

No. 11-14535

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**HISPANIC INTEREST COALITION OF ALABAMA, *et al.*,  
*Plaintiffs-Appellants,***

**v.**

**ROBERT BENTLEY, *et al.*,  
*Defendants-Appellees***

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
No. 5:11-CV-02484-SLB**

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**BRIEF OF THE ALABAMA STATE CONFERENCE OF THE NAACP AND  
OTHER AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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**U.S. COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT**

*Hispanic Interest Coalition of Alabama, et al.*

v.

*Robert Bentley, et al.*

Case No. 11-14535

**CERTIFICATE OF INTERESTED PERSONS**

**1.**

**AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that, in addition to the persons and entities identified in Appellants' opening brief, the following persons and entities have an interest in the outcome of this case. The undersigned counsel also certifies that none of the Amici Curiae associated with this brief is a publicly-held corporation, is owned by a publicly held corporation, or issues stock.

**The Amici Curiae on this Brief are:**

Alabama State Conference of the National Association for the Advancement of Colored People (NAACP)

The Alabama Council on Human Relations

Alabama New South Coalition

Alabama NOW

Asian American Legal Defense and Education Fund

Birmingham Peace Project

Dominican American National Roundtable

Equality Alabama

Equal Justice Society

Federation of Southern Cooperatives/Land Assistance Fund

Hispanic Federation

HIV Law Project

Immigration Equality

Lambda Legal Defense and Education Fund, Inc.

The Montgomery Improvement Association

National Asian Pacific American Bar Association

National Association of Latino Elected and Appointed Officials

National Council of La Raza

National Dominican American Council

National Employment Law Project

National Guestworker Alliance

National Immigration Project of the National Lawyers Guild

The National Lawyers Guild

New Orleans Workers' Center for Racial Justice

Progressive Jewish Alliance and Jewish Funds for Justice

Sikh American Legal Defense and Education Fund

Society of American Law Teachers

The Southern Christian Leadership Conference

Southern Coalition for Social Justice

The United States Hispanic Leadership Institute

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## **STATEMENT OF THE ISSUES**

1. Whether HB 56 invites or requires local and state law enforcement officials and education officials to engage in race-based discrimination, which violates the civil rights of individuals residing in Alabama and degrades public safety.
2. Whether HB 56 legislates race-based discrimination, which had previously existed but had either been found unconstitutional or struck from the Alabama Constitution.

## **SUMMARY OF THE ARGUMENT**

1. HB 56 invites, and in effect requires, race-based discrimination. First, HB 56 in effect excludes children of color from Alabama public schools by requiring children and their parents to disclose their immigration status to school officials before they can register. Given the well-founded fear that the undocumented status of a student or his or her family members will be relayed to immigration officials, a fear heightened by the express intent of the act, lawfully present children of immigrants as well as immigrant children, primarily Hispanic, are being kept from school.

Second, HB 56 mandates racial profiling by local law enforcement officials. The HB 56 requirement that police officers determine whether an individual may be

an undocumented immigrant cannot be applied without resorting to judgments based on apparent race, ethnicity or national origin. HB 56 also threatens public safety in Alabama by degrading the already fragile relationships between law enforcement and communities of color and thus chill the reporting of crimes, including hate crimes.

2. HB 56 mirror's Alabama's Jim Crow laws, intended to regulate every aspect of a person's life. These laws also required law enforcement officials to enforce discriminatory laws and criminalized the exercise of fundamental civil liberties.

## INTRODUCTION

The Amici Curiae submit this brief<sup>1</sup> in support of the Hispanic Interest Coalition of Alabama (HICA) and urge the Court to reverse the decision of the United States District Court for the Northern District of Alabama<sup>2</sup> denying a preliminary injunction against Sections 10, 12, 18, 27, 28, and 30 of the Alabama Taxpayer and Citizen Protection Act (HB 56).<sup>3</sup> These Sections require that state and local officers investigate and detain individuals on suspicion of immigration violations and impose criminal penalties on undocumented immigrants and that school officials investigate the immigration status of children enrolling in school and the children's parents.

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<sup>1</sup> Counsel for Appellants and for the State of Alabama, and the individual Appellees, have consented to *Amici* filing this brief. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *Amici* and its counsel, make a monetary contribution to the preparation and submission of this brief. *See* Fed. R. App. P. 29(c)(5).

<sup>2</sup> *United States v. Alabama*, 2011 WL 4469941, No. 5:11-CV-02484-SLB (N.D. Ala. Sept. 28, 2011) (Vol. IV, R. 137).

<sup>3</sup> Act 2011-535 (HB 56) (Vol. III, R. 131-1).

## **INTEREST OF AMICUS CURIAE**

Amicus curiae Alabama State Conference of the National Association for the Advancement of Colored People (NAACP) is a non-partisan non-profit organization with a mission since 1909 to ensure that the political, educational, social, economic, and civil rights of all persons in the state of Alabama are protected and to take measures to eliminate racial hatred and racial discrimination wherever it exists.

Joining the NAACP in this brief are 29 other organizations, whose interest is set forth below, including the Montgomery Improvement Association, founded in 1955, and the Southern Leadership Conference, founded in 1957, once led by Dr. Martin Luther King, Jr. The amici are public interest organizations representing various communities of color, faith, and individuals, all united in their pursuit of tolerance and equality. Amici submit this brief in support of Appellants' Appeal of the District Court ruling.

The Alabama Council on Human Relations ("ACHR") seeks to promote and implement programs that improve economic conditions, education, and racial relationships for all people, resulting in increased self-sufficiency and overall improvement in their quality of life.

Alabama New South Coalition ("ANSC") is a Black and progressive political organization that works on an agenda of social and economic

justice for poor and working people in the state of Alabama.

