No. 12-_____

In the
Supreme Court of the United States

STATE OF ALABAMA AND ROBERT BENTLEY, GOVERNOR OF ALABAMA, IN HIS OFFICIAL CAPACITY,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LUTHER STRANGE
Alabama Attorney General

John C. Neiman, Jr.
Alabama Solicitor General
*Counsel of Record
Andrew L. Brasher
Deputy Ala. Solicitor Gen'l
Kasdin E. Miller
Ass't Ala. Solicitor Gen'l

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
jneiman@ago.state.al.us

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QUESTION PRESENTED

In separate subparagraphs of 8 U.S.C. §1324, Congress has prohibited persons from (a) concealing or harboring unlawfully present aliens, (b) encouraging or inducing them to come into or reside in the United States, or (c) transporting them in furtherance of their unlawful presence. *See* 8 U.S.C. §1324(a)(1)(A)(ii)-(iv). Ten States have followed suit by enacting laws—often as part of comprehensive statutes modeled on the one at issue in *Arizona v. United States*, 132 S. Ct. 2492 (2012)—making it a state-law crime for their residents to engage in the same conduct. In the decision below, the Eleventh Circuit became the first Court of Appeals to hold that §1324 facially preempts all such provisions. In so doing, the court struck down an Alabama statute, ALA. CODE §31-13-13. The question presented is the following:

> Whether 8 U.S.C. §1324 impliedly and facially preempts state laws, such as ALA. CODE §31-13-13, prohibiting a State's residents from:
> (a) concealing or harboring aliens who are present in the United States in violation of federal law;
> (b) encouraging or inducing aliens to enter into or reside in the State, when their entry or residence would violate federal law; or
> (c) transporting unlawfully present aliens within the State in furtherance of their unlawful presence.

PARTIES TO THE PROCEEDINGS

Petitioners, the State of Alabama and Governor Robert Bentley, were appellees and cross-appellants in the Eleventh Circuit. Respondent, the United States of America, was appellant and cross-appellee. The Eleventh Circuit also listed National Fair Housing Alliance, Inc. as appellee, but that designation was erroneous. The Alliance filed an *amicus* brief supporting the United States in the District Court. It is not a party to the case.

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PETITION FOR A WRIT OF CERTIORARI

The State of Alabama and its Governor, Robert Bentley, respectfully petition this Court for a writ of certiorari to exercise plenary review over the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion is reported as *United States v. Alabama*, 691 F.3d 1269 (CA11 2012), and reproduced at App. 1a-56a. The District Court's opinion is reported as *United States v. Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011), and reproduced at App. 59a-202a. The Eleventh Circuit's order denying panel rehearing and rehearing *en banc* is reproduced at App. 203a-04a.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §1331. The Eleventh Circuit had appellate jurisdiction to review the District Court's rulings at the preliminary-injunction stage under 28 U.S.C. §1292(a)(1). The Eleventh Circuit entered a final judgment on August 20, 2012, and denied a timely petition for panel rehearing and rehearing *en banc* on October 17, 2012. App. 1a, 203a. This Court's jurisdiction rests on 28 U.S.C. §1254(1). The petition is timely because Alabama and the Governor have filed it within 90 days of the Eleventh Circuit's denial of rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2, of the Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."

The two statutes relevant to the question presented, §31-13-13 of the Alabama Code and 8 U.S.C. §1324, are reproduced at App. 205a-16a.

INTRODUCTION

It is rare for this Court to grant certiorari on a question that only one Court of Appeals has had a chance to address. But the current disputes between the federal government and the States over illegal immigration warranted an important departure from that norm last year. *See Arizona v. United States*, 132 S. Ct. 2492 (2012). The need to end these disputes justifies the same approach here. This case arrives in the same posture as did *Arizona*. It would allow the Court to resolve one of the few issues that still divides the country's governments about the extent to which Congress has preempted States from addressing these problems.

Like Arizona, Alabama and several other States enacted substantially identical, multifaceted statutes on illegal-immigration issues. The United States then sued its fellow sovereigns before these statutes went into effect, alleging that Congress had impliedly preempted various aspects of these laws. The lower courts in *Arizona* became the first to rule on the United States' challenge to four of the provisions common to these statutes. This Court granted certiorari to address those issues last Term, without awaiting further percolation or a split on the central questions in the case.

That decision to exercise review was good for the country. The resulting opinion on the merits, rejecting the United States' facial challenge to one of those provisions but upholding it as to the other three, provided much-needed clarity. As a consequence, in the other cases the United States brought against States with these laws, officials on both sides have been able to agree about how the

lower courts should address provisions substantially similar to the four this Court considered.

But *Arizona* did not resolve the validity of a fifth, equally important provision that is at issue in these cases. A section common to many States makes it illegal for residents to engage in one of three distinct acts:

(1) concealing or harboring aliens who are present in violation of federal law;
(2) inducing aliens to come to or reside in the State when their entry or residence would violate federal law; or
(3) transporting them in furtherance of their unlawful presence.

These state-law provisions give state and local governments much-needed tools to prevent human trafficking. They also are distinct, from a preemption perspective, from the provisions this Court considered in *Arizona*.

