SUPREME COURT OF LOUISIANA

No. 2013-KK-0315

STATE OF LOUISIANA, Respondent

Versus

ROSA LUGO MARQUEZ, Petitioner

Brief of *Amicus Curiae* by the

AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT, the

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA, the

SOUTHERN POVERTY LAW CENTER and the

NATIONAL IMMIGRATION LAW CENTER

In support of Petitioner ROSA LUGO MARQUEZ

Writ of Review to the Third Circuit Court of Appeal
No. KW-12-01356 on the Criminal Docket

No. CR-13121 on the Criminal Docket of the 15th Judicial District Court, Div. K, Parish of Lafayette, Louisiana,

Hon. Patrick Michot, Presiding Below

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Amici Southern Poverty Law Center, American Civil Liberties Union Foundation Immigrants' Rights Project, American Civil Liberties Union Foundation of Louisiana, and National Immigration Law Center are not-for-profit civil rights organizations that defend the constitutional rights of immigrants in Louisiana and throughout the nation. As part of this advocacy, *amici* have successfully litigated and continue to litigate numerous challenges to state laws related to immigration and have developed substantial expertise regarding the relevant federal law issues. *Amici* file this brief in support of the positions of Applicants-Defendants Bonifacio Ramírez and Rosa Marquez to provide additional analysis on the federal preemption question that may be helpful to the Court should it reach the issue.

ARGUMENT

The federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012). Because of the importance of immigration and the treatment of visiting non-citizens to foreign relations matters such as trade, investment, tourism, and the well-being of U.S. citizens abroad, "[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with *one national sovereign, not the 50 separate States*." *Id.* (emphasis added).

The Supremacy Clause of the U.S. Constitution states that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Accordingly, Congress has the power to preempt state laws related to immigration. *Arizona*, 132 S. Ct. at 2500. In particular, state laws related to immigration are preempted if they: (1) are expressly preempted by federal law; (2) intrude in a field occupied by federal law; (3) conflict with federal law, including by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"; or (4) amount to a "regulation of immigration," which the federal government has exclusive authority to undertake. *See id.* at 2500-01; *DeCanas v. Bica*, 424 U.S. 351 (1976).

In addition to the reasons argued in Ramírez's and Marquez's applications for writs of certiorari of review—with which *amici* agree—section 14:100.13 is also preempted because it: (1) intrudes on the field of federal alien registration—which alone specifies the circumstances under which non-citizens have to carry documents regarding lawful presence and the penalties for failing to comply—in a way that impermissibly burdens all non-citizens (including lawfully present foreign nationals) and U.S.

citizens perceived to be foreign nationals; (2) conflicts with the comprehensive federal scheme in which unlawful presence is only a civil violation and not a crime, and for which state officers are generally not permitted to arrest; and (3) intrudes on the comprehensive federal alien classification scheme by requiring state court adjudications of unlawful presence where such determinations may only be made by federal immigration judges. In highlighting additional preemption arguments that this Court could consider, *amici* also explain section 14:100.13's negative impact on individuals who are or are perceived to be foreign nationals, which erodes Louisiana's strong economic interests in business and tourism.

I. Section 14:100.13 is field preempted as an alien registration scheme that impermissibly and severely burdens lawfully present immigrants in Louisiana.

Section 14:100.13 makes it a felony for "alien students" and "nonresident aliens" to "operate a motor vehicle in the state without documentation demonstrating that the person is lawfully present in the United States." La. R.S. § 14:100.13(A). The statute also requires that a person arrested "for operating a vehicle without lawful presence in the United States," without having first been found guilty of the alleged charge, have their license immediately seized and surrendered to the office of motor vehicles for cancellation, and have their name and location reported to immigration authorities. *Id.* § 14:100.13(B).

In its findings in support of section 14.100.13, the Legislature declared its intent to enact a law that would expressly "complement" federal law by "mak[ing] operating a motor vehicle in this state when not lawfully present in the United States a crime." *Id.* § 14.100.11(B). As discussed in Part II, *infra*, because section 14:100.13 criminalizes unlawful presence where Congress has elected not to do so, it does not actually complement the federal scheme. Nonetheless, the Supreme Court's decision in *Arizona* establishes that even complementary and limited efforts by states to regulate whether and to what extent aliens within the United States may be compelled to carry immigration-related documents intrude on the comprehensive federal alien registration scheme and are thus preempted.[1] *See* 132 S. Ct. at 2502 ("Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible. Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards.").