Alabama NOW is part of The National Organization for Women (NOW), which is the largest organization of feminist activists in the United States.

Immigration affects women deeply, as more than half of the almost 12 million undocumented immigrants are women and children.

The Asian American Legal Defense and Education Fund (“AALDEF”) has protected the rights of Asians and other immigrants to be free from discrimination based on race and ethnicity as well as immigrant status.

The Birmingham Peace Project is a small, Alabama-based, organization devoted to peace and human rights. It has been an advocate for human rights for a decade, including active support for undocumented immigrants in the community.

The Dominican American National Roundtable (“DANR”) is a non-profit, charitable, members organization which brings together the different voices of all people of Dominican origin in the United States.

Equality Alabama is a nonpartisan, statewide 501(c)(3) organized to secure basic human rights for the Lesbian, Gay, Bisexual, and Transgender (LGBT) community. The foreign-born are our neighbors, friends, members, and life partners.

The Equal Justice Society (“EJS”) is a national legal organization that

promotes equality and an end to all manifestations of invidious discrimination and second-class citizenship. Using a three-pronged strategy of law and public policy advocacy, building effective progressive alliances, and strategic public communications, EJS's principal objective is to combat discrimination and inequality in America.

The Federation of Southern Cooperatives/Land Assistance Fund is a regional non-profit association providing services, resources and advocacy for 20,000 low income rural families organized into 75 active cooperatives, credit unions and community-based economic development organizations across the South.

Hispanic Federation ("HF") is a nonprofit membership organization that works to empower and advance the Hispanic community through public policy advocacy, leadership development and community revitalization projects. HF deems the enactment of Alabama HB 56 as a blatantly unconstitutional action that will directly lead to widespread discriminatory conduct and racial profiling against Latinos residing and visiting the state.

HIV Law Project believes that all people deserve the same rights, including the right to live with dignity and respect, the right to be treated as equal members of society, and the right to have their basic human needs fulfilled. HIV Law Project has long represented immigrant clients

who daily face the challenges of living with a chronic illness and the fear of deportation

Immigration Equality is a national organization that works to end discrimination in immigration law against those in the lesbian, gay, bisexual, transgender and HIV-positive community. We are particularly concerned by Alabama's law because it criminalizes the conduct of lesbian and gay United States citizens who "harbor" foreign-born same-sex spouses or partners as well as the way it will be used for racial profiling.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the oldest and largest national legal organization dedicated to achieving full civil rights for lesbian, gay, bisexual and transgender (LGBT) people and those with HIV. Through its Proyecto Igualdad, Lambda Legal serves Latino and Spanish-speaking communities across the United States.

The Montgomery Improvement Association ("MIA") is one of the country's oldest civil rights organizations. Founded in 1955, the MIA organized and ran the successful Montgomery Bus Boycott that overturned segregated seating on municipal buses. The recently enacted Alabama law aimed at immigrants is an affront to the history and principles of the MIA and threatens the entire community.

The National Asian Pacific American Bar Association (“NAPABA”) is the national association of Asian Pacific American attorneys, judges, law professors, and law students. NAPABA has a particular interest in ensuring that HB 56 is not enforced because individuals should not be subjected to heightened police scrutiny and should not be burdened with a presumption of illegality on the basis of their perceived “foreignness” in appearance.

The National Association of Latino Elected and Appointed Officials (“NALEO”) Educational Fund is the leading national nonpartisan organization that facilitates full Latino participation in the American political process, from citizenship to public service. The NALEO Educational Fund believes that state legislative measures, such as the one at issue in Alabama, are grounded in discrimination against Latinos, and will perpetuate large-scale discrimination against Latinos and other newcomers.

The National Council of La Raza (“NCLR”) – the largest national Hispanic civil rights and advocacy organization in the United States – works to improve opportunities for Hispanic Americans. NCLR believes that state laws that attempt to create distinct immigration enforcement schemes result in large-scale discrimination against Latinos regardless of

their immigration status, and are preempted by federal immigration laws.

The National Dominican American Council (“NDaC”) is the national civic-engagement-community relations organ of the Dominican American National Roundtable. We strongly oppose states/localities promulgating their own immigration regulations which would have an adverse impact upon Dominicans residing in the U.S.

The National Employment Law Project (“NELP”) is a non-profit legal organization with over 40 years of experience advocating for the employment and labor rights of low-wage and immigrant workers. NELP has an interest in the outcome of this case because the Alabama statute undermines labor standards rights for immigrant families and all workers by permitting employers to discriminate against immigrants with impunity.

The National Guestworker Alliance (“NGA”) is a membership organization representing thousands workers across sector and industry who enter the United States through the U.S. guestworker program including members who have worked in Alabama. Should HB56 go forward, our members would be directly affected and subjected to racial profiling and discrimination.

The National Immigration Project of the National Lawyers Guild

(“National Immigration Project”) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants’ rights and to secure a fair administration of the immigration and nationality laws.

The National Lawyers Guild was the country’s first integrated national bar organization and is its oldest and largest multi-issue human rights bar organization. It holds that human rights, including the rights of undocumented immigrants, are more sacred than property interests and has a long history of advocacy for immigrants.

The New Orleans Workers’ Center for Racial Justice (“Workers’ Center”) is a membership organization that was founded in the aftermath of Hurricane Katrina in response to the structural exclusion of African Americans and the brutal exploitation of immigrants within the new Gulf Coast economy. The Workers’ Center is dedicated to organizing and advocacy against racial profiling and discrimination against communities of color.

Progressive Jewish Alliance and Jewish Funds for Justice exercise a Jewish voice for justice. Our migratory history and the Biblical command to “honor the stranger” demand our objection to the unjust persecution created by HP 56 as well as its unacceptable hindrances on service

providers.