Arizona's statute has one of these provisions, but it was not before this Court in *Arizona*. In the decision below, the Eleventh Circuit became the first Court of Appeals to hold that Congress has impliedly preempted all state laws of this sort. That ruling was as erroneous as it was broad. It is as worthy of this Court's consideration as was the Ninth Circuit's decision in *Arizona*. As explained below, preemption principles point in the same direction with respect to these provisions as they did with respect to the Arizona provision on which the United States did not prevail. But even if that is not right, the States need a definitive instruction as soon as possible. The circumstances that prompted review in *Arizona* compel the same course of action here.

STATEMENT OF THE CASE

A. States' responses to illegal immigration.

In 1952, Congress passed the principal federal statute regulating immigration, the Immigration and Nationality Act, 8 U.S.C. §1101 *et seq*. The INA "set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 359 (1976)). Congress has amended the INA on numerous occasions.

Despite Congress's efforts, "[s]heer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial 'shadow population' of illegal migrants—numbering in the millions—within our borders." *Plyler v. Doe*, 457 U.S. 202, 218 (1982). The States face serious problems as a result. Whereas unacceptably high numbers of their lawful residents remain unemployed, unacceptably high numbers of people working within their borders are not lawfully authorized to do so. *See* Doc 69 – Pg 2 & Exh A. Although unlawfully present aliens benefit from government services, they do not bear the same tax responsibilities as lawful residents. *See generally* CONGRESSIONAL BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 9-10 (2007). The citizenry's perception that governments are powerless to do anything about these issues has undermined respect for the rule of law. *See* ALA. CODE §31-13-2 (legislative findings); Doc 69 – Exh B.

These problems have been pronounced in Arizona. *See Arizona*, 132 S. Ct. at 2500. Arizona's legislature responded by enacting the law that became known as Senate Bill 1070, or "S.B. 1070" for short. *See* 2010 Ariz. Legis. Serv. Ch. 113 (Apr. 10, 2010) (codified at ARIZ. REV. STAT. ANN. §11-1051 *et seq.*). This Court considered four provisions from this statute in *Arizona*. *See Arizona*, 132 S. Ct. at 2501-10.

But the problems are not confined to one State, and numerous other legislatures followed suit. In 2011 and 2012, before this Court decided *Arizona*, policymakers in Georgia, Indiana, South Carolina, and Utah all adopted statutes containing provisions similar to, and in some respects identical to, Arizona's S.B. 1070. *See* 2011 Ga. Laws Act 252 (H.B. 87) (May 13, 2011); 2012 Ind. Legis. Serv. P.L. 126-2012, §4 (S.E.A. 262) (Mar. 19, 2012); 2008 Utah Laws Ch. 26 (S.B. 81) (Mar. 13, 2008); 2011 S.C. Laws Act 69 (S.B. 20) (June 27, 2011). In preceding years, legislatures in Colorado, Florida, Missouri, and Oklahoma had already adopted similar laws. *See* 2006 Colo. Legis. Serv. Ch. 285 (S.B. 06-206) (May 30, 2006); 2009 Fla. Sess. Law Serv. Ch. 2009-160 (C.S.H.B. 123) (June 11, 2009); 2008 Mo. Legis. Serv. H.B. 2366 (July 7, 2008); 2007 Okla. Sess. Law Serv. Ch. 112 (H.B. 1804) (May 8, 2007).

The Alabama Legislature, for one, enacted a law sometimes referred to as House Bill 56, or "H.B. 56." *See* Ala. Act No. 2011-535 (June 9, 2011) (codified at ALA. CODE §31-13-1 *et seq.*). Of the four provisions this Court later considered in *Arizona*, Alabama's H.B. 56 adopted three. *See* ALA. CODE §31-13-10 (penalties for unlawfully present aliens who willfully

fail to register with the federal government); *id.* §31-13-11(a) (prohibiting unauthorized aliens from soliciting or accepting employment); *id.* §31-13-12 (requiring police to make immigration status checks on certain persons who are stopped or detained).

B. Harboring, inducement, and transportation provisions.

At issue here is another provision, common to several of these States, that this Court did not have the opportunity to consider in *Arizona*. Section 13 of H.B. 56, codified as §31-13-13 of the Alabama Code, is modeled on §5 of Arizona's S.B. 1070. *See* ARIZ. REV. STAT. ANN. §13-2929. As a general matter, these provisions make it illegal to knowingly or recklessly commit one of three acts:

(1) concealing or harboring unlawfully present aliens, *see* ALA. CODE §31-13-13(a)(1);
(2) encouraging or inducing aliens to come to or reside in the State when their entry or residence in the United States will violate federal law, *see id.* §31-13-13(a)(2); or
(3) transporting unlawfully present aliens in furtherance of their unlawful presence, *see id.* §31-13-13(a)(3).

ALA. CODE §31-13-13(a)(1)-(3) (reprinted at App. 213a-16a). Like the other statutes based on Arizona's S.B. 1070, Alabama's statute provides that law enforcement must verify, with the federal government, that the person the defendant harbored, transported, or induced was not lawfully present in the United States. *See* ALA. CODE §31-13-13(g).