But section 14:100.13 is preempted not simply because it attempts (unsuccessfully) to "complement" the comprehensive federal scheme — although that reason, standing alone, is dispositive

[1] It does not matter that section 14:100.13 does not require non-citizens to register with the State, as the same was true of Arizona's law the Supreme Court found preempted. *See* Ariz. Rev. Stat. § 13–1509. What matters is that the State has intruded in some way into a field that Congress has occupied. *See generally Arizona*, 132 S. Ct. at 2501-03.

of the preemption question. *See generally id.* at 2502-03; *see also State v. Gomez*, 2012-1357 (La. App. 3 Cir. 05/22/13), __ So. 3d __ , 2013 WL 2214552 (holding section 14:100.13 preempted because it impermissibly complemented the federal alien registration scheme); *State v. Anaya-Espino*, 48,025 (La. App. 2 Cir. 05/22/13), __ So. 3d __, 2013 WL 2217012 (same); *State v. Sarrabea*, 2012-1013 (La. App. 3 Cir. 05/01/13) __ So.3d __, 2013 WL 1810228 (same). Section 14:100.13 is a particularly problematic intrusion into the federal alien registration scheme because of its severe and burdensome consequences for lawfully present noncitizens and for lawful permanent residents and United States citizens in Louisiana who simply look or sound foreign.

The burdens posed to foreign nationals whom the federal government has permitted to remain in the country have figured as a central concern in decades of U.S. Supreme Court precedent striking down state immigration-related laws. In holding preempted Arizona's law criminalizing the failure of aliens within the state to carry documentation of their immigration status, the Court relied heavily on *Hines v. Davidowitz*, 312 U.S. 52 (1941). *Hines* involved a challenge to a 1939 alien registration scheme created by Pennsylvania that required aliens to, among other things, carry an alien registration card and show the card upon demand by state law enforcement. *Id.* at 59-60. The statute provided imposed fines and prison time on those who failed to register. *Id.* In 1940, Congress enacted a federal alien registration scheme that required that aliens register with the federal government. *Id.* at 60.

In *Hines*, the Court held that Pennsylvania's law was fully preempted by the federal registration law. In so doing, the Court observed that a particularly problematic aspect of the Pennsylvania law was that it authorized state and local police officials to specially target non-citizens, which implicated the entire nation's conduct of international affairs:

> Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens—such as subjecting them alone, though perfectly law-abiding, to indiscriminate and repeated interception and interrogation by public officials—thus bears an inseparable relationship to the welfare and tranquillity of all the states, and not merely to the welfare and tranquillity of one . . . . [E]ven though [such laws] may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs.

Id. at 65-66.

In *Arizona* itself, the Court also emphasized the extent to which a state law authorizing state officials to arrest individuals suspected of being removable aliens would undermine the federal immigration scheme, particularly because the federal government may permit certain individuals without formal immigration status to remain in the United States. In holding this portion of the Arizona

law preempted, the Court expressed its concern that the authority granted to state officers to arrest individuals suspected of immigration violations

> could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case. This would allow the State to achieve its own immigration policy. The result could be unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed.

132 S. Ct. at 2506.

Similarly, in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), the Supreme Court applied *Hines* to hold that a California law prohibiting the issuance of fishing licenses to individuals "ineligible to citizenship" was preempted. The Court rejected "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States," reasoning that such laws "conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Id.* at 419.

Like the laws preempted in *Hines*, *Arizona*, and *Takahashi*,[2] section 14:100.13's requirement that all "alien students" and "nonresident aliens" carry proof of their lawful presence while driving imposes extraordinary obligations on all lawfully present foreign nationals. Indeed, under the statute's sweeping definition of alien student, section 14:100.13 applies even to *lawful permanent residents* who are also students. *See* La. R.S. § 14:100.12 ("'Alien student' means *any* person who is attending an institution of education in the state who is not a citizen of the United States.") (emphasis added).

