiae

I. Law Student Certification

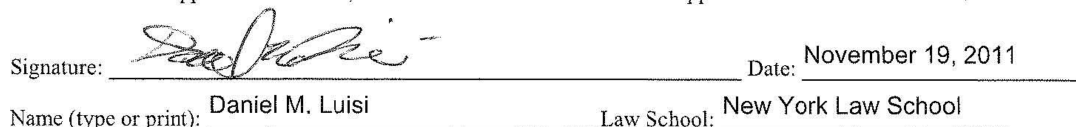
My signature below certifies that:

(a) I am enrolled in a law school approved by the American Bar Association.

(b) I have completed legal studies for which I have received at least 48 semester hours or 72 quarter hours of academic credit or the equivalent if the school is on some other basis.

(c) I will not ask for nor receive compensation of any kind for my services in this case except as authorized by 11th Cir. R. 46-11(b)(4).

(d) I have read and am familiar with the Code of Professional Responsibility of the American Bar Association, the Federal Rules of Appellate Procedure, and the Rules of the U.S. Court of Appeals for the Eleventh Circuit.



Signature: ______________________ Date: November 19, 2011

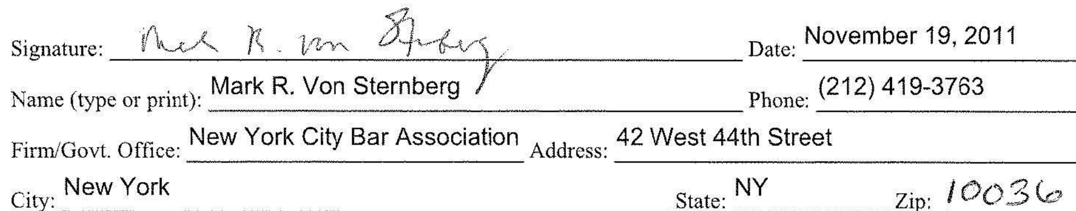
Name (type or print): Daniel M. Luisi Law School: New York Law School

II. Supervising Attorney of Record Certification

My signature below certifies that:

(a) I am a member in good standing of the bar of this court.

(b) With respect to the law student's appearance, I consent to the participation of the law student and agree to supervise the law student; assume full, personal professional responsibility for the case and for the quality of the law student's work; will assist the law student to the extent necessary; and will appear with the law student in all written and oral proceedings before this court and be prepared to supplement any written or oral statement made by the law student to this court or opposing counsel.



Signature: ______________________ Date: November 19, 2011

Name (type or print): Mark R. Von Sternberg Phone: (212) 419-3763

Firm/Govt. Office: New York City Bar Association Address: 42 West 44th Street

City: New York State: NY Zip: 10036

NOTE: This form must be accompanied by (1) a certification by the dean of the law student's law school, and (2) written consent of the party (or party's representative) on whose behalf the law student appears. See 11th Cir. R. 46-11.

4/11

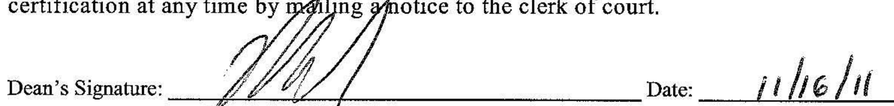
Print Form

Print Form

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Dean's Certification for Law Student Legal Representation

Law Student's Name (type or print): Daniel M. Luisi

I certify that the law student named above is qualified to provide the legal representation permitted by 11th Cir. R. 46-11, and has completed legal studies for which the law student has received at least 48 semester hours or 72 quarter hours of academic credit or the equivalent if the school is on some other basis. I understand that I may withdraw this certification at any time by mailing a notice to the clerk of court.



Dean's Signature: ______________ Date: 11/16/11

Name (type or print): Richard A. Matasar Phone: 212-431-2840

Law School: New York Law School

Address: 185 West Broadway

City: New York State: NY Zip: 10013

4/11

CERTIFICATION AND EVIDENCE OF PARTIES' CONSENT

Pursuant to Fed. R. App. P. 29(a), I hereby certify that all parties have consented to the filing of this brief of *Amicus Curiae Bar Association of the City of New York, Immigration and Nationality Law Committee*.

____

Mark R. von Sternberg

Mark Von Sternberg

From:	Mark Von Sternberg
Sent:	Tuesday, November 15, 2011 4:17 PM
To:	'luisi.daniel@gmail.com'
Subject:	FW: United States v. Alabama, No. 11-14532 (11th Cir.)

From: Tenny, Daniel (CIV) [mailto:Daniel.Tenny@usdoj.gov]
Sent: Tuesday, November 15, 2011 12:40 PM
To: Mark Von Sternberg
Cc: Abate, Michael (CIV)
Subject: United States v. Alabama, No. 11-14532 (11th Cir.)

Mr. von Sternberg,

I'm writing in response to your email to Michael Abate about amicus participation in the United States v. Alabama case. The government consents to your filing a timely amicus brief.