The Sikh American Legal Defense and Education Fund (“SALDEF”) is a national civil rights and educational organization. Its mission is to protect the civil rights of Sikh Americans and ensure a fostering environment in the United States for future generations of Sikh Americans.

The Society of American Law Teachers (“SALT”) is an association of law faculty, deans, administrators, and legal education professionals from over 170 law schools. Alabama's immigration law will yield discriminatory enforcement of its laws against immigrant communities and individuals perceived to be foreign. SALT is especially concerned with the law's adverse effects on students exercising their constitutional right to an education.

The Southern Christian Leadership Conference (“SCLC”) is a nonprofit, non-sectarian, interfaith, advocacy organization founded in February, 1957. Closely associated with its first president, Dr. Martin Luther King, Jr. and in the spirit of non-violence and justice that he promoted, SCLC is committed to non-violent action to achieve social, economic, and political justice.

The Southern Coalition for Social Justice (“SCSJ”) is a non-profit organization providing legal, organizing, research and media support to

racial minority, low-income and immigrant communities in the southern United States. SCSJ is dedicated to promoting the rights of immigrants and their families, as well as eliminating racial discrimination and ending human rights violations.

The United States Hispanic Leadership Institute (“USHLI”) is a Chicago-based non-profit, non-partisan national organization whose mission is to fulfill the promises and principles of democracy by empowering minorities and similarly disenfranchised groups through civic engagement, leadership development, and research, and by maximizing participation in the electoral process.

### **ARGUMENT**

HB 56, officially known as the Beason-Hammon “Alabama Taxpayer and Citizen Protection Act,” ushers in a legal regime of a scope not seen in Alabama since the abolishment of Jim Crow, designed, according to Alabama lawmakers, to regulate “every aspect of a person’s life.” *Alabama Lawmakers Approve Arizona-Style Immigration Bill*, Associated Press, June 5, 2011. Disturbingly, the HB 56 regime incentivizes or even forces Alabama law enforcement, schools, public offices, and ordinary citizens to discriminate based on race, ethnicity and national origin.

The State of Alabama suffers a long and disturbing history of violating

individual's civil rights, and Amici wish to ensure that the Court considers HB 56 in this lamentable context. After all, Alabama's own Jim Crow laws were similar in animus and effect to HB 56—intended to regulate every aspect of the lives of African Americans, requiring law enforcement officials to enforce discriminatory laws, and criminalizing the exercise of fundamental human liberties—and Alabama kept and enforced these heinous laws well into the twenty-first century.

HB 56 is nothing less than a modern-day incarnation of some the most abhorrent types of institutionalized discrimination to have emerged in the history of the United States. Accordingly, Amici respectfully request that this Court overturn the District Court's decision denying a preliminary injunction against Sections 10, 12, 18, 27, 28, and 30 of HB 56.

**I. HB 56 INVITES, AND IN EFFECT REQUIRES, RACE-BASED DISCRIMINATION**

With HB 56 and its *de facto* focus on the distinction between people that appear foreign and those that do not, Alabama is creating an environment where racism is invited, if not required, of the government as well as of private citizens. After all, Alabamians will necessarily rely on race, ethnicity, or indications of national origin to determine whether an someone may be an undocumented immigrant. Even under the best of circumstances, and even assuming the best of intentions, an HB 56 regime would present a severe risk of serious civil rights violations for anyone possibly perceived as “foreign.” In Alabama, however, with the reality of its own disturbing history of *de jure* racism, and given reality as it has unfolded in the few weeks HB 56 has been partially in effect, it is not reasonable to think of HB 56 as merely a potential risk to civil rights. Amici fear that the HB 56 regime was designed to provide and in effect provides legal sanction to hostilities toward people deemed, or misjudged to be, foreign. HB 56 places racial and ethnic minorities as well as immigrants (regardless of their documented or undocumented immigration status) in a status where their civil rights may be violated in accord with state law.

Amici wish to highlight a number of particularly insidious aspects of HB 56 for the Court’s consideration:

**HB 56 in effect excludes children of color from Alabama public schools.** HB 56 requires children and their parents to disclose their immigration status to school officials before they can register. Given the well-founded fear that the undocumented status of a student or his or her family members will be relayed to immigration officials, heightened by the express intent of the act, lawfully present children of immigrants as well as immigrant children, primarily Hispanic, are being kept from school.

**HB 56 mandates racial profiling by local law enforcement officials.** The HB 56 requirement that police officers determine whether an individual may be an undocumented immigrant cannot be applied without resorting to judgments based on apparent race, ethnicity or national origin. HB 56 threatens United States citizens and lawful immigrants that may appear “foreign” with detention if they cannot immediately prove their immigration status.

**HB 56 threatens public safety in Alabama.** HB 56 will degrade the already fragile relationships between law enforcement and communities of color and chill the reporting of crimes, including hate crimes.

**A. HB 56 Excludes Children of Color from Alabama Public Schools**

HB 56 requires children and their parents to disclose their immigration status to school officials before a child can be enrolled in school. HB 56 § 28. If status is not adequately established, or if the child does not provide the required information, the presumption is that the child is undocumented. HB 56 § 28(5). Section 28 authorizes school officials to report information obtained pursuant to this section to federal immigration authorities, HB 56 §28(e); however, the reading of other provisions in HB 56 in conjunction with Section 28 effectively make disclosure by schools a requirement. *See* HB 56 §§ 5-6; HICA Opening Br., p. 45.

Given a well-founded fear that school officials will report a student's or a student's family member's undocumented status to immigration officials, HB 56 makes it virtually impossible for children of immigrants as well as immigrant children—even those lawfully present—to enroll in school. When undocumented children register at school, they now do so with the fear of having their own undocumented status reported to authorities. At the same time, when certain lawfully present children register at school, they do so with the fear of having the undocumented status of their parents reported. Indeed, even for those families all of whose members are lawfully in the United States, the requirement creates a climate of fear and intimidation for Latino students which makes learning far more difficult. Under either scenario, the immigration status reporting requirement tied to

enrollment in Alabama public schools is precisely that type of decried regulation that deters access to education and “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status.” *Plyler v. Doe*, 457 U.S. 202, 223, 120 S. Ct. 2382, 2387 (1982).