Louisiana is a diverse and culturally rich state, with historical and current ties to France,[3] Honduras,[4] Mexico,[5] and other foreign nations whose citizens come to Louisiana for tourism, business,

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[2] Courts of this state have also expressed concern with the burdens that section 14:100.13 places on non-citizens in Louisiana. *See, e.g.*, *Sarrabea*, 2013 WL 1810228, at *15 ("The United States Supreme Court in *Arizona* expressly recognized the unwelcome prospect of state laws such as La.R.S. 14:100.13 being used to unnecessarily harass college students from foreign countries attending our great universities. Indeed it is foretelling that Louisiana's statute expressly targets 'alien student[s].'"); *State v. Lopez*, 2005-KA-0685 (La. App. 4 Cir. 12/20/2006), 948 So. 2d 1121, 1125, *writ denied*, 2007-K-0110 (La. 12/07/2007), 969 So. 2d 619 ("The ultimate problem presented by La. R.S. 14:100.13, however, is that paragraph (A) places a burden on both legal and non-legal aliens which exceeds any standard contemplated by federal immigration law.").

[3] *See, e.g.*, "Declaration of Intent Relating to Cooperation Between France and Louisiana" (2012-2016), *available at* http://www.consulfrancenouvelleorleans.org/IMG/pdf/Accords%20Franco%20Louisianais%20version%20anglaise.pdf.

[4] *See, e.g.*, Denese Neu, "Honduran Identity within South Louisiana Culture" (describing historic connections between Honduras and New Orleans which emerged during the peak years of the New Orleans-based United Fruit Company's operations in and importation of bananas from Honduras), *available at* http://www.louisianafolklife.org/LT/Articles_Essays/Hondurans1.html.

[5] *See, e.g.*, Migration Policy Institute, "Louisiana: Social and Demographic Characteristics," *available at* http://www.migrationinformation.org/datahub/state.cfm?ID=la (reporting that, as of 2011, Mexicans

education, and as federally authorized "guest" workers in the state's agricultural and seafood processing sectors.[6] Section 14:100.13 poses severe burdens on these lawfully present aliens and even foreign-appearing lawful permanent residents and U.S. citizens who are purportedly excluded from the law's purview. In the State's view, the document-carrying mandate in section 14:100.13(A) applies to any alien driver falling within the definition of "alien student" or "nonresident alien," *even if* the driver is actually lawfully present. State Resp. to Ramírez Writ Application at 4 ("If a non-resident alien or alien student, who is legally present in the United States, simply forgets his or her proof of lawful presence at home and goes for a drive, then that person violates the law . . . . There is simply no requirement under La. R.S. 14.100.13 that the defendant be an illegal alien.") (emphasis in original).[7]

Thus, when a lawfully present Mexican H-2A agricultural worker heads to the grocery store in Ponchatoula after a long day of picking strawberries but forgets to take her visa with her (or perhaps declines to do so because she fears it will be lost or stolen), she is in danger of, at minimum, being stopped, arrested for failing to carry proof of her lawful presence, and having her license immediately stripped from her and sent for cancellation, and even risks being sentenced to a year in prison and fined $1,000.[8] The same is true for the lawful permanent resident from France, attending Louisiana State

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were the most represented nationality among Louisiana's foreign born, constituting 18% of Louisiana's foreign born population).

[6] *See, e.g.*, U.S. Dep't of State, *J-1 Visa Exchange Visitor Program*, *available at* http://j1visa.state.gov /basics/facts-and-figures/participant-and-sponsor-totals(information related to J-1 cultural and educational exchange visa holders in Louisiana); U.S. Dep't of Labor, "State Employment-Based Immigration Profiles," *FY 2011 Annual Report Performance Data*, App'x A (2011), *available at* http://www.foreignlaborcert.doleta.gov/map /2011/la.pdf (figures related to guestworker visas assigned to Louisiana businesses). This year, Louisiana is among the top ten states relying on H-2B and H-2A guestworkers. *See* Office of Foreign Labor Certification, *H-2A Temporary Agricultural Visa Program* (2013), *available at* http://www.foreignlaborcert.doleta.gov/pdf/ h_2a_temp_ agricultural _visa.pdf; Office of Foreign Labor Certification, *H-2B Temporary Nonagricultural Visa Program* (2013), *available at* http://www.foreignlaborcert.doleta. gov/pdf/h_2b_temp_non_agricultural_visa.pdf.

