

No. 11-1789

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE TWELFTH CIRCUIT

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THE LATINO INTEGRATION COALITION,  
THE HISPANIC CENTER FOR JUSTICE,

*Petitioners,*

*v.*

SARAH CHRISTIE, GOVERNOR OF SOUTH  
ALASKA, IN HER OFFICIAL CAPACITY,  
HERMAN GINGRICH, ATTORNEY  
GENERAL OF THE STATE OF ALASKA,  
IN HIS OFFICIAL CAPACITY,

*Respondents.*

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On *En Banc* Rehearing to the  
United States Court of Appeals  
For the Twelfth Circuit

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**BRIEF ON THE MERITS BY RESPONDENTS**

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TEAM N

*Leroy R. Hassell, Sr. National  
Constitutional Law Moot Court Competition*

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## JURISDICTIONAL STATEMENT

This en banc hearing stems from a final decision of the United States District Court for the Northern District of South Alaska. On December 2, 2011 the District Court entered a judgment granting plaintiffs' motion for preliminary injunction. The District Court had subject-matter jurisdiction granted in 18 U.S.C. § 1331 because this case concerned the pre-emption of state law by federal law. The United States Court of Appeals for the Twelfth Circuit heard the appeal pursuant to the jurisdiction granted in 28 U.S.C. § 1295. On February 15th, 2012, the Circuit Court of Appeals for the Twelfth Circuit entered an order to re-hear this case en banc. Because the court has appellate jurisdiction over final orders of the District Court and because the majority of Circuit Court judges voted to rehear this case en banc, the Circuit Court has jurisdiction pursuant to 28 U.S.C. § 46.

### STATEMENT OF ISSUES

1. Whether Sections 2, 3, and 4 of South Alaska's immigration law, S.B. 1156, are preempted by federal law?

### STATEMENT OF THE CASE

#### **I) BACKGROUND**

On August 30, 2011, Governor Sarah Christie signed the "Secure South Alaska's Border's Act," S.B. 1156, which goes into effect on March 12, 2012. S. Alaska Code § 45-1-1. The law enables South Alaska's police officers the ability to enforce immigration within the state's borders.

## **II) PROCEEDINGS BELOW**

On September 7, 2011, Plaintiffs, the Latino Integration Coalition and the Hispanic Center for Justice, filed suit alleging S.B. 1156 is preempted by federal law and violates the Supremacy Clause of the United States Constitution.

On December 2, 2011, the Honorable Hillary Gibbs of the United States District Court for the Northern District of South Alaska granted Plaintiffs' Motion for Preliminary Injunction and denied Defendants' Motion to Dismiss. Defendants appealed to the United States Court of Appeals for the Twelfth Circuit.

The Honorable Judge Pelosi of the United States Court of Appeals for the Twelfth Circuit wrote the opinion for the court and, under the reasoning that S.B. 1156 is not preempted by federal law and does not regulate immigration, entered judgment in favor of the Defendants to reverse the district court's opinion.

On February 15, 2011, by petition of the Plaintiffs, a majority of the circuit judges in regular active service voted to rehear the present case *en banc*.

### **SUMMARY OF ARGUMENT**

#### **A) Regulation vs. Enforcement of Immigration**

The Constitution does not allude directly to immigration, and only naturalization, but the Supreme Court has held that Congress has "plenary power to regulate immigration." *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824). "[T]he states are not permitted to pass laws regulating immigration," *De Canas v. Bica*, 424 U.S. 351, 355 (1975), because the "[p]ower to regulate immigration is unquestionably exclusively a

federal power." *Id.* at 354 (citing *Smith v. Turner*, 48 U.S., 283 (1849); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). The Court clarified what it means to be a "regulation of immigration" as "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Toll v. Moreno*, 458 U.S. 1, 27 (1982).