Daniel

Daniel Tenny
U.S. Department of Justice, Civil Division
950 Pennsylvania Avenue, NW, Room 7215
Washington, DC 20530
(202) 514-1838
fax (202) 514-9405
daniel.tenny@usdoj.gov

Mark Von Sternberg

From: J.R. Brooks [JRB@LanierFord.com]
Sent: Monday, November 14, 2011 5:58 PM
To: Mark Von Sternberg; 'jneiman@ago.state.al.us'; 'pescalona@ago.state.al.us'; 'mfleming@ago.state.al.us'; 'jimdavis@ago.state.al.us'; 'mfairbanks@ago.state.al.us'; 'wparker@ago.state.al.us'; 'jpayne@ago.state.al.us'; Taylor Brooks
Subject: RE: Amicus Consent Request - United States v. Alabama (No. 11-14532-CC)

No objection. J.R. Brooks

From: Mark Von Sternberg [mailto:Mark.VonSternberg@archny.org]
Sent: Monday, November 14, 2011 4:26 PM
To: 'jneiman@ago.state.al.us'; 'pescalona@ago.state.al.us'; 'mfleming@ago.state.al.us'; 'jimdavis@ago.state.al.us'; 'mfairbanks@ago.state.al.us'; 'wparker@ago.state.al.us'; 'jpayne@ago.state.al.us'; J.R. Brooks; Taylor Brooks
Subject: FW: Amicus Consent Request - United States v. Alabama (No. 11-14532-CC)

Counsel:

We represent the Immigration and Nationality Law Committee of the New York City Bar Association, an independent, professional organization with membership comprised of more than 21,000 judges, lawyers, and law students. Founded in 1870, the Association has a long-standing commitment to fair and human immigration laws and policies as well as to advancing the cause of human rights in the U.S. and abroad. The Association intends to file an amicus brief in support of Plaintiffs-Appellants in the Eleventh Circuit case, United States v. Alabama, No. 11-14532-CC. May we have your consent on behalf of Defendants-Appellees to file?

Sincerely,

Mark R. von Sternberg
Chair, Immigration and Nationality Law Committee

NOTICE

This message is confidential and may contain information that is privileged, attorney work product or otherwise exempt from disclosure under applicable law. It is not intended for transmission to, or receipt by, any unauthorized person. If you have received this message in error, do not read it. Please delete it without copying it, and notify the sender by separate e-mail so that our address record can be corrected. Thank you.

Mark Von Sternberg

From: Escalona, Prim [PEscalona@ago.state.al.us]
Sent: Monday, November 14, 2011 5:29 PM
To: Mark Von Sternberg; Neiman, John; Fleming, Margaret; Davis, Jim; Fairbanks, Misty; Parker, Will; Payne, Josh; jrb@LanierFord.com; tpb@LanierFord.com
Subject: RE: Amicus Consent Request - United States v. Alabama (No. 11-14532-CC)

Yes, you have our consent for the State Defendants/Appellees.

Thank you,
Prim

Prim Escalona
AL Deputy SG
334-353-2188

Confidentiality Notice: The information contained in this email and the documents attached hereto contain confidential information intended only for the use of the intended recipients. If the reader of the message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of the information contained herein is strictly prohibited. If you have received this communication in error, please immediately notify me by reply email.

From: Mark Von Sternberg [mailto:Mark.VonSternberg@archny.org]
Sent: Monday, November 14, 2011 4:26 PM
To: Neiman, John; Escalona, Prim; Fleming, Margaret; Davis, Jim; Fairbanks, Misty; Parker, Will; Payne, Josh; 'jrb@LanierFord.com'; 'tpb@LanierFord.com'
Subject: FW: Amicus Consent Request - United States v. Alabama (No. 11-14532-CC)

Counsel:

We represent the Immigration and Nationality Law Committee of the New York City Bar Association, an independent, professional organization with membership comprised of more than 21,000 judges, lawyers, and law students. Founded in 1870, the Association has a long-standing commitment to fair and human immigration laws and policies as well as to advancing the cause of human rights in the U.S. and abroad. The Association intends to file an amicus brief in support of Plaintiffs-Appellants in the Eleventh Circuit case, United States v. Alabama, No. 11-14532-CC. May we have your consent on behalf of Defendants-Appellees to file?

Sincerely,

Mark R. von Sternberg
Chair, Immigration and Nationality Law Committee

NOTICE

NOTICE OF APPEARANCE OF COUNSEL

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
Appearance of Counsel Form

Attorneys who wish to participate in an appeal must be properly admitted either to the bar of this court or for the particular proceeding pursuant to 11th Cir. R. 46-1, et seq. An attorney not yet properly admitted must file an appropriate application. In addition, all attorneys (except court-appointed counsel) who wish to participate in an appeal must file an appearance form within fourteen (14) days after notice is mailed by the clerk, or upon filing a motion or brief, whichever occurs first. Application forms and appearance forms are available on the Internet at www.ca11.uscourts.gov.

Please Type or Print

Court of Appeals No. 11-14532

United States vs. Alabama

The Clerk will enter my appearance for these named parties: New York City Bar Association Committee on Immigration and Nationality Law. We are amicus with an interest in this case.

In this court these parties are: ☐ appellant(s) ☐ petitioner(s) ☐ intervenor(s)

☐ appellee(s) ☐ respondent(s) ☒ amicus curiae

☒ The following related or similar cases are pending on the docket of this court:

Hispanic Interest Coalition of Alabama v. Bentley, No. 11-14535

☐ Check here if you are lead counsel.

I hereby certify that I am an active member in good standing of the state bar or the bar of the highest court of the state (including the District of Columbia) named below, and that my license to practice law in the named state is not currently lapsed for any reason, including but not limited to retirement, placement in inactive status, failure to pay bar membership fees or failure to complete continuing education requirements. I understand that I am required to notify the clerk of this court within 14 days of any changes in the status of my state bar memberships. See 11th Cir. R. 46-7.