Eight other States, in addition to Arizona and Alabama, have laws prohibiting one or more of these activities. *See* COLO. REV. STAT. §18-13-128 (transporting); FLA. STAT. §787.07 (transporting); GA. CODE ANN. §§16-11-200 (transporting), 16-11-201 (harboring), & 16-11-202 (inducing); IND. CODE §35-44.1-5-4 (concealing and harboring); MO. REV. STAT. §577.675 (transporting); OKLA. STAT. tit. 21, §446 (concealing, harboring, and transporting); UTAH CODE ANN. §76-10-2901 (concealing, harboring, transporting, and inducing); S.C. CODE ANN. §16-9-460 (concealing, harboring, and transporting). But this Court did not address these provisions in *Arizona*. The district court in *Arizona* had rejected the United States' request for a preliminary injunction against Arizona's version of the provision, *see United States v. Arizona*, 703 F. Supp. 2d 980, 1002-04 (D. Ariz. 2010), and the United States did not appeal.

These provisions supplement a federal statute, 8 U.S.C. §1324, that uses much the same language and criminalizes much the same activity. *See* App. 205a-12a. One subparagraph from that statute makes it unlawful to knowingly conceal or harbor unlawfully present aliens. 8 U.S.C. §1324(a)(1)(A)(iii). Another makes it illegal to encourage or induce unlawfully present aliens to enter or reside in "the United States." *Id.* §1324(a)(1)(A)(iv). A third makes it a crime to transport unlawfully present aliens in furtherance of their unlawful presence. *Id.* §1324(a)(1)(A)(ii).

C. Proceedings below

This case is one of several suits the Justice Department filed to enjoin statutes like S.B. 1070. When Alabama's governor signed H.B. 56, the Justice Department had already sued Arizona. *See* Complaint, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 10-1413-PHX-SRB), ECF No. 1. It soon followed the same path against Alabama, South Carolina, and Utah.

1. Proceedings in the District Court

Before H.B. 56 went into effect, the United States sued Alabama and its governor in the Northern District of Alabama. *See* App. 60a. As the United States did in the complaints it filed against the other States, it alleged that federal immigration law preempted several of Alabama's provisions. *See id.* The complaint sought both preliminary and final injunctive relief, and the decision below arose from the District Court's rulings at the preliminary-injunction stage.

The District Court denied the preliminary injunction against some provisions and granted it as to others. *See* App. 57a-58a. The court's decision addressed the three Alabama provisions that overlapped with those that this Court would consider in *Arizona*. *See id.* at 82a-147a. But the District Court's reasoning on the harboring, inducement, and transportation provision was most important for present purposes.

On this front, the District Court did not rule out the possibility that States could enact *some* laws prohibiting their residents from engaging in harboring, transportation, and inducement. *See* App.

150a-52a. But the court reasoned that certain distinctions between Alabama's provision and the parallel federal code section gave rise to preemption. *See id.* at 152a-65a. First, whereas the inducement subparagraph from the federal statute bars people from inducing unlawfully present aliens to come to or enter "the United States," 8 U.S.C. §1324(a)(1)(A)(iv), the Alabama provision prohibits the State's residents from inducing unlawfully present aliens to come to or enter the "state," ALA. CODE §31-13-13(a)(2). Second, Alabama's transportation subparagraph has language, not replicated in the federal statute, saying "[c]onspiracy to be so transported shall be a violation of this subdivision." *Id.* §31-13-13(a)(3).* The District Court reasoned that in these respects the provision impermissibly conflicts with federal law. And it enjoined the entire provision. App. 165a.

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* The District Court also took note of two other distinctions that do not affect this petition. The court first observed that unlike the federal statute, *see* 8 U.S.C. §1324(a)(1)(C), the Alabama provision did not exempt certain ministers and missionaries. *See* App. 155a. That distinction is no longer relevant because the Alabama Legislature has amended §31-13-13 to create the same exemption. *See* Ala. Act No. 2012-491, §1, p. 30 (May 18, 2012) (codified at ALA. CODE §31-13-13(a)(4)). The District Court also found conflict-preempted a separate subsection making it a crime to enter into certain rental-housing agreements with unlawfully present aliens. *See* App. 160a-63a. Although that subsection was originally part of §31-13-13, the Legislature later moved it into a separate Code section, §31-13-33. *See* Ala. Act No. 2012-491, §§1 & 6, pp. 29-30, 57-58. The Eleventh Circuit held that §31-13-33 is conflict-preempted, *see* App. 27a-28a, and Alabama is not seeking review of that ruling in this petition. Any questions surrounding §31-13-33's validity are thus not at issue here.

2. Proceedings in the Eleventh Circuit

The United States appealed the District Court's denial of the preliminary injunction against some of the statute's disputed provisions, and the state defendants cross-appealed the grant of a preliminary injunction as to the others.

a. Three things of note happened before the Eleventh Circuit rendered its decision.

First, at a juncture when the merits briefing in the Eleventh Circuit was not yet complete, this Court granted certiorari in *Arizona*. *See Arizona v. United States*, 132 S. Ct. 845 (2011) (mem.). The Eleventh Circuit announced that it would not issue its decision until after this Court had ruled.

Second, before this Court decided *Arizona*, the Alabama Legislature responded to the District Court's decision in this case by amending, among other things, the provision at issue here. *See* Ala. Act No. 2012-491, §1, pp. 28-32 (May 18, 2012). The most important change for present purposes was to specify that courts are to interpret the prohibitions on harboring, inducement, and transportation "consistent with 8 U.S.C. §1324(a)(1)(A)." *Id.* §1, p. 29 (codified at ALA. CODE §31-13-13(a)(1)-(3)).