These obstacles to enrollment are unconstitutional, *see* HICA Opening Br., p. 59, and the U.S. Department of Justice and U.S. Department of Education have themselves recognized the illegitimacy of enrollment practices that “may chill or discourage the participation, or lead to the exclusion, of students based on their or their parents’ or guardians’ actual or perceived citizenship or immigration status.” *See* HICA Opening Br., p. 59 (citing “Dear Colleague” Letter from the U.S. Dep’t of Justice and U.S. Dep’t of Educ., May 6, 2011, at 1, *available at* <http://www.justice.gov/crt/about/edu/documents/plylerletter.pdf>).

Sadly, these serious civil rights violations are not theoretical. As noted in a recent New York Times piece, in the short time HB 56 has been in effect, children of immigrant communities have already been withdrawn from school, and many of those who have remained have been subject to harassment and bullying. “The law’s architects and supporters proclaim that their goal is to catastrophically disrupt the lives of illegal immigrants and their families. With reports of harassment and panic, and of a mass exodus of immigrants fleeing the state, the potential for civil rights abuses is acutely obvious.” Editorial, *Standing in the Schoolhouse Door*,

N.Y. TIMES, Nov. 5, 2011, *available at*

[http://www.nytimes.com/2011/11/06/opinion/sunday/standing-in-the-schoolhouse-door.html?\\_r=1](http://www.nytimes.com/2011/11/06/opinion/sunday/standing-in-the-schoolhouse-door.html?_r=1).

**B. HB 56 in Effect Mandates Racial Profiling**

*1. HB 56 Cannot be Applied without Resorting to Racial Profiling*

Under HB 56, Alabama law enforcement officers are required to make an on-the-spot assessment, during every stop, detention, or arrest under any law or ordinance, of the immigration status of the targeted individual. If the law enforcement officer has “reasonable suspicion” that “the person is an alien who is unlawfully present in the United States,” the officer must then make a reasonable attempt to ascertain the suspect’s immigration status.<sup>4</sup> HB 56 § 12(a).

HB 56 ostensibly requires that law enforcement officers “not consider race, color or national origin” in the enforcement of the law “except to the extent permitted by the United States Constitution and the Constitution of Alabama of 1901,” HB 56 § 11(C). The mandate is, however, impossible to fulfill. Any judgment by Alabama law enforcement authorities regarding an individual’s possible immigration status will necessarily depend on the individual’s ethnicity, skin color, facial features, accent or some other constitutionally protected attribute.

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<sup>4</sup> The statute recognizes that actual determination of immigration status may only be made by a law-enforcement officer authorized by the federal government to verify status. HB 56 § 10(b). Presumably, a person detained on suspicion of being “unlawfully present” would not be freed until an appropriate federal agent makes the determination.

Former 20-year police officer, former chief of police, and current San Francisco District Attorney, George Gascón warned as much in his declaration in support of the request to enjoin HB 56 before the District Court, noting that “HB 56 cannot be enforced in a race-neutral manner . . . . [Officers] will inevitably rely upon race and ethnicity as factors in establishing reasonable suspicion to investigate potential violations of HB 56.” George Gascón Decl. ¶ 12 (Vol. II, R. 37-39). This concern was echoed by Sheriff Mike Hale of Jefferson County in Alabama, stating: “I do not believe it is possible to instruct my deputies on how to enforce HB 56 without taking into consideration factors such as the person’s appearance and manner of speaking.” Sheriff Mike Hale Decl. ¶ 11 (Vol. II, R. 37-38).

Nonetheless, under HB 56 police officers are required to make an assessment of potential unlawful status, and, in fact, if HB 56 is not enforced, the statute provides a mechanism for private citizens to bring a civil lawsuit and for courts to order the officers to pay a fine for the failure to assess an individual’s immigration status. *See* HB 56 § 5(d). By demanding that law enforcement officers assess whether someone may be an undocumented immigrant, HB 56 forces police officers “into an untenable position by giving them an assignment which most cannot carry out without relying on racial or ethnic appearance.” *See Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties,*

*and Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 111th Cong. 77 (2009) (“Public Safety Hearing”) (statement of David A. Harris, Professor of Law, University of Pittsburgh School of Law).

Tellingly, Alabama’s own legislators have recognized that HB 56 is precisely intended to target people of a particular race, color and national origin.<sup>5</sup> When HB 56 was under consideration by the legislature, it was openly acknowledged that the alleged illegal immigration problem was really just about one ethnic group, Hispanics, and their increasing population in Alabama. *See* Compl. for Declaratory and Injunctive Relief ¶¶ 189-190 (filed July 8, 2011) ( Vol. I, R. B., Doc. 1); *see also United States v. Alabama*, 2011 WL 4469941 (N.D. Ala. Sept. 28, 2011) (Vol. IV, R. 137) (acknowledging that “anti-illegal immigrant sentiment and frustration with federal immigration policies has driven the enactment of H.B. 56.”).

