No. 12-884

In The
Supreme Court of the United States

STATE OF ALABAMA AND ROBERT BENTLEY,
GOVERNOR OF THE STATE 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

AMICUS CURIAE BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS*[1]

Amicus, Immigration Reform Law Institute ("IRLI"), assists in the representation of cities, states, municipalities and government officials against claims of preemption regarding immigration related actions. The Eleventh Circuit's underlying opinion has been cited as relevant authority in multiple cases in which IRLI currently litigates. *See*, *e.g.*, *Martinez v. City of Fremont*, No. 12-705, Entry ID No. 3946562, Resp. and Reply Br. of *Martinez* Plaintiffs-Appellants/Cross-Appellees, 4-5 (8th Cir.) (consolidated case citations omitted); *Valle del Sol v. Arizona*, No. 12-17152, Entry ID 8449267, Appellants Opening Br. 16 (9th Cir.); *Lozano v. City of Hazleton*, No. 07-3531, Doc. No. 003111091491, 28(j) Letter Regarding *Georgia Latino Alliance for Human Rights v. Deal* and *United States v. Alabama* (3d Cir.). IRLI seeks to protect the interests of its clients in these other cases. This Court should grant the State of Alabama's

[1] Counsel of record for both parties received notice at least 10 days prior to the due date of the *amicus curiaes*' intention to file this brief. Both parties have consented to the filing of an *Amicus Curiae* brief by *Amicus* Immigration Reform Law Institute. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from IRLI, their respective members, or their respective counsel made a monetary contribution to the preparation or submission of this brief. IRLI does not have a parent corporation, and no publicly held company owns 10% or more of IRLI's stock.

Petition for Certiorari to correct what is becoming a confusing application of this Court's previous precedents.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S FIELD PREEMPTION HOLDING CONFLICTS WITH THE SUPREME COURT'S HOLDING IN *DE CANAS*

This Court should grant certiorari to resolve a conflict between this Court's precedent and the Eleventh Circuit's decision. In *De Canas v. Bica*, 424 U.S. 351 (1976), this Court rejected a preemption challenge to a California state law which prohibited the employment of illegal aliens. "[Respondents] fail to point out, and an independent review does not reveal, any specific indication in either the wording or the legislative history of the INA that Congress intended to preclude even harmonious state regulation touching on aliens in general, or the employment of illegal aliens in particular." *Id.* at 357-58. A central preemption claim in *De Canas* involved the preemptive scope of 8 U.S.C. § 1324. *Id.* at 360-61. The respondents argued that the state law was field preempted by 8 U.S.C. § 1324 because Congress had included the now repealed "Texas Proviso," which exempted from harboring those employers who employed illegal aliens in the normal course of business. *Id.* The Court declined to find field preemption on the field of

harboring. *Id.* at 357; *see also id.* at 361, n.9 ("Accordingly, neither the proviso to 8 U.S.C. § 1324(a) nor Congress' failure to enact general laws criminalizing knowing employment of illegal aliens justifies an inference of congressional intent to pre-empt all state regulation in the employment areas.").

Congress has not enacted any subsequent law which would undermine this central holding of *De Canas*. Moreover, this Court has twice recently cited to *De Canas* as valid precedent. *See Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011); *see also Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012). Absent the "Texas Proviso," the harboring provisions construed in *De Canas* are identical in all relevant ways to the current 8 U.S.C. § 1324(a)(1)(A). *Compare* INA § 274(a), P.L. 414, 66 Stat. 228-29 (June 27, 1952) *with* current 8 U.S.C. § 1324(a)(1)(A). Therefore, whether the Ala. Code § 31-13-13 is "field preempted" under 8 U.S.C. § 1324 must still be controlled by *De Canas*. *See Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language.") (citations omitted); *Lorillard, a Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

The Eleventh Circuit did not acknowledge this core holding of *De Canas*. Instead, the Eleventh Circuit adopted a legally incorrect view that Congress must insert a savings clause into a federal statute before Alabama could pass a law that complements federal law. *United States v. Alabama*, 691 F.3d 1269, 1285-86 (11th Cir. 2012). That analysis raises other serious concerns regarding preemption analysis besides being in direct conflict with *De Canas*. *See infra* at III. Regardless of that flaw, this Court should grant Certiorari due to the glaring conflict between the Eleventh Circuit's holding and *De Canas*. Because this Court has already determined that Congress, in enacting the INA, generally, and the harboring statute specifically, did not "intend[ ] to preclude even harmonious state regulation touching on aliens in general," *De Canas*, 424 U.S. at 358, this Court should grant the Petition for Certiorari to ensure uniformity with this Court's precedent.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT HAS CREATED A NEW PARTIAL FIELD PREEMPTION THEORY WHICH CONFLICTS WITH SUPREME COURT PRECEDENT

This Court has always deemed field preemption to be an all-or-nothing inquiry. If Congress has occupied the field, even state laws that are in perfect harmony with federal law and proscribe the same conduct are still preempted: "[I]n areas that Congress

decides require national uniformity of regulation, Congress may exercise power to exclude any state regulation, even if harmonious." *De Canas*, 424 U.S. at 360 (emphasis in original).