The third critical event was this Court's decision in *Arizona*. The Eleventh Circuit called for supplemental briefing on *Arizona*'s impact, and the parties agreed that this Court's ruling had effectively resolved the appeal as to three of H.B. 56's provisions. *See* Ala. CA11 Suppl. Br. 1-3; U.S. CA11 Suppl. Br. 3-4, 8-9. But because this Court did not address the validity of Arizona's harboring, inducement, and transportation provision, *see supra*

at 8, the parties did not agree on the proper way for the Eleventh Circuit to resolve the issue.

b. In its opinion, the Eleventh Circuit held that federal immigration law, and more particularly 8 U.S.C. §1324, facially preempts these provisions. The court relied heavily on its opinion in a companion case, issued by the same panel on the same day, sustaining private plaintiffs' challenge to Georgia's version of this provision. *See Ga. Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1263-67 (CA11 2012) (addressing GA. CODE ANN. §§16-11-200, -201, & -202).

Unlike the District Court, the panel held that these harboring, transportation, and inducement provisions are field-preempted, such that the States have no power to enact laws in these areas at all. App. 25a. The Eleventh Circuit reasoned that the parallel federal provision "'comprehensively addresses criminal penalties for these actions undertaken within the borders of the United States, and a state's attempt to intrude into this area is prohibited because Congress has adopted a calibrated framework within the INA to address this issue.'" *Id.* at 24a (quoting *Ga. Latino Alliance*, 691 F.3d at 1264). Citing this Court's field-preemption precedents, the panel concluded that "Alabama is prohibited from enacting concurrent state legislation in this field of federal concern." *Id.* at 25a (citing *Arizona*, 132 S. Ct. at 2501-03; *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956)).

The Eleventh Circuit also held, in the alternative, that the provision was conflict-preempted "in its entirety." *Id.* at 28a n.11 (emphasis omitted). The

court inferred that Congress intended "to confer discretion on the Executive Branch" related to these acts because the federal code "'confin[ed] the prosecution of federal immigration crimes to federal court.'" *Id.* at 24a (quoting *Ga. Latino Alliance*, 691 F.3d at 1265). Allowing states to pass their own laws prohibiting the same conduct, the court concluded, impermissibly undermined that intent. *Id.* at 25a-26a.

The court also added that in its view certain "individual" components of §31-13-13 were conflict-preempted. App. 28a. The court concluded that the inducement subsection impermissibly differed from 8 U.S.C. §1324 because Alabama's law prohibits the inducement of an alien to enter the "state," rather than "the United States." App. 26a-27a. The court also held that the sentence making it a crime to conspire to be illegally transported varied too far from the corresponding federal prohibition on transportation. App. 27a. The court acknowledged Alabama's argument that if these individual components were preempted, the right remedy was to enjoin only those components and to leave the remainder of the provision in place. App. 28a n.11. But the court held that it was unnecessary to limit the injunction in light of its antecedent conclusions that the provision "*in its entirety*" was field-preempted and in conflict with Executive Branch discretion. *Id.* (emphasis in original).

Alabama and the Governor sought panel and *en banc* rehearing, but the Eleventh Circuit denied the petition. *See id.* at 204a.

REASONS THIS COURT SHOULD GRANT CERTIORARI

This case involves one of the last pieces of the puzzle this Court undertook to resolve in *Arizona*. It was only by happenstance that the Court did not address this question at that time. This Court should answer it now, for the same reasons it granted certiorari at a similar stage in *Arizona*.

When Arizona asked this Court to consider the issues surrounding S.B. 1070, the United States offered what normally would have been stout arguments against certiorari. The Government's BIO observed that except with respect to one of the four statutory provisions the Ninth Circuit had considered, Arizona had "not even claim[ed] that a conflict" existed among appellate courts. Brief for the United States in Opposition at 15, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182). The BIO also convincingly argued that even on that one provision, the split Arizona asserted was illusory. *Id.* at 28-30. The BIO pointed out that Arizona was seeking "review of a preliminary injunction, not a final judgment." *Id.* at 32. And because the questions at issue were percolating in the other courts where the Justice Department had filed suit, declining certiorari would have allowed "the relevant legal issues" to "have been refined by thorough consideration" by those lower courts. *Id.*

These sorts of circumstances would doom a certiorari petition in any ordinary case. But Arizona correctly observed that "[n]othing about this lawsuit and these issues is ordinary." Petition for a Writ of Certiorari at 24, *Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182). The Justice Department's "own actions—in bringing this extraordinary injunctive action and in

pursuing similar litigation against other States—highlight the pressing significance." Reply Brief for Petitioners at 1, *Arizona*, 132 S. Ct. 2492 (2012) (No. 11-182). And awaiting further percolation was not a viable option when the cost was allowing "extraordinary confrontations between sovereigns to proliferate." *Id.* at 3. As Arizona put it, "[t]he choice between the multiplication of such confrontational federal actions and a definitive resolution by this Court is not a close one." *Id.* at 4.

This Court's decision to grant Arizona's petition was the right thing for the country. It allowed the Court to effectively eliminate a huge chunk of these "confrontations between sovereigns," *id.* at 3, and it allowed the Justice Department and state AGs to agree about many aspects of these cases going forward.