HB 56 unconstitutionally targets an insular and poor community of racial minorities, many of whom may be deemed to look, act or sound “foreign,” regardless of their immigration status. Specifically, Hispanics account for 3.5

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<sup>5</sup> Of note, the Federal District Court for the Middle District of Alabama concluded in another matter that Scott Beason, co-sponsor of HB-56, was motivated by “racist intent.” “The court finds that Beason and Lewis lack credibility for two reasons. First, their motive for cooperating with F.B.I. investigators was not to clean up corruption but to increase Republican political fortunes by reducing African American voter turnout. Second, they lack credibility because the record establishes their purposeful, racist intent.” *U.S. v. McGregor*, 2011 WL 5025835 \*3 (M.D.Ala. Oct. 20, 2011).

percent of Alabama's population, where the median annual income among Hispanics in Alabama is \$17,000.<sup>6</sup>

HB 56 targets Hispanics, but other ethnic groups and communities of color, especially Middle Eastern and Asian communities, are also at risk of finding themselves in its crosshairs. The Asian American population in the United States, for example, is rapidly increasing and is presently made up primarily of foreign-born individuals from Vietnam, Korea, American Samoa, India, Thailand, the Philippines, and China. See Rand Corp., *America Becoming: The Growing Complexity of America's Racial Mosaic* (2001), available at [http://www.rand.org/pubs/research\\_briefs/RB5050/index1.html](http://www.rand.org/pubs/research_briefs/RB5050/index1.html). Foreign-born Americans, even those who are citizens or have been granted federal permission to remain in the United States, are likely to speak limited or heavily accented English, which may trigger heightened police scrutiny under HB 56. Ethnic minority Americans born in the United States are also likely to face heightened policy scrutiny under HB 56, simply because of their appearance.

Prior experience teaches that it is invariably a “disastrous and expensive”

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<sup>6</sup> As of 2011, 26.1 percent of Alabama's population is “Black,” 3.5 percent is “Latino,” and 2.8 percent identified as “Other (non-white.)” *Alabama Demographics*, LA Times.com, June 9, 2011 (citing U.S. Census Bureau) available at <http://www.latimes.com/news/nationworld/nation/wire/la-na-alabama-immigration.eps-20110610,0,3224865.graphic> (last visited July 26, 2011.). The terms “Hispanic” and “Latino” are used interchangeably in this brief. See Demographic Profile of Hispanics in Alabama, 2009, Pew Hispanic Center, available at <http://pewhispanic.org/states/?stateid=AL> (last visited 26 July 2011).

mistake to involve local police in immigration enforcement because such efforts may foster widespread racial profiling and other civil rights violations. Craig E. Ferrell, Jr., *Immigration Enforcement: Is It a Local Issue?*, 71 *The Police Chief*, No. 2, Feb. 2004.<sup>7</sup> The fact is that even under the best of circumstances and with federal oversight and training, errors still occur. For example, the Immigration and Nationality Act § 287(g) allows the U.S. Attorney General to delegate immigration enforcement functions to specified state and local law enforcement agencies. 8 U.S.C. § 1357(g) (2006). A recent report by the Department of Homeland Security's Office of the Inspector General found that many state and local agencies enrolled in the 287(g) program are being investigated or sued for civil rights violations.<sup>8</sup> See U.S. Department of Homeland Security, Office of Inspector General, *The Performance of 287(g) Agreements* (Mar. 2010), available at

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<sup>7</sup> See also ACLU of North Carolina and UNC Chapel Hill Immigration & Human Rights Policy Clinic, *The Policies and Politics of Local Immigration Enforcement Laws—287(g) Program in North Carolina*, 43-47 (Feb. 2009), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, 4-5 (Sept. 2009), available at [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf) (lasted visited Jul. 27, 2011) (finding “compelling evidence” of “aggressive” racial profiling of Hispanics by Irving, Texas police officers after they began participating in the criminal alien program).

<sup>8</sup> The report describes how one state agency improperly engaged in “random street operations” to target “minor offenses and violations of local ordinances,” even though the 287(g) program does not allow state and local agencies to perform such operations. In addition, the report found incidents of immigrants being arrested for federal immigration violations without prior arrests on state or local charges, which is prohibited under the 287(g) program.

[http://www.dhs.gov/xoig/assets/mgmtrpts/OIG\\_10-63\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf). Even the intensive federal training and oversight that law enforcement agencies are required to undergo when they join the 287(g) program has not prevented racial profiling.

The practical result is that HB 56 will establish a legally sanctioned mechanism for law enforcement officials to unjustifiably subject Hispanics and other perfectly legal communities of color, including those perceived to be Middle Eastern or Asian, to arbitrary deprivations of fundamental civil liberties, including detention, interrogation, and the constant fear of the possibility of both.

2. *HB 56 Places United States Citizens and Lawful Immigrants who Appear Foreign at Risk of Detention*

Under HB 56, police officers are to detain individuals they suspect of being undocumented until their immigration status can be verified. The statute recognizes that actual determination of immigration status may only be made by the federal government. HB 56 § 10(b). Presumably, a person detained on suspicion of being unlawfully present would not be freed until an appropriate federal agent makes that determination.

All legal residents and even United States citizens risk jail time if unable to satisfactorily demonstrate that they are legally present. In fact, the irony is that United States citizens are likely among the most vulnerable individuals, since citizens do not have a citizenship card analogous to the “Green Card” permanent residents are granted, nor do citizens possess documentation akin to what is issued

to lawfully present foreign visitors. A United States citizen profiled as “foreign” by a law enforcement officer, whether because of a constitutionally permissible or impermissible characteristic, having nothing to show to prove citizenship could well end up in jail until her citizenship can be confirmed.

HB 56 creates a presumption that people are undocumented unless they can prove otherwise. Given that only those individuals who appear foreign to law enforcement officials are the ones saddled with that *de facto* burden of proof, and given the demographics of Alabama, this burden in effect becomes a presumption that Hispanics, and increasingly Middle Easterners and Asians, are undocumented, and thus vulnerable to arrests and detentions.