Field preemption requires a high burden of proof to displace all state authority. Congress must have legislated "'so pervasive[ly] . . . that Congress left no room for the States to supplement it' or where there is a 'federal interest' . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona*, 132 S. Ct. at 2501 (citations omitted). "Only a demonstration that complete ouster of state power" was intended by Congress can establish field preemption. *De Canas*, 424 U.S. at 357-58. Field preemption only exists if "Congress ha[s] left no room for state regulation." *United States v. Locke*, 529 U.S. 89, 111 (2000); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). What is more, field preemption is so rare in the immigration context, that in the more than 120 years of comprehensive federal immigration laws, this Court has only found one immigration field preempted – the alien registration field, after Congress adopted the Alien Registration Act of 1940. *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941); *Arizona*, 132 S. Ct. at 2501-02.

The Eleventh Circuit has now departed from this long line of Supreme Court precedent and developed a novel "partial preemption" theory. *Alabama*, 691 F.3d at 1285-86. Congress specifically invited states onto the field of harboring. *See* 8 U.S.C. § 1324(c) (clarifying

that all officers whose job it is to enforce the law may make arrests); *Arizona*, 132 S. Ct. at 2506 (state and local officers have authority to arrest for bringing in and harboring certain aliens). That invitation alone should end the field preemption inquiry. But, instead of respecting precedent, the Eleventh Circuit labeled § 1324(c) a "savings clause" and created a new theory that Congress set aside this one part of the harboring field where the states could act. *Alabama*, 691 F.3d at 1286. This violates the basic tenant of field preemption, that it is an all-or-nothing enterprise. *Locke*, 529 U.S. at 111. The Eleventh Circuit offers no case support for its new partial field preemption theory.

The Eleventh Circuit's new "partial preemption" theory further conflicts with this Court's guidance that any field preemption finding presumes that the federal scheme of regulation is so pervasive that it leaves no room for states to act. *Arizona*, 132 S. Ct. at 2501. However, the harboring provisions of federal law are miniscule. They include only three brief subsections of federal law defining the crime, defining the penalties, and inviting state assistance. 8 U.S.C. § 1324(a)-(c). Because of their brevity and simplicity, and the absence of any administrative structure, "[i]t therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement," much less the field of harboring specifically. *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983); *Arizona*, 132 S. Ct. 2492 (states have "the authority to enforce the criminal provisions of federal immigration law").

Additionally, this new partial preemption theory in the harboring context is already precluded by Supreme Court precedent. Identical arrest provisions are found in the harboring statute construed by *De Canas* and the current harboring statute construed by the Eleventh Circuit. *Compare* INA § 274(b), P.L. 414, 66 Stat. 228-29 (June 27, 1952) *with* current 8 U.S.C. § 1324(c). If partial field preemption possessed constitutional validity, it would have been endorsed over thirty years ago.[2] This Court should grant the Petition to end the conflict between this Court's precedent and the Eleventh Circuit opinion.

III. CERTIORARI SHOULD BE GRANTED TO STOP THE WIDENING PERCEPTION THAT CONGRESS GRANTS POWER TO THE STATES UNDER THE PREEMPTION CLAUSE RATHER THAN RESTRICTING THE POWER OF STATES

The Supremacy Clause is an extraordinary power of the federal government to restrict State action. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1996). Under the Supremacy Clause, the Federal Government does not grant power to states, but restricts power the States would otherwise exercise in its absence. *See N.Y. Tel. Co. v. N.Y. State DOL*, 440 U.S.

[2] Of course, even if partial field preemption existed, it would not apply in this case, given that *De Canas* already holds that the harboring statute did not field preempt or constitute partial field preemption. *See supra* at I.

519, 533 (1979) ("[O]ur cases have consistently recognized that a congressional intent to deprive the States of their powers to enforce such general laws is more difficult to infer than intent to pre-empt laws directed specifically at concerted activity.") (citations omitted); *see also* The Federalist No. 32, at 155 (Alexander Hamilton) (The Gideon ed., 2001) (labeling preemption as an "alienation of state sovereignty"). The Eleventh Circuit has now inverted this principle and other Courts have begun following that Circuit's flawed approach.