But *Arizona* did not resolve all the important aspects of these controversies. Because the United States did not appeal its initial loss in *Arizona* on the harboring, inducement, and transportation provision, no fewer than ten States still face uncertainty about their laws in this area. Four disputes, including this one, remain pending between the United States and States over the question presented. *See United States v. South Carolina*, Nos. 2:11-2958 & 2:11-2779, ___ F. Supp. 2d ___, 2012 WL 5897321 (D.S.C. Nov. 15, 2012) (maintaining preliminary injunction), *appeal docketed*, No. 12-2514 (CA4 Dec. 17, 2012); United States' Notice of Motion & Motion for a Preliminary Injunction at 2, *United States v. Utah*, Nos. 2:11-CV-01072-CW & 2:11-CV-00401-CW-EJF (D. Utah Dec. 5, 2011), ECF No. 136; Complaint at 24, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010)

(No. 10-1413-SRB), ECF No. 1. Likewise, private plaintiffs are seeking to enjoin these provisions. *See, e.g.*, *Valle del Sol v. Whiting*, No. 10-1061, at 8 (D. Ariz. Sept. 5, 2012) (order granting preliminary injunction), *appeal docketed*, No. 12-17152 (CA9 Sept. 26, 2012); *Ga. Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1263-67 (CA11 2012); Complaint for Declaratory & Injunctive Relief at 29-32, 59-60, *Lowcountry Immigration Coal. v. Haley*, No. 2:11-cv-02779-RMG (D.S.C. Oct. 12, 2011), ECF No. 1; Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction at 33-34, *Utah Coal. of La Raza v. Herbert*, No. 2:11-cv-00401-BCW (D. Utah May 6, 2011), ECF No. 37. And absent a definitive pronouncement from this Court, officials in five more States may soon have to choose between declining to enforce their statutes or defending lawsuits brought by the Justice Department or coalitions of private interest groups. *See* COLO. REV. STAT. §18-13-128; IND. CODE §35-44.1-5-4; FLA. STAT. §787.07; MO. STAT. §577.675; OKLA. STAT. tit. 21, §446.

Just as in *Arizona*, the pendency and stakes of these lawsuits make this Court's immediate intervention appropriate. As explained below, this Court's analysis of the provisions in *Arizona* does not answer the distinct question presented here. To the contrary, the Eleventh Circuit's conclusions are inconsistent with this Court's precedents, and its decision has created a conflict among lower courts. This petition is the right vehicle to help move these confrontations toward the full stop everyone, on all sides, desires.

A. The Eleventh Circuit misapplied *Arizona* and created a conflict among lower courts.

Arizona did not hold that all state laws addressing illegal-immigration issues are preempted. Nor did it hold that the particular provisions at issue here are incompatible with federal law. It instead applied preexisting, generally applicable preemption rules to the four provisions on which Arizona had sought this Court's review. *See Arizona*, 132 S. Ct. at 2500-01. For reasons that varied with each provision, *Arizona* concluded that these principles required the facial invalidation of three of the provisions but not the fourth. *See id.* at 2501-10.

These governing principles require state law to yield, even in the absence of a federal statute expressly preempting it, if the Court can draw one of two inferences about Congress's intent. The first is field preemption, under which the state law is impliedly preempted if it regulates "conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id.* at 2501. The second is conflict preemption, under which the state law is impliedly preempted if either "'compliance with both federal and state regulations is a physical impossibility'" or "the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In holding that the provisions at issue here fail on both field- and conflict-preemption grounds, the Eleventh Circuit reached a different conclusion from

the only state courts that appear to have considered the question. In *State v. Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008), Arizona's intermediate appellate court rejected a criminal defendant's preemption claims against an analogous, pre-S.B. 1070 Arizona statute. That statute makes it a crime to transport unlawfully present aliens for a commercial purpose. *Id.* at 709 n.8 (citing ARIZ. REV. STAT. §13-2319). The court held that §1324 did not field-preempt the Arizona statute because "[t]here is no indication in the INA or its history that Congress intended to preclude harmonious state regulation touching on the smuggling" of unlawfully present aliens. *Id.* at 711. The court also held that this provision was not conflict-preempted because "to a large extent, Arizona's objectives mirror federal objectives." *Id.* at 712. The court added that the state law "further[ed] the legitimate state interest of attempting to curb 'the culture of lawlessness' that has arisen around this activity by a classic exercise of its police power." *Id.* at 711-12. The Arizona courts, and one federal district court, have reiterated these conclusions. *State v. Barragan-Sierra*, 196 P.3d 879, 890 (Ariz. Ct. App. 2008); *We Are Am./Somos Am., Coal. v. Maricopa Cnty. Bd. of Supervisors*, 594 F. Supp. 2d 1104, 1114 (D. Ariz. 2009) (rejecting field-preemption challenge to statute), *aff'd in part and rev'd in non-pertinent part,* 386 Fed. Appx. 726, 727 (CA9 2010) (holding that "it's not 'readily apparent' that federal law preempts Ariz. Rev. Stat. § 13-2319").

Those holdings are incompatible with the Eleventh Circuit's analysis, and this Court should grant certiorari to determine which of these decisions was right. To be sure, unlike the state court in

Flores, the Eleventh Circuit had the benefit of this Court's decision in *Arizona*. But the provisions this Court held invalid in *Arizona* are materially different from the provisions at issue here, and this Court's opinion on the Arizona provisions did not require the decision below. In concluding otherwise, the Eleventh Circuit misconstrued what this Court said in *Arizona* on both the field- and conflict-preemption fronts.