State Bar: New York State Bar No.: 2047835

Signature: Mark R. von Sternberg

Name (type or print): Mark R. von Sternberg Phone: 212-419-3763

Firm/Govt. Office: New York City Bar Association E-mail: mark.vonsternberg@archny.org

Street Address: 42 West 44th Street Fax: 212-751-3197

City: New York, State: NY Zip: 10036

12/07

<u>LETTER TO ELEVENTH CIRCUIT CLERK BRENDA WIEGMANN CONFIRMING A GRANT OF A CONTINUANCE TO FILE AS *AMICUS*</u>

NEW YORK
CITY BAR

**COMMITTEE ON
IMMIGRATION & NATIONALITY
LAW**

MARK R. VON STERNBERG
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Nicole.feit@wilmerhale.com

November 16, 2011

Ms. Brenda Wiegmann
Office of the Clerk
United States Court of Appeals for the Eleventh Circuit
Elbert P. Tuttle United States Court of Appeals Building
56 Forsyth Street, NW
Atlanta, GA 30303

RE: United States v. Alabama
No. 11-14532

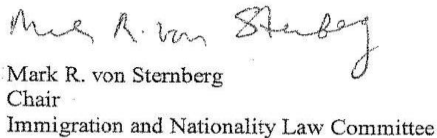
Dear Ms. Wiegmann:

Under separate cover, I have transmitted to you my notice of appearance in this case. As you know, I am writing on behalf of the Immigration and Nationality Law Committee of the New York City Bar Association (New York City Bar), which would like to file an amicus curiae brief in this litigation.

As we discussed, it is my understanding that New York City Bar will be granted an extension of time until November 28, 2011 within which to file its brief.

Thank you very much for your consideration in this matter.

Very truly yours,



Mark R. von Sternberg
Chair
Immigration and Nationality Law Committee

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street, New York, NY 10036-6689 www.nycbar.org

TABLE OF AUTHORITIES

CASES

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 123 S. Ct. 2374 (2003)....................21

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United States v. Arizona, 703 F. Supp. 2d 980 (D.Ariz 2010).................................3

United States v. Arizona, 641 F.3d 339 (9th Cir. 2010)..........................4, 15, 16, 22

Wyeth v. Levine, 555 U.S. 555, 129 S. Ct. 1187 (2009)..........................8, 14, 19, 20

U.S. CONSTITUTION, RULES, STATUTES, TREATIES, AND REGULATIONS

Constitution:

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U.S. CONST. art. I, § 8, cl. 3...17

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H.B. 56 § 10..5, 6, 8, 9

H.B. 56 § 12(a)..6, 9, 14, 15

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H.B. 56 § 27..2

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H.B. 56 § 30..2

Support Our Law Enforcement and Safe Neighborhoods Act of 2010 ("S.B. 1070")...3

Federal Legislation and Statutes:

8 U.S.C. § 1304 (2006)..5

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STATEMENT OF THE INTEREST OF *AMICUS CURIAE*[1]

The Association of the Bar of the City of New York is an independent, professional organization with membership comprised of more than 23,000 members. Founded in 1870, the Association has a long-standing commitment to fair and humane immigration laws and policies as well as to advancing the cause of human rights in the United States and abroad. The Association has a concern with state statutes in general which seek to preempt the formulation of a rational federal program for immigration reform. The issues raised by statutes such as Alabama's Taxpayer and Citizen Protection Act of 2011 tend to coarsen the debate which should inform all discussion of what a suitable federal program would comprise. Such questions lie at the heart of the federal preemption issues which this brief seeks to address.

[1] All parties have consented to the filing to this brief, as indicated by letters from appellants and respondents which are attached hereto. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

STATEMENT OF THE ISSUE

The issue presented by this appeal is whether the District Court properly denied the United States' request for a preliminary injunction against sections 10, 12(a), 18, 27, 28, and 30 of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, Ala. Laws Act 2011-535 (hereinafter "H.B. 56" or "the Act"). A sub-issue is whether the United States is likely to succeed on the merits of its claim that those sections are preempted by the scheme of federal immigration regulation established by the Immigration and Nationality Act (hereinafter INA), and therefore are invalid under the Supremacy Clause of the Constitution. U.S. CONST. art. VI, cl. 2.

SUMMARY OF ARGUMENT

Through H.B. 56, the State of Alabama has enacted a new set of state law immigration criminal offenses and duties required of state officers that, together, amount to an attempt to set a policy for enforcement of federal civil immigration law independent of and in conflict with enforcement priorities established by federal statute and valid federal regulation. When Alabama's efforts are evaluated in light of relevant Supreme Court case law on preemption, well-established principles of statutory construction, and the basic division of responsibilities

established by the Constitution and the federal system of government, it becomes clear that the State has charted an unconstitutional course.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT INCORRECTLY HELD THAT THE INA DOES NOT PREEMPT STATE GOVERNMENTS FROM REGULATING IMMIGRATION WITHOUT THE CONSENT AND DIRECTION OF THE FEDERAL GOVERNMENT

For the purposes of the arguments advanced by this brief, H.B. 56 is identical to the Support Our Law Enforcement and Safe Neighborhoods Act ("S.B. 1070") recently enacted in Arizona, and preliminarily enjoined by the federal courts there. *United States v. Alabama*, No. 2:11-cv-2746-SLB, 2011 WL 4469941 at *30 (N.D.Ala. Sept. 28, 2011) (citing *United States v. Arizona*, 703 F. Supp. 2d 980, *aff'd by* 641 F.3d 339 (9th Cir. 2011)).

The stated legislative intent of H.B. 56 is to serve "a compelling public interest to discourage illegal immigration by requiring all agencies within [the] state to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws." H.B. 56 § 2. However, the word "cooperate" conceals the true effect of the Act's provisions: to alter federal enforcement priorities established by the national government through enactment of new state offenses

and police procedures, which will foist a deluge of immigration detainees upon the federal government.