### **C. HB 56 Threatens Public Safety in Alabama**

#### *1. HB 56 Will Have a Chilling Effect on the Reporting and Investigation of Crime in Alabama*

Ironically, due to its endangerment of constitutionally protected individual rights, HB 56 actually threatens public safety by providing a severe disincentive for communities of color to report crimes, including and especially hate crimes, lest they subject themselves to law enforcement scrutiny and detention until their immigration status can be established.

Perceived discriminatory police treatment erodes trust between law enforcement and the community it is supposed to protect. *See Anita Khashu, The Role of Local Police: Striking a Balance Between Immigration Enforcement and*

*Civil Liberties 23* (Mary Malina ed., 2009), available at <http://www.policefoundation.org/pdf/strikingabalance/Role%20of%20Local%20Police.pdf> (“Police Foundation Report”). Alabama law enforcement officials know this all too well. Law enforcement bodies to this day grapple with the tremendous rifts that exist as a result of the dismal and painful history in Alabama of repression by law enforcement officials of communities of color. HB 56 will magnify those rifts by instilling or exacerbating fear and mistrust of law enforcement officials in Alabama’s communities of color, particularly the Hispanic, and increasingly Middle Eastern and Asian, community. This will prevent reporting of crime and willing cooperation in criminal investigations. Fear of reporting crimes and cooperating with police investigations has frequently been recognized as a problem among undocumented immigrants. See, e.g., Nat’l Network for Immigrant & Refugee Rights, *Over-Raided, Under Siege: U.S. Immigration Laws and Enforcement Destroy the Rights of Immigrants* 36 (2008), available at [http://www.nnirr.org/resources/docs/UnderSiege\\_web2.pdf](http://www.nnirr.org/resources/docs/UnderSiege_web2.pdf); S. Poverty Law Ctr., *Under Siege Life for Low-Income Latinos in the South* 6 (Apr. 2009), available at <http://www.splcenter.org/sites/default/files/downloads/UnderSiege.pdf> (noting that 41 percent of migrant workers in survey reported wage theft). The fact that HB 56 transforms every law enforcement official into a *de facto* immigration official

inestimably aggravates this problem, risking a complete lock-down among immigrant communities where individuals' cooperation with police will disappear altogether.

For those fearful that they or a loved one will be deported, reporting a crime or providing witness information to law enforcement officials who, under HB 56, must perpetually watch for people “unlawfully present” in the United States is a proposition too risky to accept. Further, a significant number of lawfully present people live with parents, siblings, neighbors and friends who are not. For example, one survey found that 57 percent of Hispanics report worrying that they or a close friend or family member will be deported, and 35 percent of American-born Hispanics—more than one in three—admit to having this concern. Pew Hispanic Ctr., *Hispanics and Arizona's New Immigration Law 3* (2010) (“2010 Pew Report”), available at <http://pewhispanic.org/files/factsheets/68.pdf>.

Even before HB 56, the indignity of repeatedly being stopped by the police, questioned as a potential criminal, and in some cases searched and/or detained, already served to alienate members of the Latino community—including U.S. citizens—from law enforcement. In fact 55 percent of Hispanics in Alabama have reported that they received “unjust treatment” by police because of their race. See Southern Poverty Law Ctr., *Racial Profiling Under Siege: Life for Low-Income Latinos in the South*, (2009), available at <http://www.splcenter.org/get->

informed/publications/under-siege-life-for-low-income-latinos-in-the-south; *see also* 2010 Pew Report, (native-born and foreign-born Latinos equally likely to report having been stopped by police and asked about their immigration status in the previous twelve-month period throughout the U.S.); Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 Harv. LATINO L. REV. 1, 18 (2005) (finding that even Latino citizens change the way they live to avoid being harassed by police). According to a 2008 National Survey of Latinos, only 45 percent of Latinos said they had a great deal or fair amount of confidence that police officers in their communities would treat Latinos fairly. *See* 2010 Pew Report, at 4. HB 56 will further marginalize members of communities who already doubt that they will be treated fairly by the police.<sup>9</sup>

When victims and witnesses are too afraid to seek out and cooperate with law enforcement, public safety is at risk. *See* Public Safety Hearing, at 81-82 (statement of Hubert Williams, President, Police Foundation) (recommending that local law enforcement not engage in immigration enforcement activities that directly involve

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<sup>9</sup> A 2009 report concluded that a local Virginia police department's enforcement of immigration laws caused a 15 percent decrease in the level of trust in government in the Hispanic community, and a two-point drop (out of ten points) in their quality of life. Thomas M. Guterbock *et al.*, *Evaluation Study of Prince William County Illegal Immigration Enforcement Policy*, at xi, 76-78 (2009), available at <http://www.co.prince-william.va.us/docLibrary/PDF/10636.pdf> (last visited Jul 27, 2011).

the public, such as requesting documentation in connection with traffic stops).<sup>10</sup>

Law enforcement agencies have recognized how critical it is to have the trust of the community. See Jack McDevitt *et al.*, Ne. Univ. Institute on Race & Justice, *COPS Evaluation Brief No.1: Promoting Cooperative Strategies to Reduce Racial Profiling* 21 (2008) (“Being viewed as fair and just is critical to successful policing in a democracy.”). Accordingly, many police departments have adopted “community based policing,” which requires police to interact with members of the community to forge trust and respect.<sup>11</sup> Police Foundation Report at 24.

Rather than encouraging cooperation between law-enforcement officers and the communities they serve, HB 56 will chill reporting by victims and collaboration

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<sup>10</sup> The danger of the underreporting of hate crimes exists for all minorities, not just ethnic minorities. For instance, law enforcement organizations have recognized that lesbian, gay, bisexual and transgender communities often are reluctant to report hate crimes to unsympathetic officials. See King County Dep’t of Pub. Health, *Safety and Hate Crimes*, Oct. 7, 2008, available at <http://www.kingcounty.gov/healthservices/health/personal/glb/HateCrime.aspx> (last visited Jul 27, 2011).

