Case Nos. 11-14532-CC & 11-14535-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

United States of America,

Plaintiff-Appellant,

v.

State of Alabama, et al.,

Defendants-Appellees.

On Appeal From the United States District Court
for the Northern District of Alabama
Case No. 2:11-cv-2746-SLB

BRIEF *AMICUS CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPELLEES, AND PARTIALLY AFFIRMING AND PARTIALLY REVERSING THE DISTRICT COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS*

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law.[1] ACLJ attorneys have argued in numerous cases before the Supreme Court of the United States and other federal courts, and have participated as amicus curiae in the Arizona immigration law litigation. *See United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 2011 WL 3556224 (U.S. Dec. 12, 2011). The ACLJ is committed to the constitutional principles of federalism and separation of powers, both of which are jeopardized by the Administration's attack against Alabama's immigration law, HB 56.

STATEMENT OF THE ISSUES

Amicus adopts in its entirety the Statement of the Issues ("Questions Presented") set forth in the State of Alabama's Response Brief for Appellees.

SUMMARY OF THE ARGUMENT

This case reveals a clash between the Administration and Congressionally-enacted laws over the states' role in immigration law enforcement. For the past quarter century, Congress has welcomed, and in fact highly depends on, state and

[1] Pursuant to Eleventh Circuit Rule 29, the undersigned counsel states that the parties consented to the filing of this brief. No party's counsel authored this brief in whole or in part and no person - other than the amicus curiae, its members or its counsel - contributed money that was intended to fund preparing or submitting this brief.

local assistance in enforcing federal immigration laws. National immigration policy, as codified in Congressional Acts, provides for concurrent federal/state authority to enforce federal immigration laws. Many states across the country are enacting laws like Alabama's HB 56. In keeping with Congress's intent, most of these state laws, including HB 56, mirror federal immigration provisions and incorporate federal standards. State efforts to promote national policy as embodied in federal statutes should be upheld provided they hew closely to federal standards. Because the provisions of HB 56 track federal standards, HB 56 promotes Congressional immigration policy and is not preempted.

The Administration's attack on HB 56 undermines federalist and separation of powers principles by permitting the Administration's policy preferences to trump Congress's statutory acknowledgement that states have inherent authority to enforce laws that profoundly affect their citizens' welfare. A decision sustaining the Administration's claims will effectively leave the states powerless over unchecked illegal immigration and the associated social and economic costs that their citizens must bear.

ARGUMENT

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

This lawsuit arose out of the current Administration's objection to Alabama's comprehensive immigration law, HB 56, but the case brings to light a significant conflict between the Executive and Legislative branches of the federal government. The gravamen of the Administration's Complaint is that HB 56 independently (and impermissibly) enforces federal immigration law. The Administration's preemption argument is premised upon the assumption that the Executive's enforcement and foreign policy priorities should trump Congress's intent in enacting federal immigration laws. The preemption claims in this case must therefore be considered against the backdrop of the clash between federal law and the Administration's policy goals. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637-38, 72 S. Ct. 863, 871-72 (1952); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427, 123 S. Ct. 2374, 2393 (2003) (noting that if the case had presented a conflict between federal law and presidential foreign policy objectives, *Youngstown* would control).

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

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

Youngstown, 343 U.S. at 637-38, 72 S. Ct. at 871-72 (Jackson, J., concurring) (emphasis added, footnote omitted); *see also Medellin v. Texas*, 552 U.S. 491, 524, 128 S. Ct. 1346, 1367-68 (2008) (Justice Jackson's concurrence in *Youngstown* sets forth the "accepted framework" for evaluating claims of presidential power).

The Administration's preemption claims are manifestly incompatible with the expressed will of Congress, and it is Congress that has plenary power over immigration.

A. Because Congress Has Plenary Power Over Immigration, The District Court Properly Held That The Administration's Enforcement Priorities Do Not Have Preemptive Force.