Although an individual state may retain a significant interest in enforcement of federal criminal laws, it does not possess such an interest in enforcing federal civil immigration regulations. Section 274(c) of the INA explicitly confers authority on state officials to make arrests for the federal criminal immigration offenses, but no section of the INA empowers state officers to *independently* enforce civil immigration regulations.[2]

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[2] While some courts have recognized that states may retain authority to enforce federal criminal immigration laws so long as the state versions of such laws do not impede federal priorities, *see, e.g.*, *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999), there is scant authority for the proposition that states may attempt, whether directly or indirectly, to enforce or change federal enforcement policies of *civil* federal immigration law. *See United States v. Arizona*, 641 F.3d 339, 362 n.21 (9th Cir. 2011). Cases that at first blush may suggest otherwise merely confirm, on closer examination, that the prerogatives of the federal government are paramount, and state laws empowering police to enforce civil federal immigration laws are permissible only where Congress invites such cooperative enforcement by statute, or the Executive Branch does so in its discretion (discretion which is also conferred by federal statute). *See generally Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011) (holding that state laws which regulate the employment relationship through licensing laws are permitted because of the explicit savings clause enacted by Congress in 8 U.S.C. § 1324(a)(h)(2), allowing state regulation of employment of unauthorized aliens through "licensing and similar laws."); *Arizona Contractors*

Section 10 of H.B. 56 provides that "[i]n addition to violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) [INA § 264(e)] or 8 U.S.C. § 1306(a) [INA § 266(a)], and the person is an alien unlawfully present in the United States."[3]

Ass'n, Inc. v. Napolitano, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW, 2007 WL 4570303, at *12–13 (D.Ariz. Dec. 21, 2007) (same); *Rojas v. City of New Brunswick*, Civ. No. 04-3195, 2008 WL 2355535, at *29 (D.N.J. Jun. 4, 2008); *see also Report on the Constitutionality of Arizona Immigration Law S.B. 1070*, COMM. ON IMMIGRATION & NATIONALITY LAW (Bar Ass'n of the City of New York), July, 2010, at 14–16 ("More serious preemption concerns may be raised by provisions that criminalize matters already regulated by federal immigration law. Of this latter category, the most serious preemption arguments likely exist where state law attempts to reach past traditional police powers to regulate matters closely related to entry and removal of aliens to the United States, and the conditions of their lawful presence within the country. State laws addressing such matters appear most susceptible to preemption challenges, as the federal law is arguably intended to wholly occupy this field." (quoting MICHAEL JOHN GARCIA, LARRY M. EIG & YULE KIM, CONG. RESEARCH SERV., R 41221, STATE EFFORTS TO DETER UNAUTHORIZED ALIENS: LEGAL ANALYSIS OF ARIZONA'S S.B. 1070 (2010), *available at* http://www.fas.org/sgp/crs/homesec/R41221.pdf (last visited Nov. 17, 2011))).

[3] INA § 264(e) requires that aliens eighteen years and older carry in their personal possession at all times certain required alien registration documents, and punishes a failure to comply with a federal misdemeanor. INA § 266(a) establishes a federal misdemeanor for aliens who willfully refuse to undergo required registration procedures, punishable by a fine, prison time, or both.

The District Court reasoned that this state criminal law, creating state offenses "related to the INA's alien registration scheme[,]"*Alabama*, 2011 WL 4469941 at *11, was not preempted by these federal criminal statutes because the state offenses "arise in an narrower set of circumstances" than the federal offenses in that they include the element that an alien be "unlawfully present in the United States" in addition to a failure to carry documents or register. *Id.* This is an overly formalistic analysis of the nature of the provisions enacted by H.B. 56. Instead, the court should have considered the likely impact that sections 10 and 12(a) would have on the exclusive power of the federal government to enforce federal civil immigration laws.

The enactment of section 10, providing police with an immigration-related reason to stop those suspected of being unlawfully present aliens without required documents, will likely place state officers in the situation where a "reasonable suspicion" will be raised that the suspected offender is an unlawfully present alien under H.B. 56 § 12(a). Because section 12(a) places an affirmative duty upon a state officer in such a situation to verify the suspected offender's immigration status with the federal government,[4] section 10 is in fact an end run around the

[4] Section 12(a) of the Act provides that if during "any lawful stop, detention, or arrest . . . where reasonable suspicion exists that the person is an alien unlawfully present in the United States, a reasonable attempt *shall be made*, when practicable,

prohibition against individual states engaging in civil immigration enforcement without the direction of and in conflict with the prerogatives of the federal government—these two new provisions will in effect force state officers, acting in their official duty, to foist an uninvited wave of unlawfully present aliens onto the federal government, and thereby attempt to force a change in federal enforcement priorities in response to the resultant influx.[5]

Apart from the question of whether H.B. 56's superficially criminal provisions effect an invalid intrusion into federal civil immigration enforcement, the District Court also applied a doctrinally flawed preemption analysis. It relied

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to determine the citizenship and immigration status of the person, except if the determination may hinder or obstruct an investigation." (Emphasis added). Because the general rule here is that an attempt "shall be made," such a determination may only be avoided when it would not be practicable or would hinder an investigation. Thus, this provision of the Act effectively places an affirmative duty on the state officer to contact and seek assistance from the federal government in all such situations.

[5] Such an end run around the prohibition of unguided state enforcement of civil immigration law violates the spirit and purpose behind the doctrine of federal preemption, by sacrificing orderly administration of federal law for chaos concealed by a veneer of formalistic legitimacy. *See Report*, *supra* note 2, at 18 ("It has been long recognized that a state's arrest of an alien for a criminal violation of the federal registration provisions 'may be legally suspect if there is reason to believe that the federal government will not prosecute the offender for the violation.'" (quoting GARCIA, *supra* note 2 (citing *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216 (9th Cir. 1995)))).

heavily on *Wyeth v. Levine*, 555 U.S. 555, 129 S. Ct. 1187 (2009), a case addressing the potential preemptory relationship between a state's power to regulate harmful drugs through its tort law and a federal scheme of labeling and drug regulation entrusted to the Food and Drug Administration. 555 U.S. at 558–59. This case is largely inapposite, because the factors in favor of federal preemption are weaker when an individual state attempts to regulate in an area within its traditional police power; regulation of immigration or the conditions of alien admission does not fall within this tradition, as the District Court indeed recognized. *Alabama*, 2011 WL 4469941 at *12 ("Because the states have not traditionally occupied the field of alien registration, the court applies no presumption against preemption for H.B. 56 § 10.").[6] Instead, a more appropriate