The Eleventh Circuit held Ala. Code § 31-13-13 conflict preempted because:

> In the absence of a savings clause permitting state regulation in the field, the inference from these enactments is that the role of the states is limited to arrest for violations of federal law.

Alabama, 691 F.3d at 1286.[3] Other courts are already following the Eleventh Circuit's flawed reasoning. *United States v. South Carolina*, 2012 U.S. Dist. LEXIS 170752, *12 (D. S.C. 2012); *Valle del Sol v. Whiting*, 2012 U.S. Dist. LEXIS 172196, *33 (D. Ariz. 2012).

Under the Eleventh Circuit's view of preemption, a State is preempted from acting unless Congress has

[3] This also appears to be part of the reason that the Eleventh Circuit found Ala. Code § 31-13-13 field preempted.

authorized a State to act. That analysis is contrary to implied conflict preemption doctrine: "[W]e will not infer preemption of the States' historic police powers absent a clear statement of intent by Congress." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring) (*citing Rice*, 331 U.S. at 230); *see also Altria Group, Inc., v. Good*, 129 S. Ct. 538, 543 (2008) ("[T]he historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress.") (internal citations omitted); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (Displacing state power requires that "Congress . . . unequivocally expres[s] its intent to abrogate.") (internal quotation marks and citation omitted).

The Eleventh Circuit's mistaken analysis also directly conflicts with *De Canas* in the immigration context:

> [F]ederal regulation . . . should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.

De Canas, 424 U.S. at 356 (*quoting Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)) (emphasis added). Such "unmistakable" congressional statements, by definition, cannot be found in congressional silence. *Whiting*, 131 S. Ct. 1968, 1985 (2011) ("Our precedents establish that a high threshold

must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act.") (citation and internal quotations omitted). "Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law." *Id.* (citations and internal quotations omitted). The Eleventh Circuit did not explain, nor could it, how the "high threshold" for conflict preemption could be met through Congressional silence regarding a State's authority to mirror federal law.

This lack of explanation is particularly troubling because it has been settled law since 1847 that a state and the federal government can criminalize similar conduct without violating the constitution. *See United States v. Lanza*, 260 U.S. 377, 382 (1922); *Fox v. Ohio*, 46 U.S. 410 (1847); *Moore v. Illinois*, 55 U.S. 13, 20 (1852) ("The same act may be an offence or transgression of the laws of both."); *Bartkus v. Illinois*, 359 U.S. 121, 132-33 (1959) (collecting cases). As Justice Oliver Wendell Holmes once wrote, "Of course an act may be criminal under the laws of both jurisdictions . . . The general proposition is too plain to need more than statement." *Westfall v. United States*, 274 U.S. 256, 258 (1927) (*citing Lanza*, 260 U.S. at 382).

In *Fox v. Ohio*, the Supreme Court definitively rejected an argument that the Double Jeopardy Clause of the Fifth Amendment and Congress's power

to coin money under Article I of the Constitution preempted the State of Ohio from penalizing the use of counterfeit money in Ohio. *See Fox*, 46 U.S. at 432-33 ("Whether that portion of the statute of Ohio, under which the prosecution against the plaintiff has taken place, and, consequently . . . are consistent with or in contravention of the constitution of the United States, or of any law of the United States enacted in pursuance of the constitution?"); *see also Bartkus*, 359 U.S. at 129 (explaining that Fox involved a preemption challenge regarding the Fifth Amendment). The Court held that the federal government and a state government may criminalize the same act regarding coining money and not violate the Constitution. *Fox*, 46 U.S. at 435; *Bartkus*, 359 U.S. at 129 (recognizing that *Fox* held that although there was a possibility of double punishment, "a finding of pre-emption" did not "flow[ ]" from that finding); *see also California v. Zook*, 336 U.S. 725, 735 (1949) ("[T]here is no conflict in terms, and no possibility of such conflict, [if] the state statute makes federal law its own[.]"). *Arizona* also recognizes this principle. *See Arizona*, 132 S. Ct. at 2503 ("[A] State may make violation of federal law a crime.").