1. The Eleventh Circuit misapplied *Arizona* when it found these provisions field-preempted.

The Eleventh Circuit's error on field preemption stretched that doctrine in unprecedented ways. As this Court noted in *Arizona*, "[f]ield preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." 132 S. Ct. at 2502. A finding of field preemption dramatically cabins State sovereignty, so this Court has resorted to it only in narrow circumstances. The federal scheme must be "'so pervasive . . . that Congress left no room for the States to supplement it,'" or the "'federal interest'" must be "so dominant that the federal system will be assumed to preclude enforcement of state laws.'" *Id.* at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The fields of harboring, inducement, and transportation do not fall within those descriptions. To be sure, this Court in *Arizona* did strike down a *registration* provision, Section 3 of S.B. 1070, on field-preemption grounds. But this Court's holding that Congress had preempted the "field of alien

registration" was limited to that field. *Id.* (emphasis added). That conclusion flowed from *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941), which held that states cannot "complement" the "standard for the registration of aliens" or "enforce additional or auxiliary regulations." *See Arizona*, 131 S. Ct. at 2501; *id.* at 2529-30 (Alito, J., concurring in part and dissenting in part). No precedent from this Court similarly holds that Congress has preempted the different fields at issue here, and the general principles set forth in *Hines* and *Arizona* point in the other direction.

The language of 8 U.S.C. §1324, for one, belies the Eleventh Circuit's holding. In contrast to the text of the federal registration statutes, which "reflects a congressional decision to foreclose *any* state regulation" of alien registration, *Arizona*, 131 S. Ct. at 2502 (emphasis added), the federal harboring statute recognizes that States will play a role. As the Eleventh Circuit noted, the federal code by its terms "allow[s] state officials to arrest" persons for harboring, transportation, and inducement crimes. App. 22a; *see* 8 U.S.C. §1324(c) (providing that "all . . . officers whose duty it is to enforce criminal laws" have "authority to make . . . arrests for a violation . . . of this section"). Congress thus acknowledged that States have a legitimate interest in directing their officers to engage in on-the-spot regulation of these activities. It is implausible that Congress, in the same breath, meant to implicitly preclude state legislatures from regulating these same activities through generally applicable laws.

Logic and common sense confirm the point. This Court previously has found field preemption only in

areas where the federal interest is "so dominant" as to eliminate the State's regulatory interest. *Arizona*, 132 S. Ct. at 2501 (quoting *Rice*, 331 U.S. at 230). The Court thus has held that States cannot make it a crime to commit perjury in federal court, or to commit sedition against the United States—two areas in which, as a matter of common sense, a State's interest in developing its own laws is decidedly unclear. *See Thomas v. Loney*, 134 U.S. 372, 375-76 (1890) (perjury in federal court); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (sedition against the United States). The same logic holds for the state registration provisions at issue in *Hines* and *Arizona*. The point of *Hines* was that Congress had adopted a single, "uniform national registration system" for alien registration. *Hines*, 312 U.S. at 74. Once Congress had stepped into the field, the States had little interest in passing their own laws to force aliens to comply with Congress's uniform rules. *Cf. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348-51 (2001) (States cannot pass laws making it illegal to commit a fraud on the federal Food and Drug Administration).

That logic does not hold for the different provisions at issue here. Although these provisions may occasionally criminalize acts taken by unlawfully present aliens, these statutes' heartland is in regulating conduct of the States' *own* citizens—the lawful residents of the State, in other words, who engage in the prohibited acts of harboring, transportation, and inducement. These state laws thus do not "touch on foreign relations" to the same degree as alien-registration laws. *Arizona*, 132 S. Ct. at 2506. Nor is there reason to infer that Congress

intended to exclude States from regulating their own citizens' conduct in this field. To the contrary, harboring and concealment have their most significant practical effects on the States and localities where these activities occur. Both the people who do the concealing and those who are concealed may commit crimes to perpetuate the concealment, and their actions may cause collateral damage to other, lawfully present state residents. States have compelling, freestanding interests in preventing their citizens from contributing to these problems.

The most apt precedent in this context is thus not *Hines*, but *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847). This Court in *Fox*, while acknowledging that the Constitution vests the national government with exclusive jurisdiction to punish the counterfeiting of money, held that States do have authority to implement their own laws prohibiting their residents from passing counterfeit currency. *See id.* at 433-34. State legislative action in that area is justified, despite its intersection with an issue of distinct federal concern, because fraudulent transactions in counterfeit money have damaging local effects. As the *Fox* Court explained, preemption made no sense in that context because "[t]he punishment of a cheat or a misdemeanour practised within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties." *Id.* at 434; *accord Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963) (no federal preemption over avocado regulation because "supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local

concern"). Given the States' distinct interest in precluding their residents from helping others evade the law, field preemption is an equally senseless theory in the case at hand.

The Eleventh Circuit's contrary conclusion rests on the sweeping and unprecedented premise that Congress occupies a field, to the exclusion of the States, whenever it enacts laws that "comprehensively address[] criminal penalties for these actions undertaken within the borders of the United States." App. 24a. If that is true, then challenges to state drug-distribution laws will be in the pipeline soon. *See* 21 U.S.C. §841 (comprehensively addressing criminal penalties for drug distribution). But that is not the way field preemption works. As this Court held long ago, "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *United States v. Lanza*, 260 U.S. 377, 382 (1922).