[6] The preemption analysis employed by *Wyeth* is more appropriate for a case akin to *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011). There, the State of Arizona passed a statute providing "that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked[,]" and requiring that "all Arizona employers use a federal electronic verification system to confirm that the workers they employ are legally authorized workers." *Id.* at 1973. Though the Court there held that such laws regulating the employment relationship were "within the mainstream of the state's police power," *id.* (citing *DeCanas v. Bica*, 424 U.S. 351, 356, 96 S. Ct. 933, 937 (1976)), the state law in question was a licensing law, and thus fell squarely within a savings clause carved out of 8 U.S.C. § 1324(a)(h)(2) which provided that federal law preempts "any State or local law imposing civil or criminal sanctions (*other than through licensing or similar laws*) upon those who employ unauthorized aliens." *Id.* (emphasis added). Thus, that case

case from which to draw the proper preemption doctrine is *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399 (1941), which dealt with an individual state's foray into the field of federal immigration law.[7] Failing to apply the appropriate legal

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is distinguishable from Alabama's foray into the field of immigration regulation on two grounds. First, the provisions of H.B. 56 in issue here cover not the employment relationship, but instead affirmatively seek to promote increased enforcement of *federal civil* immigration law by the addition of new state crimes and affirmative duties on state police officers. *See* H.B. 56 §§ 10 & 12(a). Second, these provisions of H.B. 56 do not plausibly fit into any savings clause contained in the INA.

[7] In *Hines*, the Pennsylvania legislature enacted an "Alien Registration Act," requiring "every alien 18 [sic] years or over, with certain exceptions, to register once each year; provide such information as is required by the statute, plus any 'other information and details' that the [Pennsylvania] Department of Labor and Industry may direct; pay $1 as an annual registration fee; receive an alien identification card and carry it at all times; show the card whenever it may be demanded by any . . . [relevant state officer]; and exhibit the card as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one." *Id.* at 60. The issue in the case was whether this regulation was preempted by the Federal Alien Registration Act of 1940, ch. 439, 54 Stat. 451–60 (repealed 1952), which also provided a detailed alien registration scheme, including "finger-printing of all registrants," privacy protection for information collected pursuant to that act, and a federal crime for willful failure to register, but did not require aliens to carry their registration documents at all times. *Id.* at 60–61. The Court held that Pennsylvania's law was preempted by the federal act, reasoning that (a) the Constitution confers supreme power on the federal government to regulate the nation's foreign affairs, of which immigration regulation is an integral part; (b) the existence of this broad federal power was entitled to greater than the usual weight accorded to federal regulation in a preemption analysis; (c) the federal scheme of alien registration had been in

doctrine of federal preemption from *Hines*, the District Court adopted an implausibly narrow view of its holding that is divorced from *Hines*'s spirit and reasoning.

The court focused, in isolation, on a particular passage of *Hines* that proclaimed: "states cannot, *inconsistently with the purpose of Congress*, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Alabama*, 2011 WL 4469941 at *12 (District's emphasis). The court explained away *Hines* by observing that the state-created alien registration scheme in that case was not exactly the same as the federal one established by the INA, and concluded that Alabama's effort was permissible because it rested on congressionally recognized inherent state authority to enforce federal immigration law: authority which, in the court's view, is confirmed by INA §§ 287(g) and 274A(h)(3). *Id.* at *34, 37 ("The plain language of this subsection [INA § 287(g)(10)] reveals that local officials have some inherent authority to assist in the enforcement of federal immigration law, so long as the local official

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existence for many years, was "broad and comprehensive," and was intertwined with reciprocal obligations negotiated from foreign governments for the treatment of American citizens while abroad in those countries; and (d) the Congressional purpose to create a uniform scheme of alien registration, integrated into one harmonious whole with the general scheme of federal immigration regulation, would have been frustrated by Pennsylvania's attempt to enact its own scheme of registration. *See id.* at 63–74.

'cooperates' with the federal government."). The court cited to no case precedent in support of its proposition that a state retains such "inherent authority[,]" *see id.* at *37,[8] and this innovative notion is in direct conflict with the language, reasoning, and logic of *Hines*.

First, the court misread the phrase in *Hines*, "inconsistently with the purpose of Congress," failing to account for the modifying language that follows it, which reads: "*conflict* or *interfere with*, *curtail* or compliment, the federal law, or enforce additional or auxiliary regulations." *Hines*, 312 U.S. at 66–67 (emphases added). The court implicitly assumed that this phrase meant that states may "compliment … or enforce additional or auxiliary regulations[,]" so long as such efforts are not undertaken "inconsistently with the purpose of Congress." *See id.* at *14. This reading of the *Hines* language is not obviously correct. The same sentence contains the phrase "conflict or interfere with" and the word "curtail." State laws having these attributes would obviously be inconsistent with congressional purpose.

[8] A state's "inherent authority" to regulate in an area cannot, by definition, be implied from Congressional statute: such authority must either be grounded in the constitutional text or the structure of the federal system of government. In light of the nature of the power being asserted here (i.e., its connection to attributes of federal sovereignty and the federal government's sole power to set the nation's foreign policy, *see* Part II, *infra*), it is unlikely that the framers of the Constitution intended such a state of affairs. *See Hines*, 312 U.S. at 63 n.11, 64 nn.12 & 13 (quoting THE FEDERALIST NO. 42 (James Madison), NO. 80 (Alexander Hamilton), & NO. 3 (John Jay)).