<sup>11</sup> To encourage cooperation between the police department and the public, other locales have adopted policies similar to the Los Angeles Police Department’s Special Order No. 40, which prohibits police officers from “initiat[ing] police action with the objective of discovering the alien status of a person.” L.A. Police Dep’t, LAPD Manual Vol. 4 § 264.50, available at [http://www.lapdonline.org/lapd\\_manual/volume\\_4.htm#264.50](http://www.lapdonline.org/lapd_manual/volume_4.htm#264.50) (last visited Jul. 27, 2011); see also L.A. Police Dep’t, Chief of Police Special Order No. 40 (Nov. 27, 1979) (adopting policy located in LAPD Manual at Vol. 4 § 264.50 because “effective law enforcement depends on a high degree of cooperation between the Department and the public it serves”), available at [http://www.lapdonline.org/get\\_informed/pdf\\_view/44798](http://www.lapdonline.org/get_informed/pdf_view/44798) (last visited Jul 27, 2011).

with residents to end crime, and jeopardize the effectiveness of law enforcement's efforts to keep Alabama safe. Mike Hale, Sheriff of Jefferson County in Alabama, is "concerned about the effect HB 56 will have on [his] office's ability to engage immigrant and minority communities . . . which is essential to keeping our communities safe and to solve crimes that occur here . . . [and] HB 56 may result in . . . deputies being viewed as State immigration officers instead of law enforcement officers trying to protect everyone . . ." Sheriff Mike Hale Decl. ¶ 13 (Vol. II, R. 37-38). Thus, not only will enforcement of HB 56 harm communities already distrustful of law enforcement, it ultimately will threaten the public safety and well-being of all Alabama residents.<sup>12</sup>

2. *HB 56 Leaves Minorities Even More Vulnerable to Hate Crimes*

Those who are most intimidated by the new law enforcement regime will also be among those most in need of government protection against hate crimes. By the Federal Bureau of Justice's own estimates, only 44 percent of hate crimes are reported to the police. Caroline Wolf Harlow, Bureau of Justice Statistics, *Hate*

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<sup>12</sup> In fact, HB 56 has serious public health implications as well. The Alabama Department of Public Health is concerned that HB 56 is deterring people from seeking medical care, and increasing the risk of illnesses across the state. See Jay Reeves, Alabama Immigration Law Sparking Public Health Worries, Associated Press, Oct. 28, 2011, *available at* <http://www.msnbc.msn.com/id/45081790/ns/health/t/ala-immigration-law-sparking-public-health-worries/>. By forcing people into the shadows, HB 56 limits access to lifesaving medical care and treatment for people with HIV/AIDS. Barriers to HIV treatment also increase the risk of further transmission of HIV.

*Crime Reported by Victims and Police* 4 (Nov. 2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/hcrvp.pdf> (last visited Jul 27, 2011). One explanation for the significant underreporting of hate crimes corresponds to the reason that undocumented workers underreport crimes generally: victims fear, with good reason, reinforced by HB 56, that calling attention to the crime will lead to further targeting, whether by perpetrators or by the police. Moreover, the level of vitriol in the immigration debate has recently increased: In only two years the number of groups termed “nativist extremist” by the Southern Poverty Law Center, *i.e.*, “organizations that go beyond mere advocacy of restrictive immigration policy to actually confront or harass suspected immigrants,”<sup>13</sup> has more than doubled, from 144 groups in 2007 to 309 groups in 2009. Heidi Beirich, S. Poverty Law Ctr., *The Year in Nativism*, Intelligence Report, Spring 2010, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/spring/the-year-in-nativism> (last visited Jul 27, 2011). In such a hostile climate, all minority groups need to be able to trust law enforcement to ensure their safety. For the reasons expressed above, however, HB 56 ensures that fewer victims or witnesses of hate crimes will report those crimes to law enforcement.

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<sup>13</sup> S. Poverty Law Ctr., New SPLC Report: “Patriot” Groups, Militias Surge in Number in Past Year, Mar. 2, 2010, available at <http://www.splcenter.org/get-informed/news/splc-report-number-of-patriot-groups-militias-surges-by-244-in-past-year> (last visited Jul 27, 2011) (defining “nativist extremist”).

## **II. HB 56 REINCARNATES ABOLISHED FORMS OF RACE-BASED DISCRIMINATION**

Alabama is no stranger to legalized racism.

Alabama's Jim Crow laws, like HB 56, were intended to regulate every aspect of a person's life. These laws required law enforcement officials to enforce laws that promulgated racism and criminalized the exercise of fundamental human liberties such as association, speech and religion. *See, e.g.,* The Code of Alabama (1923) *available at* <http://www.yale.edu/glc/archive/976.htm> (last visited Aug. 3, 2011). These laws continued well into the 20th century. Alabama's anti-miscegenation laws were overturned only forty-four years ago, and not by choice, but by order of the Supreme Court of the United States. Indeed, it was only in November 2000 that Alabama removed the anti-miscegenation provision from its constitution, and that with only 60% of the vote. *See Proposed Constitutional Amendments to Appear on Statewide Ballots November 7, 2000 General Election, available at* <http://www.sos.state.al.us/Elections/2000/2000PropStateAmendmts.aspx>; Alabama 2000 Proposed Amendments Results, *available at* <http://alabamavotes.gov/downloads/election/2000/general/2000g-amend.pdf> (last visited Aug. 5, 2011).