2. The Eleventh Circuit misapplied *Arizona* when it found these provisions conflict-preempted in their entirety.

The Eleventh Circuit compounded its error by citing conflict preemption as an alternative basis for striking down the provision. That holding represents a similarly important and unwarranted expansion of the limited principles this Court applied in *Arizona*.

The Eleventh Circuit was on particularly shaky ground when it held that this provision impermissibly "undermines the intent of Congress to confer discretion on the Executive Branch" to decline to prosecute certain federal cases under 8 U.S.C.

§1324. App. 25a. It is unclear why the Eleventh Circuit found it significant, for these purposes, that 8 U.S.C. §1329 "confin[es] the prosecution of federal immigration crimes to federal court." *Id.* (quoting *Ga. Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250, 1265 (CA11 2012)). Every federal crime works the same way. *See* 18 U.S.C. §3231 ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."). For each criminal activity that both the States and federal government choose to prohibit, there will always be a possibility that a local D.A. will pursue a case that a local U.S. Attorney has chosen to let go. But the courts do not normally call this phenomenon "conflict preemption." They normally call it "federalism."

In citing *Arizona* to support its theory, the Eleventh Circuit once again glossed over critical distinctions between Arizona's registration provision and the different provision at issue here. This Court found that Arizona's registration provision conflicted with federal law because it gave state officials "the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Arizona*, 132 S. Ct. at 2503. But this was a problem only because the Congress has adopted a uniform alien-*registration* scheme, and because the Arizona *registration* provision had a structure that the provisions at issue here do not share. That registration provision had the practical effect of "add[ing] a state-law penalty

for conduct proscribed by federal law." *Id.* at 2501. In contrast, the provisions at issue here do not simply impose state-law "penalties" for what are really violations of federal law. They actually proscribe the harboring, transportation, and inducement conduct in question. And whereas it is plausible that a State's prosecution of an alien for violating federal registration laws could "frustrate federal policies" concerning foreign affairs, *Arizona*, 132 S. Ct. at 2503, it is hard to say the same of a State's prosecution of its residents for the different acts at issue here.

3. The Eleventh Circuit misapplied *Arizona* when it found individual components of these provisions preempted.

The Eleventh Circuit committed further error when, on top of finding the entire law facially invalid, it opined that two of the law's "individual" components were conflict-preempted for more particular reasons. App. 28a.

The court first wrongly took issue with language in §31-13-13's inducement subparagraph, §31-13-13(a)(2). Consistent with the parallel statutes in Arizona and two other States, the language in Alabama's provision makes it illegal to induce certain aliens to come to or reside in "this state." *See* ALA. CODE §31-13-13(a)(2); *accord* ARIZ. REV. STAT. ANN. §13-2929(A)(3); GA. CODE ANN. §16-11-202(b); UTAH CODE ANN. §76-10-2901(2)(c). The Eleventh Circuit read this language as making it illegal to help unlawfully present aliens cross state lines, whether or not they are already present in the United States. This was a problem, according to the

court, because "it is not (and has never been) a federal crime for a person to encourage an alien to migrate into another state" after the alien is already "inside the [United States'] territory." App. 26a. That reasoning is faulty on a couple of levels. Even if that asserted difference in the statutes created an obstacle to the federal government's enforcement of the immigration laws—and it does not—this Court in *Arizona* cautioned that in these pre-enforcement challenges, "it would be inappropriate to assume," before state courts have had an opportunity to interpret their provisions, that they "will be construed in a way that creates a conflict with federal law." 132 S. Ct. at 2510. And Alabama's provision is most naturally read as prohibiting lawful residents from causing unlawfully present aliens to enter "the state" only when those persons are simultaneously entering, in the statutes' words, "*the United States* . . . in violation of federal law." ALA. CODE §31-13-13(a)(2) (emphasis added).

The Eleventh Circuit made a similar mistake when it opined that an individual sentence from the transportation subparagraph, §31-13-13(a)(3), was preempted. This sentence, which resembles the law in two other States, specifies that "[c]onspiracy to be so transported shall be a violation of this subdivision." ALA. CODE §31-13-13(a)(3); *accord* S.C. CODE ANN. §16-9-460; *State v. Flores*, 188 P.3d 706, 711 (Ariz. Ct. App. 2008) (holding that aliens who are smuggled can be convicted under Arizona law). The Eleventh Circuit asserted that this component of the law is individually preempted because, in the court's view, "unlawfully present aliens who are transported 'are not criminally responsible for

smuggling under 8 U.S.C. § 1324.'" App. 27a (quoting *United States v. Hernandez-Rodriguez*, 975 F.2d 622, 626 (CA9 1992)). But the Eleventh Circuit cited nothing in support of that proposition except dicta from a Ninth Circuit case. And that dicta is contrary to the language of the federal statute, which imposes penalties on "[a]ny person" who "engages in any conspiracy to" transport aliens in furtherance of their unlawful presence. 8 U.S.C. §1324(a)(1)(A)(v).

In any event, the Eleventh Circuit's concerns about these individual components of §31-13-13 did not justify its injunction against the entire provision. The Alabama Legislature made the statute's components severable, *see* Ala. Act No. 2011-535, §33, and the courts' normal course is to "enjoin only the unconstitutional applications of a statute while leaving other applications in force," *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006). Thus, these individualized preemption arguments would warrant, at most, an injunction against the individual components, not the entire provision. The Eleventh Circuit acknowledged this point, but justified its broader holding on its prior reasoning that §31-13-13 is void "in its entirety" because of field preemption and the need for federal officials to exercise prosecutorial discretion. App. 28a n.11 (emphasis omitted). That wide-sweeping theory is the heart of the decision below, and it deserves this Court's review.