Therefore, the phrase "inconsistently with the purpose of Congress" might be interpreted to mean either (a) that any state laws that "complement, the federal law, or enforce additional or auxiliary regulations" (apart from those within the States' traditional police powers) would, like those laws which have the clearly prohibited attributes, necessarily conflict with Congressional purpose; or (b) that the phrase beginning with "inconsistently" was only intended to apply to complementary or "additional auxiliary regulations," thus describing a dual standard: state regulations conflicting or interfering with, or curtailing federal immigration regulations are, by definition, inconsistent with the purpose of Congress, while state laws adding complementary or auxiliary regulations to the federal scheme must be individually analyzed—under the same standard employed in a normal preemption analysis not implicating the broad federal immigration power—to determine whether they are "inconsistent" with congressional purpose.

While the District Court's strained reading of *Hines* might be supportable if the passage it quoted supplied the only relevant interpretive guidance, a consideration of the rest of *Hines* makes it clear that the interpretation of the opinion's language that is less permissive of state authority is the appropriate one. Taking account of the

> [n]umerous treaties, in return for reciprocal promises from other governments … [to] pledge[] the solemn obligation of this nation to the end that aliens residing in our territory shall not be singled out for discriminatory burdens,

the Court in *Hines* concluded that

> [a]ny concurrent power that may exist [in the individual states to regulate immigration] is restricted to the narrowest of limits.

Hines, 312 U.S. at 68.

Relevant to the question of field or conflict preemption are the varieties of federal and state power implicated.

> In the final analysis, there can be no one crystal clear distinctly marked formula. [The Court's] primary function is to determine whether, under the circumstances of this particular case, [Alabama's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Hines, 312 U.S. at 67. The power of the federal government to regulate immigration is, among these "circumstances," entitled to the greatest weight when the question presented is whether a state has impermissibly interfered with this power.

> "[T]he power to restrict, limit, regulate, and register aliens as a distinct group is *not an equal and continuously existing concurrent power of state and nation, but whatever power a state may have is subordinate to supreme national law*."

Id. at 68 (emphasis added).

That the District Court ignored this important aspect of *Hines*'s reasoning is apparent in its analysis of whether sections 287(g) and 274A(h)(3) of the INA preempt any residual state authority to act in the same field. With its misguided application of *Wyeth*'s holding to the immigration context, the District Court neglected to address the *Hines* Court's command that "[t]he *nature of the power exerted by Congress*, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject." *Hines*, 312 U.S. at 70 (emphasis added). Instead, the court undertook an excessively narrow reading of INA §§ 287(g) and 274A(h)(3) that failed completely to account for special considerations in a preemption analysis when the federal power to regulate immigration is involved.

Section 12(a) of the Act imposes a mandatory duty on "state, county, or municipal law enforcement officer[s] of this state [sic]" to make a "reasonable attempt, when practicable, to determine the immigration status" of a person during "any lawful stop, detention, or arrest" when a "reasonable suspicion exists that the person is an alien who is unlawfully present in the United States[.]" Under this provision, six forms of state-approved identification documents provide a presumption of lawful presence. Finally, section 12(a) provides that the final

determination of immigration status must be made by contacting the federal government pursuant to 8 U.S.C. § 1373(c) (INA § 274A(h)(3)). *Alabama*, 2011 WL 4469941 at *27.

The District Court held that this section of H.B. 56 was not preempted by federal law, reasoning that provisions of the INA requiring federal responses to state immigration status inquiries and others allowing independent enforcement action by states of federal immigration law indicated congressional intent not to preempt. The District Court rejected the reasoning in *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2010), where the Ninth Circuit held that Congress intended to permit states to cooperatively enforce immigration law only in the discretion and under the "close supervision of the Attorney General[.]" *Alabama* 2011 WL 4469941 at *31. Instead, the District Court reasoned that because INA § 287(g)(10) "explicitly carves out certain immigration activities by state and local officials as not requiring a written agreement[,]" *id.* at *35, and because INA § 274A(h)(3) envisions situations where the federal government is obligated to respond to state inquiries as to the immigration status of persons in its custody, *id.* at *36, section 12(a)'s provisions requiring Alabama officers to verify the immigration status of persons in its custody, independent of the Attorney General's direction, were not preempted by federal law.

These positions are untenable for the reasons cited by the Ninth Circuit majority in *Arizona*: they interpret the alleged exceptions presented by INA § 274A(h)(3) and INA § 287(g)(10) to swallow the otherwise unwavering rule that state regulation of immigration may take place only under the close supervision of the U.S. Attorney General. Instead, the District Court interprets the INA to vest completely independent authority in states to apprehend persons they believe to be unlawfully present aliens in service of an all-out civil enforcement policy. "This interpretation would result in one provision swallowing all ten subsections of § 1357(g) [INA § 287(g)]," and would defeat the congressional purpose manifest throughout INA § 287(g) to vest in the Attorney General the ultimate authority to supervise enforcement. *United States v. Arizona*, 641 F.3d 339, 351.[9]

[9] *See, e.g.*, INA §§ 287(g)(1) (permitting the Attorney General to enter into agreements with states by which he or she may deputize state officers whom he or she determines are fit to the task of immigration enforcement); 287(g)(2) (requiring that state officers receive a written certificate of training in federal law before they may be deputized); 287(g)(5) (limiting both in duration and scope such authority delegated to state officers by agreement with the Attorney General of the United States). In light of these provisions and the rest of the subsections of § 287(g), the only reasonable interpretation of § 287(g)(10) is that Congress intended that state officials be available to the Attorney General for deputization in the case of emergent events that would make prior entrance into an agreement impracticable. *Arizona*, 641 F.3d at 350 n.9.