Preemption requires "unmistakabl[e]" intent by Congress, *De Canas*, 424 U.S. at 361 n.9, and conflict preemption based on the "purposes and objectives of Congress" requires a "high threshold" that must be met before preemption can be found. *Whiting*, 131 S. Ct. at 1985. The Eleventh Circuit erred in its preemption analysis because it took Congress's

silence on a State's authority to enact laws that mirror federal ones as preempting state action, rather than following the long standing preemption principle that Congress must "unequivocally expres[s]" its intent to preempt. *Seminole Tribe of Fla.*, 517 U.S. at 55. In the absence of preemptive congressional abrogation of state laws, the states need not seek permission before they can act.

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S HOLDING THAT POTENTIAL EXECUTIVE DISCRETION PREEMPTS STATE ACTION CONFLICTS WITH LONG-STANDING SUPREMACY CLAUSE DOCTRINE

The Eleventh Circuit held that Ala. Code § 31-13-13 was preempted because it potentially conflicted with future discretionary actions by officers of DHS: Ala. Code § 31-13-13 "undermines the intent of Congress to confer discretion on the Executive Branch in matters concerning immigration" because "Congress limited the power to pursue [prosecution of federal immigration crimes] to the appropriate United States Attorney." *Alabama*, 691 F.3d at 1287. This holding conflicts with the basic notion of our federalist system, that Congress, not the Executive Branch through unelected federal officials, has the power to preempt. *North Dakota v. United States*, 495 U.S. 423, 442 (1990) ("It is Congress – not the [Department of Defense] – that has the power to pre-empt

otherwise valid state laws. . . ."); *Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105, 131 (2d Cir. 2007), *rev'd in part on other grounds*, 129 S. Ct. 2710 (2009) ("[T]he Supremacy Clause in article VI, clause 2 grants the power to preempt state law to the Congress, not to appointed officials in the Executive branch."). The Supremacy Clause only gives preemptive force to the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States." U.S. Const. art. VI, cl. 2.

This exact holding was rejected by this Court in *Arizona v. United States*.

> It is true that § 2(B) does not allow state officers to consider federal enforcement priorities in deciding whether to contact ICE about someone they have detained. . . . In other words, the officers must make an inquiry even in cases where it seems unlikely that the Attorney General would have the alien removed. . . . Congress has done nothing to suggest it is inappropriate to communicate with ICE in these situations, however. Indeed, it has encouraged the sharing of information about possible immigration violations. See 8 U.S.C. § 1357(g)(10)(A).

Arizona, 132 S. Ct. at 2508; *see also id.* at 2527 (Alito, J., concurring in relevant part) ("The United States' attack on § 2(B) is quite remarkable. The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or

regulation, but because it is inconsistent with a federal agency's current enforcement priorities. . . . I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force. . . .).

The Eleventh Circuit's holding represents a momentous shift in preemption doctrine, permitting an unelected Executive Branch agency to "confer power upon itself" to preempt state laws. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). "If accepted, [the Eleventh Circuit's] pre-emption [holding] would give the Executive unprecedented power to invalidate state laws that do not meet with its approval, even if the state laws are otherwise consistent with federal statutes and duly promulgated laws. This argument, to say the least, is fundamentally at odds with our federal system." *Arizona*, 132 S. Ct. at 2527 (Alito, J. concurring in relevant part).

Additionally, even if an Executive Agency could preempt state law through some hypothetical discretionary future action, no preemptive effect could apply in the context of 8 U.S.C. § 1324 for two reasons. First, the federal statue expressly permits state officers to use their own "discretion" in enforcing its provision. *Id.* at § 1324(c) ("all other officers whose duty it is to enforce criminal laws" have "the authority to make any arrest"). Whether the "Secretary of Homeland Security . . . prioritize[s] the identification and removal of aliens convicted of a crime by the severity of that crime," *Alabama*, 691 F.3d at 1287, has no bearing on whether a State may arrest and

subsequently prosecute someone for alien smuggling. Many of the individuals who would be convicted under Ala. Code § 31-13-13 would not even be aliens. Ala. Pet. for Cert. at 21-22.

Second, the federal RICO statute already permits *individual plaintiffs* injured in their "business or property" to enforce the violations of 8 U.S.C. § 1324 crimes wholly outside of any federal discretion. 18 U.S.C. §§ 1961(1)(F), 1962-1963; *see also Williams v. Mohawk Indus.*, 465 F.3d 1277 (11th Cir. 2006); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002). Because Congress permits private lawsuits for violations of 8 U.S.C. § 1324 wholly outside of any enforcement actions, it is illogical to conclude that the Executive Branch may preempt a state law through some hypothetical future "discretion."

CONCLUSION

Amicus respectfully requests this Court to Grant the Petition for Writ of Certiorari.

Respectfully submitted,

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