Sections 2, 3, and 4 of S.B. 1156 do not attempt, in any way, to determine whether an individual should or should not be admitted into the country. Instead, S.B. 1156 identifies those individuals that are not admitted into the country by a verification process through the federal government and enforces federal and state immigration laws against any violators. Thus, S.B. 1156 does not *regulate* immigration.

#### **B) Preemption by Federal Laws**

Article VI, Clause 2 of the United States Constitution mandates that the Constitution and all treaties and laws made pursuant to the Constitution be treated as the supreme law of the land. Thus, if there is a conflict between a state law and a federal law, the federal law will be considered supreme and the state law will be found invalid. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). When analyzing preemption, the court must, in every case, determine whether Congress intended to preempt state law. *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3rd Cir. 2010).

In looking to the provisions of the INA, it is clear that Congress intended that the federal and state governments cooperate with one another to enforce the federal immigration regulations. S.B.

1156 simply codifies South Alaska's regulations regarding how the state government will carry out the duties entrusted to it by Congress as well as the state's attempts to carry out Congress's goals and objectives. For those reasons and others, S.B. 1156 §2, §3, and §4 are not preempted by federal law.

## ARGUMENT

### **I) STANDARD OF REVIEW**

This rehearing is limited solely to the question of whether or not S.B. 1156 is preempted by federal law. Because this is a question of law, the appropriate appellate standard of review in this case is *de novo* review. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2001). *De novo* review is required when the Circuit Court of Appeals is hearing an appeal from the District Court on a question of preemption. *Id.* When *de novo* review of a District Court is required, "no form of appellate deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

### **II) S.B. 1156 ENFORCES IMMIGRATION LAWS BUT DOES NOT REGULATE IMMIGRATION AS DEFINED BY THE SUPREME COURT OF THE UNITED STATES**

#### **A) Immigration Regulation and Enforcement**

Article I, Section 8 of the United States Constitution vests power in Congress "[t]o establish a uniform rule of naturalization." U.S. Const. § 8. The Supremacy Clause of the U.S. Constitution declares the Constitution, federal laws, and treaties as "the Supreme Law of the Land." U.S. Const., art. VI, cl. 2. Though the Constitution does not allude directly to immigration, and only naturalization, the Supreme Court has held that Congress has "plenary power to regulate

immigration." *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824). Moreover, "the states are not permitted to pass laws regulating immigration," *De Canas v. Bica*, 424 U.S. 351, 355 (1975), because the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *Id.* at 354 (citing *Smith v. Turner*, 48 U.S. 283 (1849); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876); *Chy Lung v. Freeman*, 92 U.S. 275 (1876); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)). But the regulation of immigration is of no relevance in this case because neither Sections 2, 3, or 4 of S.B. 1156 regulates immigration. Instead, S.B. 1156 is South Alaska's attempt at enforcing federal standards of naturalization and immigration.

There is a clear distinction between the regulation of immigration and the enforcement of immigration laws. The Court has clarified what it means to be a "regulation of immigration" as "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Toll v. Moreno*, 458 U.S. 1, 27 (1982).

Plaintiffs claim that "[S.B. 1156] trenches upon the federal government's exclusive power to regulate immigration, and is in now way a valid exercise of South Alaska's police power." Compl. 3. As determined below, this reasoning is flawed as the laws simply enforce federal laws and do not impede the purposes of them.

South Alaska's S.B. 1156 does not regulate immigration, even partially, as Plaintiffs attempt to suggest. Instead, Sections 2, 3, and 4 of the law fail to fall on the side of regulation and can

logically and legally only be seen as enforcement of already enacted Federal laws and regulations.

**B) Section Two Does Not Regulate Immigration**

Section 2 of S.B. 1156 is provided for in three parts. First, the authority for any South Alaska police officer, during a lawful stop and where reasonable suspicion exists, to determine the immigration status of the person. Second, the Section provides a police officer the mandatory obligation of checking the immigration status when a person is arrested and verifying this status "with the federal government pursuant to 8 United States Code section 1373(c). Third, the law creates a presumption against any person being an illegal alien if any valid United States federal, state or local government issued identification.