Congress has plenary power to prescribe the immigration laws. *INS v. Chadha*, 462 U.S. 919, 940, 103 S. Ct. 2764, 2779 (1983) ("The plenary authority of Congress over aliens . . . is not open to question"); *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S. Ct. 1473, 1478 (1977) ("'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens") (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S. Ct. 671, 676 (1909)); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659, 12 S. Ct. 336,

338 (1892) (identifying different sources for Congress's power over aliens). While the Executive has power to conduct United States foreign policy, federal immigration laws reflect national and foreign policy goals in the immigration context. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 72 S. Ct. 512, 519 (1952) (Immigration policy "is vitally and intricately interwoven with contemporaneous policies in regard to [among other things] the conduct of foreign relations . . . .").

Where Congress exercises plenary power to prescribe laws, the Executive must follow Congress's direction. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696-99, 121 S. Ct. 2491, 2502-04 (2001) (holding the Attorney General had no power to detain aliens indefinitely because that power conflicted with 8 U.S.C. § 1231(a)(6) (2006)); *Jama v. ICE*, 543 U.S. 335, 368, 125 S. Ct. 694, 715 (2005) (Souter, J., dissenting) ("Congress itself . . . significantly limited Executive discretion by establishing a detailed scheme that the Executive must follow in removing aliens").[2] Though some immigration laws grant Executive officials

[2] *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S. Ct. 309 (1950), is not contrary to this principle. One issue in *Knauff* was whether Congress unconstitutionally delegated legislative power to the President. *Id*. at 542. 70 S. Ct. at 312. The Court found that it had not, noting that "[t]he exclusion of aliens is a fundamental act of sovereignty" that "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *Id*. Thus, "Congress may in broad terms authorize the executive to exercise the power . . . ." *Id*. at 543, 70 S. Ct. at 313. "Executive officers may be entrusted with the duty of specifying the procedures *for carrying out the congressional intent*." *Id*.

discretion, the laws balance the various concerns they embody within the constraints of each statute's text, not the Executive's exercise of prosecutorial discretion. *Cf. Oceanic Navigation Co.*, 214 U.S. at 339-40, 29 S. Ct. at 676 (Congressional authority over aliens "embraces every conceivable aspect of that subject . . . ."); *Jama*, 543 U.S. at 368, 125 S. Ct. at 715-16 (Souter, J., dissenting) ("Talk of judicial deference to the Executive in matters of foreign affairs, then, obscures the nature of our task here, which is to say not how much discretion we think the Executive ought to have, but how much discretion Congress has chosen to give it").

Therefore, federal agency regulation can preempt state law only when the agency is acting within the scope of its congressionally-delegated authority, that is, when the agency is furthering Congress's intent. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369, 106 S. Ct. 1890, 1898-99 (1986). In other words, when Congress tells an agency to act, the agency must comply. *See Massachusetts v. EPA*, 549 U.S. 497, 533, 127 S. Ct. 1438, 1462 (2007) (agency cannot refuse to obey statutory commands to pursue its own priorities).

There is a strong presumption against implied administrative agency preemption, which is all that the Administration could potentially claim here because DHS has no formal regulations expressly preempting state laws:

(emphasis added). *Knauff* thus presupposes that the Executive must act in accord with Congress's wishes.

> [A]gencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 717, 105 S. Ct. 2371, 2377 (1985). As for the scope of the agency's delegated authority, a court may not "simply . . . accept an argument that the [agency] may . . . take action which it thinks will best effectuate a federal policy" because "[a]n agency may not confer power upon itself." *Louisiana Public Serv. Comm'n*, 476 U.S. at 374, 106 S. Ct. at 1901-02. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress." *Id.* at 374-75, 106 S. Ct. at 1901-02.

To determine whether federal immigration laws preempt state laws then, Congressional enactments and goals must be the focal point, not administrative agency policy as dictated by the Executive Branch's prosecutorial preferences, or its foreign policy objectives. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77, 129 S. Ct. 538, 543 (2008); *De Canas v. Bica*, 424 U.S. 351, 363, 96 S. Ct. 933, 940 (1976) (state law dealing with aliens is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of *Congress*") (quotations omitted) (emphasis added).