In addition to Alabama state laws, HB 56 also shares disturbing parallels with

the federal Fugitive Slave Act of 1850, which required law enforcement officials to arrest any *alleged* runaway slave, and where failure to do so would result in a significant fine. *See* HB 56 §§ 5, 7. Further, under the Fugitive Slave Act any individual harboring or transporting a runaway slave would be subject to imprisonment as well as a fine. Free and enslaved looked and sounded remarkably similar, however, and under the Fugitive Slave Act untold numbers of free people were subject to detention, violence and worse. *See, e.g.*, David S. Heidler and Jeanne T. Heidler, Encyclopedia of the American Civil War 794-96 (2002). This, of course, was at a time when, by edict of the Supreme Court, African Americans “had no rights which the white man was bound to respect.” *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856), *superseded by Constitutional Amendment*.

Over the past 150 years, the courts have prevented the application of many statutes aimed at excluding certain minority groups from the benefits, rights, and liberties granted to those in the majority. In some cases, like with HB 56, the statute in question effectively applied only to certain groups. *See, e.g.*, *Oyama v. United States*, 332 U.S. 633, 644, 68 S. Ct. 269, 274 (1948) (refusing to apply California’s Alien Land Law, which essentially applied only to Japanese, to deprive American citizen of title to land solely because his father was Japanese); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S. Ct. 2217, 2227 (1993) (holding that, although city’s “animal sacrifice” ordinance appeared

facially neutral, ordinance was intended to suppress a central element of Santeria religion in violation of First Amendment). In others, a facially neutral statute was discriminatorily applied. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 1072-73 (1886) (holding that a facially neutral local ordinance requiring laundry operators to obtain permits from San Francisco Board of Supervisors was nevertheless unconstitutional as applied because the Board of Supervisors had denied the permit requests of more than 200 Chinese applicants, and granted permits to 80 similarly situated non-Chinese applicants).

In *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1944), in a famous dissent which has since been universally acknowledged as correct, so much so that the victims have been paid reparations by the United States, Justice Frank Murphy decried the exclusion of Japanese Americans from the Pacific Coast, stating that such act “[fell] into the ugly abyss of racism,” 323 U.S. at 233, 65 S. Ct. at 202, and even resembled “the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy,” 323 U.S. at 240, 65 S. Ct. at 205. Justice Murphy wrote:

***I dissent, therefore, from this legalization of racism.*** Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. ***All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct***

*civilization of the United States.* They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.

323 U.S. at 242, 65 S. Ct. at 206 (emphasis added).

Notably, Justice Murphy spoke of “residents” of the United States, not citizens. Similarly, in his celebrated letter from the Birmingham jail, Martin Luther King wrote:

Moreover, I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. *Whatever affects one directly, affects all indirectly.* Never again can we afford to live with the narrow, provincial “outside agitator” idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.

Martin Luther King Jr., Letter from a Birmingham Jail, (April 16, 1963) *available at* [http://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html). (last visited Aug. 4, 2011) (emphasis added).

The form of *de jure* racism HB 56 threatens to usher in is not only contrary to the traditions and values of the United States as enshrined in our Constitution, but also violates universally recognized notions of fundamental civil rights and basic freedoms, as evidenced by the multinational treaties that address this topic, treaties to which the United States is a party. The International Convention on the Elimination of All Forms of Racial Discrimination, for example, defines racial

discrimination as “*distinction*, exclusion, restriction or preference *based on* race, colour, *descent, or national or ethnic origin which has the purpose or effect of* nullifying or *impairing the* recognition, *enjoyment or exercise, on an equal footing, of* human rights and *fundamental freedoms in* the political, economic, social, cultural or *any other field of public life.*” Art. 1, Mar. 7, 1966, 660 U.N.T.S. 195 (emphasis added).

These fundamental rights extend to undocumented persons. Under the International Covenant on Civil and Political Rights, the Parties “*undertake[] to respect and to ensure to all individuals within its territory* and subject to its jurisdiction *the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*” Art. 2.1, Mar. 23, 1966, 999 U.N.T.S. 171. As explained by the Human Rights Committee of the Office of the United Nations High Commissioner for Human Rights, “*the rights set forth in the Covenant apply to everyone*, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that *each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.*” General Comment No. 15: The position of aliens under the Covenant, 04/11/1986, *available at* <http://tinyurl.com/4y6p5zq> (last visited Aug. 3, 2011).

## CONCLUSION

HB 56 excludes children of color, particularly Hispanic children and children of other immigrant communities, from public schools. HB 56 mandates racial profiling and permits the detention of U.S. citizens and lawfully present immigrants if they fail to establish their immigration status to the satisfaction of local law enforcement. HB 56 threatens public safety by eroding relationships between law enforcement and immigrant communities, resulting in underreporting of crime, especially hate crimes.

HB 56 creates a regime where personal liberty and property are presumptively threatened for anyone that may appear or sound foreign. At the moment, HB 56 threatens the Hispanic community in Alabama most directly, but all minority groups, especially Middle Eastern and Asian Americans are vulnerable. This is a form of legalized racism that violates not only our own Constitutional ideals, but also universally recognized tenets of respect for fundamental human rights.

For these reasons and the reasons set forth above, this Court should reverse the district court's order denying Plaintiffs' motion for a preliminary injunction against sections 10, 12, 18, 27, 28 and 30 of HB56.

Respectfully submitted this 21st day of November, 2011.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7), I hereby certify that, excluding materials authorized to be excluded from the word count by 11 Cir. R. 32-4, this brief contains 6,965 words. I have relied on a word-processing system for the word count. I further certify that this brief has been prepared in a proportionally spaced typeface utilizing 14-point Times New Roman font.

Signed on this day of November 21, 2011.

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## CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Fed. R. App. P. 25(a)(2)(B), I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System.

I further certify that I caused a true and correct copy of the “**BRIEF OF THE ALABAMA STATE CONFERENCE OF THE NAACP AND OTHER AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**” to be served on each party, by electronic mail or by depositing same in the United States mail, first-class postage prepaid and properly addressed, to the individuals listed on the attached Service List this 21<sup>st</sup> day of November, 2011..

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