Section 2, in no part, regulates or attempts to regulate immigration as defined by the Supreme Court. *Toll*, 458 U.S. at 27. This Section only mandates officers to check the immigration status of individuals that are either lawfully arrested or where the officer has a reasonable suspicion that the lawfully-stopped individual does not have legal residency status. The plaintiffs continue to argue, Compl. 11, as did the district court, that Section 2 of S.B. 1156 will cause undue burden and hardship on the federal government by causing an unnecessary influx of verification requests by the State of South Alaska. The District Court argues "[s]tate laws have been found to be preempted where they imposed a burden on a federal agency's resources that impeded the agency's function." District Ct. 22. The the District Court supports this claim with *Buckman Co. v. Plaintiff's Legal Comm.*,

531 U.S. 341. This court, as the District Court explains, held that a state law was preempted in part because it would create an incentive for individuals to "submit a deluge of information that the [federal agency] neither wants nor needs, resulting in additional burdens on the FDA's evaluation of an application"). District Ct. 22. The federal government makes no indication or implication that an increased number of verification requests by state authorities would be burdensome, unwanted or unneeded. Instead, the federal government does all it can to improve the cooperation of federal officials in answering these verification requests by state and local authorities. Congress not only requires federal officials to respond to state inquiries, 8 U.S.C. § 1373(c) (2011), but also simplified the process for making sure these verifications were handled as quickly as possible by creating the Law Enforcement Support Center (LESC). Moreover, Congress expressed its intent to welcome state involvement by reserving inherent state authority in immigration law enforcement. 8 U.S.C. § 1357(g)(10) (2011). Therefore, Congress wants state involvement in immigration enforcement. The verification requests are not burdensome and not wanted by Congress; otherwise the laws just discussed would not have been enacted.

Plaintiffs also argue that S.B. 1156 provides that anyone who cannot produce proper government issued identification is "subject to a lengthy and intrusive immigration verification process." Compl. 10. While the verification process may seem lengthy and intrusive, illegal immigration is a serious problem in South Alaska, as it is in a lot of the United States. The federal government understands that they are

unable to tackle this issue on their own, and thus provides direct intent that they want and need the State's help with enforcement. Under 8 U.S.C. § 1357(g)(1), Congress deputizes state and local officers as immigration agents. Moreover, 8 U.S.C. § 1103(a)(11), Congress states that the federal government will compensate states that assist in the enforcement of immigration. Those individuals that cannot produce the proper government issued identification might be in violation of both state and federal immigration laws. In order to protect enforcement of these laws, the state had to enact a mandatory check required by its officers. Moreover, the federal government requires each alien, at least eighteen years of age, to "carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him." 8 U.S.C. § 1304(e) (2011).

Finally, the district court argues that "Congress intended for states to be involved in the enforcement of immigration laws under the Attorney General's close supervision." District Ct. 24. The court states that the "Attorney General 'may enter into a written agreement with a State . . . pursuant to which an officer or employee of the State . . . who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . . may carry out such function.' 8 U.S.C. § 1357(g)(1)." These excerpted portions may cause confusion as to Congress' intent and thus, Congress was sure to include subsection (g)(10), which states:

(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10) (2011). Thus, Congress was sure to make clear that there is no requirement for an agreement between State officials and the Attorney General in order to enforce federal laws.

### **C) Section Three Does Not Regulate Immigration**

Section 3 of S.B. 1156 provides, "in addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), and the person is an alien unlawfully present in the United States." S. Alaska Code § 45-1-3. Moreover, an alien unlawfully present in the United States" who violates Section 3 is "guilty of a Class C misdemeanor and subject to a fine not to exceed [\$100] and not more than 30 days in jail." *Id.* § 3(f). Thus, for violating federal alien registration laws, South Alaska imposes criminal sanctions stated above. Plaintiffs argue that Section 3 not only criminalizes, but also regulates who should and should not be in the country. This is, again, flawed reasoning because

subsection 3(b) explicitly states that "an alien's immigration status shall be determined by verification of the alien's immigration status with the federal government pursuant to 8 U.S.C. § 1373(c)." *Id.* § 3(f).