II. THE POWER AND RESPONSIBILITY OF THE FEDEERAL GOVERNMENT TO ADDRESS THE FOREIGN RELATIONS CONSEQUENCES OF ITS CHOSEN IMMIGRATION POLICIES PRECLUDE AN INDEPENDENT ROLE FOR INDIVIDUAL STATES IN THIS FIELD

Express constitutional provisions and the federal system itself vest the sole responsibility for conducting our nation's foreign policy in the federal government and, in addition, reveal that the states are functionally unequipped to shoulder these duties. The Constitution grants the federal government the power to "establish a uniform Rule of Naturalization," U.S. CONST. art. I, § 8, cl. 4, and to "regulate Commerce with foreign Nations," U.S. CONST. art. I, § 8, cl. 3. In addition, the power to regulate immigration rests on attributes of federal sovereignty;[10] the United States, as does every civilized nation, retains the power to set for itself an immigration policy which regulates the admission, detention, and expulsion of aliens.[11] "Where individual state action would impinge in some major way" upon

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[10] *Chae Chan Ping v. United States*, 130 U.S. 581, 602, 604, 9 S. Ct. 623, 628, 629 (1889); *see also Report*, *supra* note 2, at 7 n.12. The federal government has also been entrusted by the Constitution to adopt uniform rules of naturalization. *See DeCanas v. Bica*, 424 U.S. 351, 358 n.6, 96 S. Ct. 933, 938 n.6 (1976) ("The Federal Government has broad constitutional powers in determining . . . the terms and conditions of [aliens'] naturalization[,]. . . . [and] [u]nder the Constitution the states are granted no such powers . . . .") (quoting *Hines*, 312 U.S. at 66) (internal quotations omitted).

[11] *Report*, *supra* note 2, at 7.

this power, "a case for constitutional preemption will be made out—even in the absence of federal statutory enactment."[12]

Further, the legislatures of individual states have neither the incentive nor the capability to consider the impact of immigration regulation on our national interests in the arena of foreign affairs. Instead, the power to regulate immigration is an important pillar of the federal government's exclusive responsibility for the conduct of our nation's foreign policy that, historically, has complimented the diplomatic function of the political branches of government.[13] To allow a state to assume the sort of authority sought here by Alabama gives rise to the paradox of power without responsibility: a state could raise an international crisis through implementation of its own statutes while avoiding the responsibility to address the resulting consequences in any meaningful way.[14]

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[12] *Report*, *supra* note 2, at 7; *see generally Tayyari v. N.M. St. U.*, 495 F. Supp. 1365 (D.N.M. 1980).

[13] *See Report*, *supra* note 2, at 8; *s*ee *generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 16–18 (1st ed. 1972).

[14] *See Hines v. Davidowitz*, 312 U.S. 52, 63 ("If the United States should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?" (quoting *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875))); *see generally* Daniel Booth, Note, *Federalism on Ice: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063 (2006); *Report*, *supra* note 2, at 8.

In the determination of whether a given state effort to regulate in an area not within its traditional police powers is preempted by federal law, "it is of importance that [the] legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively [sic] to demand broad national authority. Any concurrent state power that may exist is *restricted to the narrowest of limits*; the state's power here is not bottomed on the same broad base as is its power to tax." *Hines*, 312 U.S. at 68 (emphasis added).

In its failure to recognize the basic difference in a preemption analysis when a federal power affecting international relations is implicated—as opposed to when a power within the traditional realm of state sovereignty is at issue—the District Court committed reversible error. The court's heavy reliance on *Wyeth* was misplaced because the conflicting bases of respective state and federal power implicated were of a fundamentally different nature in that case. The state there attempted to regulate, through its tort law, labeling requirements for a prescription drug when its labeling and content had been approved by the federal Food and Drug Administration (FDA). The power of a state to protect its own citizens from the harmful affects of dangerous drugs is of a fundamentally different nature than the power to regulate immigration. 555 U.S. at 558–59. The former does not

obviously implicate foreign affairs concerns, while the latter does. This power to regulate harmful consumer products through tort law is much more akin to the tax power of a state than the power to regulate immigration.[15] Further, the District Court's analogy to the state power asserted *Wyeth* is directly undermined by *Hines*; the Court in *Hines* explained that immigration legislation "is an entirely different category from … state pure food laws regulating the labeling on cans." *Hines*, 312 U.S. at 68.

The District Court also rejected evidence offered by the United States—in the form of a sworn declaration by Deputy Secretary of State William J. Burns—that the contested provisions of H.B. 56 were preempted by national policy concerning immigration enforcement and its spillover effects into the arena of foreign affairs. *Alabama*, 2011 WL 4469941 at *17. The court reasoned that even in a field where foreign affairs are implicated to a weighty degree, "[s]tatements from Executive Branch officials and other evidence of foreign discontent or threats of reprisal are insufficient to establish the national position." *Alabama*, 2011 WL

[15] In contrast, legislation based on a state's traditional police power (including, *inter alia*, the right to regulate the commerce within its borders, protect the health and welfare of its citizens by regulating consumer products, and the right to set the terms of the employment relationship) that has some incidental effect on the lives of immigrants might be permissible in the absence of a stronger statement of preemptory intent by Congress. *See Whiting*, 131 S. Ct. 1968, 1971; *supra* note 2 and accompanying text.

4469941 at *18. The court cited *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 327–28, 114 S. Ct. 2268, 2284 (1994), a case where the preemption analysis was necessarily different from that appropriate here, because the state power to tax was involved: a power which even the Court in *Hines* recognized as weighing strongly against preemption by federal law in the absence of a clear statement by Congress of its intent to do so. *See Hines*, 312 U.S. at 68.