B. Pragmatic considerations call for immediate review.

It is only because of the vagaries of litigation that this Court has not already decided this question. If the United States had appealed its district-court loss on this issue in *Arizona* to the Ninth Circuit, then this Court almost certainly would have taken it up when it granted certiorari in that case. But because the United States did not pursue the claim then, it remains very much in dispute in courts throughout the country. As was true of the issues on which this Court granted certiorari in *Arizona*, the benefits of immediately answering this question outweigh any gains that could be derived from further percolation in the remaining cases.

Four of these still-pending cases are the sorts of "extraordinary confrontations between sovereigns" that, as Arizona pointed out when it sought certiorari in *Arizona*, uniquely justify this Court's immediate review. Reply Brief for Petitioners at 3, *Arizona*, 132 S. Ct. 2492 (2012). The United States is seeking to enjoin these provisions not only in this case, but also in its suits against Arizona, South Carolina, and Utah. *See United States v. South Carolina*, Nos. 2:11-2958, 2:11-2779, ___ F. Supp. 2d ___, 2012 WL 5897321 (D.S.C. Nov. 15, 2012) (maintaining preliminary injunction), *appeal docketed*, No. 12-2514 (CA4 Dec. 17, 2012); United States' Notice of Motion & Motion for a Preliminary Injunction at 2, *United States v. Utah*, Nos. 2:11-CV-01072-CW & 2:11-CV-00401-CW-EJF (D. Utah Dec. 5, 2011), ECF No. 136; Complaint at 24, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 10-1413-PHX-SRB), ECF No. 1. At a time when

governments face daunting fiscal problems, these controversies impose costs that no one can afford. And financial considerations are the tip of the federalism iceberg here. The States and the federal government do not revel in being adverse to each other, and officials on both sides want these cases to reach their final resolution quickly. Although each case presents unique issues, the harboring, inducement, and transportation question is the one that cuts across all of them. In light of the similar statutes in five other States, more DOJ lawsuits can be expected soon. *See* COLO. REV. STAT. §18-13-128; FLA. STAT. ANN. §787.07; IND. CODE §35-44.1-5-4; MO. REV. STAT. §577.675; OKLA. STAT. tit. 21, §446. It makes sense to answer this question before these cases proceed.

This is particularly so because private plaintiffs have filed their own, facial challenges to several of these provisions. *See Valle del Sol v. Whiting*, No. 10-1061 (D. Ariz. Sept. 5, 2012) (order granting preliminary injunction), *appeal docketed*, No. 12-17152 (CA9 Sept. 26, 2012); *Ga. Latino Alliance for Human Rights*, 691 F.3d at 1250; Complaint for Declaratory & Injunctive Relief at 29-32, 59-60, *Lowcountry Immigration Coal. v. Haley*, No. 2:11-2779 (D.S.C. Oct. 12, 2011), ECF No. 1; Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, *Utah Coal. of La Raza v. Herbert*, No. 2:11-cv-00401-BCW (D. Utah May 6, 2011), ECF No. 37. When private plaintiffs prevail in civil-rights suits, they seek attorney's fees under 42 U.S.C. §1988. The fee claims may be particularly high if the plaintiffs prevail in these *Arizona*-like cases, for a number of groups have elected to join

these complaints *en masse*. *See, e.g.*, *Hispanic Interest Coal. v. Governor of Alabama*, 691 F.3d 1236, 1239 (CA11 2012) (36 private plaintiffs represented by a total of 39 attorneys). Unless this Court intervenes now, officials in jurisdictions where those plaintiffs have not yet sued may soon have to either expose their States to these lawsuits or decline to enforce their duly enacted laws.

The nature and breadth of the Eleventh Circuit's decision cements the case for certiorari. It is standard practice for this Court to grant review when a Court of Appeals declares a federal statute unconstitutional. *See* E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP & E. HARTNETT, SUPREME COURT PRACTICE §4.12, at 264 (9th ed. 2007). Something close to that presumption should apply when, as here, the lower court facially invalidates an important statute that has parallels in several States. The Eleventh Circuit did not send Alabama and other States back to the drawing board for another try, giving them an opportunity to tailor the provisions more narrowly to address some limited concern. The court instead held that States simply lack the power to regulate their citizens' conduct in this important field.

The Eleventh Circuit was wrong, and States should have this power. But whether they do or not, they deserve to know now, rather than having to wait for years of costly, controversial litigation to provide a definitive answer. Just as these considerations warranted immediate review in *Arizona*, they warrant closing the loop on these issues here.

CONCLUSION

This Court should grant certiorari and reverse the Eleventh Circuit's judgment.

Respectfully submitted,

LUTHER STRANGE
Ala. Attorney General

John C. Neiman, Jr.
Ala. Solicitor General
Counsel of Record

Andrew L. Brasher
Dep. Ala. Solicitor Gen'l

Kasdin E. Miller
Ass't Ala. Solicitor Gen'l

OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 242-7300
jneiman@ago.state.al.us

Attorneys for Petitioners

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