#### **D) Section Four Does Not Regulate Immigration**

Section 4 of S.B. 1156 provides several motor vehicle regulations to help prevent traffic disruption within the State of South Alaska. The law makes it "unlawful for an occupant of a motor vehicle ... stopped on a street, roadway or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic." S. Alaska Code § 45-1-4 (emphasis added). Refer to Appendix B for the text of S.B. 1156 § 4. In addition, the law makes it unlawful for a person to enter a motor vehicle that is conducting the activity emphasized in italics above. Also, the law makes it unlawful for a person who is unlawfully present in the United States and who is "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state." *Id.* The last subsection of Section 4 provides that any "violation of the this section is a class 1 misdemeanor." *Id.* 4(F).

The law clearly does not intend to be a regulation of immigration as Plaintiffs suggest. This section of the law specifically provides for the determination of an alien's immigration status by the use of (1) a law enforcement officer authorized by the federal government to verify the status, or (2) U.S. Customs and Border Protection pursuant to 8 U.S.C. § 1373. *Id.* 4(E). Thus, the section does not intend to

regulate immigration, but instead help support the enforcement of immigration within the state's borders.

**E) Sections Two, Three, and Four Only Enforce Immigration Laws**

For the foregoing reasons, Sections 2, 3, and 4 are not regulating immigration as defined by the Supreme Court, *Toll v. Moreno*, 458 U.S. 1, 27 (1982), and solely enforcing immigration laws.

**III) S.B. 1156 IS NOT PREEMPTED BY FEDERAL LAW**

**A) Legal Standard of Preemption**

Article VI, Clause 2 of the United States Constitution mandates that the Constitution and all treaties and laws made pursuant to the Constitution are the supreme law of the land. Thus, if there is a conflict between a state law and a federal law, the federal law will be considered supreme and the state law will be found invalid. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). This practice is known as the preemption doctrine. *Id.*

The Supreme Court has recognized three situations in which preemption occurs. *Id.* First, express preemption occurs when a federal law contains a clause that expresses Congress's clear intention to overrule all state law regarding a field of regulation. *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010). Field preemption occurs where the federal laws in a field of regulation are "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Finally, conflict preemption occurs where a state law conflicts with federal law, "either where compliance with both laws is impossible or where state law erects an obstacle to the accomplishment

and execution of the full purposes and objectives of Congress.” *Hillsborough County, Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707.

In spite of the different categories of preemption, all preemption analysis begins with determining the Congressional intent in passing the statute or regulation. *Farina*, 625 F.3d at 115 (quoting *Hillsborough County, Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707 (1985)). Congressional intent “primarily is discerned from the language of the preemption statute and the statutory framework surrounding it.” *Id.* (quoting *Gade*, 505 U.S. at 111).

In addition, the “structure and purpose” of the regulation or statute is relevant as well. *Id.*

Using these preemption principles, it is clear that S.B. 1156 § 2, § 3, and § 4 are not preempted by federal law.

#### **B) Section Two is Not Preempted by Federal Law**

To begin with, S.B. 1156 § 2 is not preempted because it is consistent with Congressional intent. Plaintiffs argue that S.B. 1156 § 2 is both field and conflict preempted, however, this contention is false. Please refer to Appendix A for the text of S.B. 1156 § 2.

##### **i) Section Two is Not Field Preempted**

Plaintiffs argue that “the extensive statutory scheme created by the Immigration and Nationality Act (INA) leaves no room for supplemental state law,” and thus, Congress has made clear their intent to be the sole regulator in the field of immigration. Compl. 11. Because Congress has made clear their intent, Plaintiffs argue that section two is preempted.