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

Congress has passed numerous laws demonstrating its intent to welcome State participation in concurrent enforcement of federal immigration laws. Specifically, in 1996, Congress also enacted 8 U.S.C. § 1357(g)(1) (2006), which allows state and local officers to be deputized as immigration agents. When deputized as immigration agents pursuant to § 1357(g)(1), state and local police are granted authority that extends beyond their inherent power to arrest for immigration violations. Sections 1357(g)(1) through (9) include the power to *investigate* immigration violations, to amass evidence, and to prosecute an immigration case. State and local officials operating pursuant to a § 1357(g) agreement also have the authority to take custody of aliens on behalf of the federal government. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Alb. L. Rev. 179, 191 (2005). Thus, when state and local officials operate pursuant to a §1357(g) agreement, they are essentially endowed with the powers of a federal immigration agent. Those powers must be exercised with the oversight and cooperation of the Attorney General.

What § 1357(g)(10) does, however, is to clarify that this congressionally-delegated authority is distinct from an officer's inherent authority to inquire into

immigration status and arrest for immigration violations. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 Geo. Immigr. L.J. 459, 478 (2008); *see also United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1298 (10th Cir. 1999). That inherent authority preexisted the 1996 law and was unimpaired by it. *See, e.g.*, *United States v. Contreras-Diaz*, 575 F.2d 740, 743-745 (9th Cir. 1978); *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984) (State and local officers have "general investigatory authority to inquire into possible immigration violations."). That inherent authority to make arrests does not require the oversight of federal authorities. All Alabama HB 56, section 18 does is require state and local officials to exercise on a consistent basis the Congressionally-recognized inherent authority they already possessed.

To ensure cooperation by federal officials, Congress *required* immigration authorities to respond to state and local inquiries seeking to "verify or ascertain the citizenship or immigration status of any individual . . . ." 8 U.S.C. § 1373(c) (2006). Congress did not establish a hierarchy of inquiries according to national security considerations. Instead, 8 U.S.C. § 1373(c) requires LESC staff to answer all inquiries about immigration status.

If the Administration thinks Congress should establish priorities for LESC inquiries, it can ask Congress to do so. The Administration does not have the authority to do so itself and then claim that exercising that authority preempts state laws. *See Massachusetts v. EPA*, 549 U.S. at 533, 127 S. Ct. at 1463 (2007) (agency cannot pursue its own priorities in defiance of statutory commands); *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 717, 105 S. Ct. 2371, 2377 (1985) (Ascribing preemptive force to administrative decision-making absent Congressional authorization "would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence").

The Administration's reading of §1357(g)(10) essentially eviscerates that subsection's meaning. The Administration urges this Court to follow the Ninth Circuit's analysis collapsing subsection (g)(10) into the preceding subsections (g)(1) through (9), conferring upon the Attorney General authority to exercise a sort of (logistically impossible) hyper control over all state participation in federal immigration law enforcement. See *United States v. Arizona*, 641 F.3d 339, 349-350 (9th Cir. 2011). This was not Congress's intent, as evidenced by the following language: "*Nothing* in [§1357(g)] shall be construed to require an agreement . . . to communicate with the Attorney General regarding the immigration status of any individual" 8 U.S.C. § 1357(g)(10) (emphasis added).

The Administration would have this Court distort Congress's command to U.S. Immigration and Customs Enforcement to provide state and local authorities with information about an alien's status at the state and local authorities' request into a "[d]on't call us, we'll call you" relationship. *United States v. Arizona*, 641 F.3d at 377 (Bea, J., dissenting).

Congress further encouraged State participation in federal immigration law enforcement by banning municipal sanctuary policies that prohibited officers from contacting federal officials about possible immigration violations. Congress passed two statutes in 1996 to ban sanctuary policies. 8 U.S.C. § 1644 (2006) forbids state or local official actions that "prohibit[], or in any way restrict[]" a state or local government entity's ability to "send[] to or receiv[e] . . . information regarding the immigration status, lawful or unlawful, of an alien in the United States." 8 U.S.C. § 1373(a)-(b) expands preemption of sanctuary policies to those that prohibit or restrict government entities or officials from sending or receiving information regarding "citizenship or immigration status" and also preempts laws that prohibit or restrict immigration status information sharing. *See, e.g., City of New York v. United States*, 179 F.3d 29, 31-32 (2d Cir. 1999) (upholding constitutionality of law banning sanctuary policies).