The District Court also distinguished two cases where statements of federal policy in the field of foreign affairs were held to be relevant evidence that state action in the same field was preempted: *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374 (2003), and *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 120 S. Ct. 2288 (2000). The court held that these cases supported its interpretation of preemption doctrine, that "to base a finding of preemption … on Executive Branch foreign policy, the court must have some evidence of a national foreign policy—either some evidence of Congress's intent or a treaty or international agreement establishing the national position[,]" as opposed to mere statements by Executive officials. *Alabama* 2011 WL 4469941 at *18.

The INA itself and congressionally ratified treaties which it incorporates provide the predicate foundation for the relevance of the statements by Executive Branch officials. By statutory design, "[the Department of Homeland Security]

exercises a large degree of discretion in determining how to best to carry out its enforcement responsibilities[.]" *United States v. Arizona*, 641 F.3d 339, 351. INA § 103(g)(2) provides that "The Attorney General shall establish such regulations … review such determinations in immigration proceedings, delegate such authority, and perform such other tasks *as the Attorney General determines to be necessary* for carrying out this section." (Emphasis added). This is, in effect, a clear statement of Congressional intent to vest in the relevant Executive official, the Attorney General,[16] discretion in deciding how best to set enforcement priorities within the legal framework established by the INA. Therefore, statements by Executive Branch officials on relevant foreign policy considerations which factor into determining how to set such enforcement priorities cannot be less than probative and relevant to assess whether the federal government has preempted state law purporting to realign such priorities and considerations.

Further, there is at least one treaty, signed and ratified by the United States, that is relevant (even under the District Court's criterion) to the question of whether H.B. 56's emphasis on enforcement-at-all-costs as an overriding immigration policy conflicts with federal law: the Convention relating to the Status

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[16] The Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, vested some of this authority in the Secretary of Homeland Security, another federal official.

of Refugees (Geneva, 28 July 1951) 18 U.N.T.S. 3, *entered into force* 22 April 1954.[17] INA § 208 envisions a regime where even aliens present without lawful status are not automatically subject to detention pending expulsion, but instead afforded the opportunity to present a claim for relief from removal within the complex scheme of adjudication and enforcement established by Congress—a scheme chosen with great deliberation and containing considerable detail.[18]

Under INA § 208, the Secretary of Homeland Security or the Attorney General promulgates regulations in his or her respective discretion, to create "requirements and procedures" to determine eligibility for asylum benefits. INA §

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[17] Although the United States neither signed nor ratified the 1951 Convention, it did sign and ratify the 1967protocol to that Convention, Protocol Relating to the Status of Refugees (New York, 31 Jan. 1967) 606 U.N.T.S. 267, *entered into force* 4 Oct. 1967. Subsequently, the United States enacted The Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102, which brought our nation into compliance with the 1967 protocol by incorporating its commands into INA § 208, which establishes the domestic federal law of asylum.

[18] *See Report*, *supra* note 2, at 12–13. Complex procedures governing normal and expedited removal under sections 240 and 235 of the INA, respectively, combined with the many forms of relief available in removal proceedings (including Cancellation of Removal under INA § 240A(a) and (b)(1), and lasting relief in the form of asylum, withholding of removal under INA § 241(b)(3), and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85), would be thrown into disarray if the federal government was suddenly forced, under state pressure, to incarcerate a flood of new aliens suspected of civil immigration violations.

208(b)(1)(A). The extent of discretion entrusted by Congress to the Attorney General is further demonstrated by INA §§ 208(b)(2)(C) ("The Attorney General may *by regulation* establish *additional limitations and conditions*, consistent with this section, under which an alien shall be ineligible for asylum"), and 208(b)(2)(D) ("There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).") (emphases added).[19] These provisions, vesting in the Attorney General wide discretion in the administration of the asylum provisions under INA § 208, belie the District Court's observation that "[t]here is no evidence before the court … that … any other provision of H.B. 56[] conflicts with Congressional intent regarding national foreign policy goals or with an international agreement 'identifying a federal foreign relation [sic] policy.'" *Alabama* 2011 WL 4469941 at *19 (internal alterations omitted). Individual states may not frustrate the purposes of these delicately crafted federal provisions, which envision a regime whereby the Executive Branch makes difficult discretionary enforcement choices, by foisting an unmanageable flood of new immigration detainees upon the federal government.

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[19] Subparagraph (A)(v) of INA § 208(b)(2) entrusts to the Attorney General the determination whether aliens who potentially pose a danger national security should nonetheless remain eligible for asylum.

CONCLUSION

Alabama has attempted to chart its own course by usurping part of the federal government's power to regulate the conditions of admission of aliens to the territory. However, the individual states, unlike the federal government, do not possess the constitutionally conferred tools to navigate the dangerous seas of foreign affairs of which this power is a part. It is for this reason that the Constitution, well-established rules of statutory construction, over a century of precedent, and important concerns of federalism in our system of divided government require a holding that the District Court erred in refusing to enjoin the provisions of H.B. 56 challenged in this appeal.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing *Brief of Amicus Curiae Bar Association of the City of New York, Immigration and Nationality Law Committee* complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B). The brief has been prepared in a proportionally spaced typeface using 14 point-Times New Roman font and contains 6, 186 words, as counted by Microsoft Word.

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Mark R. von Sternberg

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November 2011, I filed the foregoing **BRIEF OF *AMICUS CURIAE* BAR ASSOCIATION OF THE CITY OF NEW YORK, IMMIGRATION AND NATIONALITY LAW COMMITTEE** with the Court via the CM/ECF system and by same-day mail via Federal Express (the original and six copies of) and served the foregoing **BRIEF OF *AMICUS CURIAE* BAR ASSOCIATION OF THE CITY OF NEW YORK, IMMIGRATION AND NATIONALITY LAW COMMITTEE** on the following counsel of record via Federal Express and the EDF Electronic Brief Uploading system:

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