In making that argument, it is clear the Plaintiffs looked solely to the sheer number of regulations that comprise the INA and not to what those regulations actually say. Throughout the entirety of the INA, there are numerous provisions that not only allow state cooperation in the enforcement of immigration laws, but encourage it. For example, state and local law enforcement officials are authorized to arrest and detain certain illegal aliens. 8 U.S.C. § 1252c (1996). Additionally, Congress mandates the Attorney General to turn over information regarding illegal aliens that have committed felonies within a state to their respective law enforcement officials. This is so that state law enforcement officials can track, find and arrest these illegal aliens that they then turn over to the federal government for deportation proceedings. *Id.* In examining this provision of United States Code, it is clear that although the federal government has complete control over the regulation of who can and cannot enter or remain in the United States, Congress recognized that they would not be able to enforce the laws without the help of the states. *De Canas v. Bica*, 424 U.S. 351, 354 (1976). Thus, section two of S.B. 1156 is not preempted because the bill is simply the state's regulation on how to handle the duties they were entrusted to carry out by Congress.

Although that provision alone is enough to show that Congress intended for the federal and state governments to work together regarding enforcement, Congress also allows state officers to perform the duties of immigration officers. 8 U.S.C. 1357(g), (1996). Further, if a state officer acts, she does so subject to the direction and

supervision of the attorney general. 8 U.S.C. 1357(g)(3), (1996). However, even if the state officer is not acting subject to the direction of the Attorney General, the state officer is still encouraged to communicate with the Attorney General regarding the immigration status of any individual. 8 U.S.C. 1357(g)(10)(a). Clearly, in enacting these regulations that not only encourage but mandate the cooperation of state and federal authorities, Congress intended for states to be involved in the enforcement of immigration laws.

Congressional intent is the "touchstone" for all preemption analysis. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Congress must intend for the federal law to be supreme in order for state law to be preempted. *Id.* It is clear here, upon analyzing different provisions, that Congress never intended that the enforcement of immigration fall solely upon the shoulders of the federal government. The INA fosters communication and cooperation between federal and state government so as to achieve Congress' objective of regulating immigration in the most effective way possible. S.B. 1156 § 2 is not preempted because it is simply regulating the way in which South Alaska officers can carry out the duties entrusted to them by the federal government.

**ii) Section Two is Not Conflict Preempted**

Section Two requires that, if a law enforcement officer has a reasonable belief that a lawfully stopped individual is an illegal alien, the law enforcement officer must investigate that individual's immigration status. S.B. 1156 § 2 (2011). Plaintiffs contend that

this requirement will "impose a substantial burden on federal authorities, who will be required to respond to an enormous increase in the number of immigration status inquiries." Compl. 11. This requirement, they argue, "unilaterally imposes burdens on the federal government's resources and processes." Compl. 13. Plaintiffs argue that this burden will become an obstacle to the accomplishment of Congress's objectives and thus, S.B. 1156 § 2 is conflict preempted.

This argument fails because it assumes that section two gives officers a power that they did not have before and thus, there will be substantially more inquiries than are currently made. Plaintiffs are ignoring precedent that has granted state and local law enforcement officers the "general investigative authority to inquire into possible immigration violations" for more than 25 years. *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 (10th Cir. 1984). Further, the Immigration and Naturalization Service (INS) is required to respond to ALL inquiries by a federal, state or local government agency "seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law." 8 U.S.C. § 1373(c) (1996).

S.B. 1156 § 2 is not conflict preempted. Examining the provisions of the INA reveal that Congress intended for the state and local governments to contact the federal government regarding potential immigration violations. Additionally, the federal government is mandated to respond to all inquiries. 8 U.S.C. § 1373(c) (1996). This mandate was given after it became clear that it was well within the authority of a state officer to investigate immigration violations.