Congress has also used its spending power, U.S. Const. art. I, §8, cl. 1, to support cooperative immigration enforcement by appropriating federal funds for

state and local governments that assist in enforcing immigration laws. 8 U.S.C. § 1103(a)(11) (2006).

Finally, the Executive Branch itself has encouraged concurrent immigration enforcement. In 1996, the Justice Department's Office of Legal Counsel ("OLC") supported state and local enforcement of criminal INA provisions and also concluded that state and local officers could detain aliens for registration law violations. 20 Op. O.L.C. 26, 29, 37 (1996) (Exhibit A).[3] Since 2001, the Justice Department has entered warrants ("detainers") for civil immigration violations into the National Crime Information Center database ("NCIC"), available nationally to state and local officers. Kobach, *The Quintessential Force Multiplier*, *supra* at 191. In 2002, a revised OLC memo dropped the "criminal law enforcement only" limitation and analyzed the statutes and cases expressing and recognizing Congress's intent to allow broad concurrent enforcement. Mem. from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, for the Attorney General, *Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, 5-8 (Apr. 3, 2002) (Exhibit B).

Each provision of HB 56 mirrors federal immigration provisions, incorporates federal standards and poses no obstacle to federal immigration policy.

[3] Courts also recognize state and local authority to arrest aliens for violating alien registration laws. *See, e.g., Estrada v. Rhode Island*, 594 F.3d 56, 65 (1st Cir. 2010); *Contreras-Diaz*, 575 F.2d at 743-745.

In fact most of the provisions, including particularly sections 10, 12, and 18 promote federal policy. To accept the Administration's argument that HB 56 is preempted without any support from statutory language is to "undercut the principle that it is Congress rather than the courts that preempts state law." *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (quoting *Gade* v. *Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 111, 112 S. Ct. 2374, 2390 (1992) (Kennedy, J., concurring)). In the absence of any statutory language indicating conflict between HB 56 and federal law, this Court should decline the invitation to engage in a "free-wheeling judicial inquiry" into whether HB 56 is "in tension with federal objectives." *Whiting*, 131 S. Ct. at 1985.

The District Court's decision declining to enjoin HB 56 sections 10, 12(a), 18, 27, 28, and 30 is consistent with the Supreme Court's decision in *Whiting*. In *Whiting*, the Court rejected the assumption – an assumption which pervades the Administration's brief – that state immigration laws that trace federal provisions can still be impliedly preempted even though statutory language supports non-preemption. Where "Congress specifically preserved [enforcement] authority for the States, it stands to reason that Congress did not intend to prevent the States from using the appropriate tools to exercise that authority." 131 S. Ct. at 1981. Because in *Whiting*, Arizona incorporated federal standards into its law revoking

the licenses of businesses that knowingly hire illegal aliens, the Court held that "there can by definition be no conflict between state and federal law . . . ." *Id.*

Equally significant is the *Whiting* Court's holding that where Congress has carved out a role for the states in immigration enforcement, preemption cases involving uniquely federal areas of regulation are inapposite. Specifically, the very cases the Administration relies on, such as *American Insurance Association v. Garamendi*, 539 U.S. at 401, 405-06, 123 S. Ct. at 2379, 2381-82 (2003), *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373-74, 120 S. Ct. 2288, 2294-95 (2000), and *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352, 121 S. Ct. 1012, 1019 (2001), were not relevant because in those cases, the "state actions . . . directly interfered with the operation of a federal program." 131 S. Ct. at 1983. Arizona's licensing law in *Whiting* did not interfere with the federal laws banning the employment of illegal aliens because those federal laws operated "unimpeded by the state law." *Id.* at 1984.