Thus, Congress recognized that potentially, the INA could face a large amount of inquiries, yet they still included the mandate that they respond. 8 U.S.C. § 1373(c) (1996). It is clear that South Alaska officers, acting within the power given to them by Congress, are acting to further the goals and objectives of Congress, not burden them. Section Two does nothing more than build into state law powers that state officers already had.

**C) Section Three is Not Preempted**

S.B. 1156 § 3 provides that:

“In addition to any violation of federal law, a person is guilty of willful failure to complete or carry and alien registration document if the person is in violation of 8 U.S.C. § 1304(e) or 8 U.S.C. § 1306(a), and the person is an alien unlawfully present in the United States.”

S.B. 1156 § 3a also explains that an “alien unlawfully present in the United States who violates Section Three is guilty of a class C misdemeanor and subject to a fine of not more than one hundred dollars and not more than 30 days in jail.” Plaintiffs argue that Section Three is field preempted because it “supplants federal alien registration laws (and the federal officers who administer and enforce those laws), federal removal procedures and priorities, and congressional judgments regarding the appropriate penalties for unlawful presence in the United States.” Compl. 12. They also suggest that because these provisions are contrary to the Congressional purposes of the INA and thus, are conflict preempted.

**i) Section Three is Not Field Preempted**

The lower court relied on the decision in *Hines v. Davidowitz* in deciding that section three would likely be field preempted. *Hines* dealt with a statute that required aliens to register with the state government, in addition to registering with the federal government. *Hines v. Davidowitz*, 312 U.S. 52, 59 (1941). Further, the Pennsylvania law required aliens to carry the identification card issued by the state government at all times. *Id* at 63. The Court found that the state's registration requirement was preempted by Congress's requirement that all aliens must register with the federal government but are not required to carry their identification cards. *Id* at 78.

*Hines* can be distinguished from the case at hand because the South Alaska regulation does not impose any additional regulation requirements upon alien residents. Instead, the South Alaska bill simply incorporates the federal law that already requires aliens over the age of 18 to register and carry his or her registration card upon his or her person. 8 U.S.C. § 1304(e) (1996). When examining Congressional intent, it is clear that Congress intended for aliens to carry their cards at all times when they are within the United States. S.B. 1156 §3 allows this intention to be carried through the entire state of South Alaska.

**i) Section Three is Not Conflict Preempted**

Section three does not conflict with federal law so as "either where compliance with both laws is impossible or where state law erects an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County, Fla. v.*

*Automated Med. Lab., Inc.*, 471 U.S. 707. First and foremost, compliance with both laws is possible as the state law simply incorporates the federal law. S.B. 1156 § 3 (2011). The only difference is that the subsection attaches state law criminal penalties for failure to abide by the federal laws. S.B. 1156 § 3(f) (2011).

States can attach criminal penalties to conduct that the federal court also sanctions. *Bartkus v. Illinois*, 359 U.S. 121, 131 (1959). In evaluating the different provisions of the INA (as explained in section II(a) above) reveal that Congress, though given sole power to regulate immigration, has created a scheme of laws that foster cooperation between states and the federal government to enforce immigration laws. *De Canas v. Bica*, 424 U.S. 351, 354 (1976). This allocation of concurrent enforcement authority creates a "cooperative federal-state scheme" for the enforcement of immigration laws. *Aminoil U.S.A. v. Cal State Water Res. Control Bd.*, 674 F.2d 1227 (9th Cir. 1982). Thus, section three is not conflict preempted because it does not "erect an obstacle to the execution of the full purposes and objectives of Congress." In fact, it helps Congress to achieve their goals by allowing those state officials who are given power by the INA to ensure that all aliens are properly registered with the federal government.

For the foregoing reasons, federal law does not preempt section three.

#### **D) Section Four is Not Preempted**

Plaintiffs allege that "Section Four criminalizes the act of seeking day labor work and conflicts with the federal government's determination that criminal sanctions should not attach to the solicitation or performance of work by unlawfully present aliens." Compl. 13. Though no citation is provided, Plaintiffs are likely referring to section 1324a of Title 8 of the United States Code. Subsection (h) (2) provides:

##### (2) Preemption

The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

Thus, plaintiffs allege that Section Four is expressly preempted because subsection (F) attaches criminal sanctions to the employers of illegal aliens. This contention is false.

#### **i) Section Four is Not Expressly Preempted**

When evaluating a federal law that contains an express preemption clause, the court must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). 8 U.S.C. 1324(a)(h)(2) is an express preemption clause that states explicitly what types of laws Congress did not want the states enacting. Section four does not fit into this definition. The only types of laws that are preempted are those that impose civil or criminal sanctions upon "those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. 1324a (h)(2),

(1996). Examining each subsection of section four makes clear that the types of behavior being criminalized are not of the type that fall within the preemption clause.

Subsection A of section four prohibits an occupant of a vehicle from picking up passengers with the intent of hiring them if they block traffic while doing so. Section B prohibits the act of entering a car with the purpose of being hired, if the car is blocking traffic while picking that person up. S.B. 1156 §4 (a-b), (2011). Although illegal aliens may be affected by these laws, these regulations are nothing more than traffic regulations that serve to promote the steady flow of traffic. Thus, these provisions do not fall under the preemption clause of 8 U.S.C. § 1324(a)(h)(2). Plaintiffs may argue that these provisions criminalize the act of hiring an illegal aliens but again, these sections prohibit nothing more than blocking traffic while hiring or being hired from a vehicle. S.B. 1156 § 4 (A-B), (2011).

Subsection C prohibits illegal aliens from seeking employment within the state of South Alaska. S.B. 1156 § 4(C), (2011). Similar to subsections A-B, this does not fall within the preemption clause found at 8 U.S.C. § 1324(a)(h)(2). The only thing the preemption clause prohibits is the attaching of criminal penalties to those who employ unauthorized aliens. It does not mention laws attaching criminal penalties to those aliens seeking employment. Thus, it is not expressly preempted.

## **ii) Section Four is Not Field Preempted**

The argument can be made that Section Four is field preempted because the scheme of regulation surrounding the employment of aliens is so pervasive as to indicate Congress' intent to be the sole regulator in that field. In *Chamber of Commerce v. Whiting*, the court addressed the same express preemption clause that is of issue today. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1970 (2011). In *Chamber*, the court found that within that preemption clause, Congress clearly left room for the states to make their own laws regarding licensure. *Id.* This reveals, not only that the express preemption clause left room to the states to make their own regulations, but also that the scheme of regulation surrounding the employment of aliens left room for states to make their own laws. Congress intended to leave room for the States to make their own procedures that "simply implement the sanctions that Congress expressly allowed the States to pursue." *Id.* at 1971. Thus, section four is not field preempted.

For the foregoing reasons, federal law does not preempt section four.

**CONCLUSION**

The judgment of the United States District Court for the Northern District of South Alaska should be reversed because Sections 2, 3, and 4 of S.B. 1156 are not preempted by federal law.

Respectfully submitted.

TEAM N

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JANUARY 13, 2012

**APPENDIX A**

S.B. 1156 § 2 provides that:

For any lawful stop, detention or arrest made by a law enforcement official...where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person. The person's immigration status will be verified with the federal government pursuant to 8 U.S.C. § 1373(c)...A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid South Alaska driver license.
2. A valid South Alaska non-operating identification license.
3. A valid tribal enrollment card or other form of tribal identification.
4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

S. Alaska Code § 45-1-2.

**APPENDIX B**

S.B. 1156 § 4 provides:

A. It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway or highway to attempt to hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

B. It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

C. It is unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state.

D. A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or South Alaska Constitution.

E. In the enforcement of this section, an alien's immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.

2. The United States immigration and customs enforcement of the United States customs and border protection pursuant to 8 U.S.C. § 1373 (c).

F. A violation of this section is a class 1 misdemeanor.

S. Alaska Code § 45-1-4.