Similarly, HB 56 impedes no federal law. To the contrary, HB 56 promotes Congressional immigration policy by enforcing the very laws the Administration avoids enforcing.

II. FEDERALISM PRINCIPLES SHOULD BE PARAMOUNT IN ANALYZING PREEMPTION CHALLENGES TO STATE LAWS THAT DO NO MORE THAN ENFORCE FEDERAL IMMIGRATION STANDARDS.

The Supreme Court emphasized in *Plyler v. Doe* that "unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service." 457 U.S. 202, 229, 102 S. Ct. 2382, 2401 n.23 (1982). Thus, the states are not "without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns." *Id.* at n.23. In the realm of illegal immigration control, preempting state laws that mirror federal standards but provide slightly different enforcement mechanisms eviscerates the states' ability to "make choices that are responsive to their residents' desires, to experiment, and to advance liberty and freedom within their boundaries." Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 Brook. L. Rev. 1313, 1326 (2004) ("[A] broad vision of inferred preemption invalidates beneficial state laws."). *See also* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 697 (1991); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. Chi. Legal F. 57, 80 (2007).

The Constitution is structured so that "[s]tates possess sovereignty concurrent with that of the Federal Government, subject only to limitations

imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S. Ct. 792, 795 (1990).

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory v. Ashcroft, 501 U.S. 452, 458, 111 S. Ct. 2395, 2399 (1991) (citing Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1491–1511 (1987)) (other citations omitted). The Founders established the federalist system so that states could "respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *United States v. Bond*, 131 S. Ct. 2355, 2364 (2011).

Although the Supremacy Clause, U.S. Const. art. VI, cl. 2, confers "a decided advantage" to the federal government, the power to preempt state laws is "*an extraordinary power* . . . [that the Court] *assume[s] Congress does not exercise lightly*." *Gregory*, 501 U.S. at 460, 111 S. Ct. at 2400 (emphasis added). And, when the preemption claimed is one of implied conflict, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal act." *Whiting*, 131 S. Ct. at 1985 (quotations omitted). Thus, "the true test

of federalist principle[s]" comes in preemption cases. *Egelhoff v. Egelhoff*, 532 U.S. 141, 160, 121 S. Ct. 1322, 1335 (2001) (Breyer, J., dissenting).

The states bear the overwhelming brunt of the social and economic costs resulting from unchecked illegal immigration. Although most tax revenues generated by illegal immigrants flow to the federal government, almost all the costs, including those borne by locally funded social services and those caused by illegal immigrant crime, accrue to the states. Schuck, *Taking Immigration Federalism Seriously*, *supra*, at 80. Of the net national illegal immigration cost of almost $100 billion, the federal government bears only $19.3 billion while state and local governments bear a net loss of $79.8 billion spent in services and benefits provided to illegal aliens. Jack Martin & Eric A. Ruark, Fed'n for Am. Immigration Reform, *The Fiscal Burden of Illegal Immigration on United States Taxpayers* 79 (July 2010) [hereinafter *FAIR: The Fiscal Burden of Illegal Immigration*], *available at*

http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921.

State sovereignty is most undermined when the states are left to "the mercy of the Federal Government," and deprived of "their opportunities to experiment and serve as 'laboratories.'" *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567, 105 S. Ct. 1005, 1026 n.13 (1985) (Powell, J., dissenting). The Administration's assault on Alabama, as well as the other states it has sued seeking

to enjoin their immigration laws, treads upon federalism by stripping the states of all sovereignty over problems that Congress and our federalist system have traditionally committed to the police power of the states. HB 56 mirrors federal immigration provisions and in no way interferes with any *Congressionally* ordained federal objective. HB 56 should not be preempted.

CONCLUSION

In Case No. 11-14532, this Court should affirm the District Court's judgment declining to enjoin Sections 10, 12, 18, 27, 28, and 30. In Case No. 11-14674, this Court should reverse the injunction against Sections 11(a), 13(a), 16, and 17.

Respectfully submitted this 3rd day of January, 2012,

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