[7] The State's interpretation and the broad sweep of 14.100.13(A) notwithstanding, as detailed in Section II *infra*, the plain text of the penalty portions set forth in subsections (B) and (C) of section 14.100.13 indicate that the only individuals who could be punished for violating subsection (A) are those "without lawful presence." But whether section 14.100.13's penalty provisions apply to lawfully present "alien students" and "nonresident aliens," or only to noncitizens "without lawful presence," section 14.100.13 is still preempted because subsection (A) seeks to regulate the circumstances under which non-citizens carry documentation proving lawful presence—just like in *Arizona*. *See also* n.11 *infra*. The fact that the State apparently believes that even lawfully present aliens could be convicted and punished under the statute only illustrates further why the federal government has chosen to occupy this field to the exclusion of the state legislation on such matters.

[8] To the extent that La. R.S. § 14:100.13(B) provides for the immediate seizure and summary cancellation of a driver's license upon mere arrest of an allegedly unlawfully present driver and without an opportunity to be heard first as to one's innocence or lawful presence, it also likely violates the U.S. and Louisiana constitutions' guarantees of procedural due process. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (recognizing an individual's Fourteenth Amendment right to procedural due process before

University, who neglects to take his green card with him when rushing to drive a sick friend to the emergency room, or for the Honduran tourist who, unaware of the law, leaves his visa in the hotel safe while attending Mardi Gras festivities in New Orleans. An immigrant battered spouse eligible for humanitarian immigration relief pursuant to the federal Violence Against Women Act and who is thus permitted to remain in the United States by federal law, *see, e.g.*, 8 U.S.C. § 1229b(b)(2) & 8 C.F.R. § 214.14, but whose abusive spouse has stolen from her the paperwork she needs to demonstrate her authorization to be in the United States faces the same fate.

Moreover, even non-student lawful permanent resident or United States citizen drivers who look or sound "foreign" are burdened by the statute. Although section 14:100.13(A) does not technically require permanent residents and citizens to show documentation, state and local officials may demand documents of those with foreign accents or who "look foreign" in order to determine whether they fit within a statutory exception. If that individual is unable to produce their green card or naturalization certificate, the inquiring officer is likely to consider them "without lawful presence" and subject them to arrest and seizure of their license pursuant to section 14:100.13(B). That these persons may later be able to prove their innocence is cold comfort when faced with the humiliation and burden of arrest and significant bureaucratic hurdles necessary to regain one's license. And as the example of Alabama, Arizona, Georgia and other states with such laws have illustrated, subjecting immigrant individuals to such burdens discourages foreign investment in these states and impedes commerce and robust participation in community life.[9] In holding preempted state laws requiring aliens to carry documentary proof of their immigration status, courts have observed that significant legal burdens placed by states on aliens can interfere with the "delicate" relationships between nations and undermine national interests in

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the state suspends his driver's license); *State v. Edwards*, 353 So. 2d 476, 477 (La. App. 3 Cir. 1977) ("Procedural due process is required before a driver's license may be revoked."); La. Const. Art. 1, § 2.

[9] *See* Jillian Berman, *Georgia Immigration Law Could Have Dire Consequences For State's Economy: Study*, Huffington Post (Oct. 5, 2011), http://www.huffingtonpost.com/2011/ 10/05/georgia-immigration-law-economy_n_995889.html; Megan Kimble, *Arizona Immigration: SB 1070 Took Toll on State's Reputation*, Los Angeles Times (Apr. 26, 2012) (reporting that conventions cancelled because of SB 1070 cost Arizona $23 million in lost tax revenues and $350 million in direct spending); Ed Pilkington, *Alabama Red-Faced as Second Foreign Car Boss Held Under Immigration Law*, The Guardian (Dec. 2, 2011) (discussing arrest of German auto executive motorist and the ticketing of a Japanese auto executive motorist pursuant to Alabama's immigration law, as well as negative economic effects caused by the law); *see also* National Immigration Law Center, *Racial Profiling After HB 56: Stories from the Alabama Hotline* (2012) at 2-4, 8-10 (describing public and private discrimination against Latino U.S. citizens and lawfully immigrant citizens following HB 56), *available at* http://bit.ly/10vWSNX; Southern Poverty Law Center, *Alabama's Shame: HB 56 and the War on Immigrants* (2012) at 7-10, 19, 23-24 (documenting harassment and difficulties faced by U.S. citizens and lawfully present immigrants in Alabama following enactment of Alabama's immigration law and its impact on commerce and community life), *available at* http://bit.ly/15cBs8a.

trade and diplomacy. *See Arizona*, 132 S. Ct. at 2498 ("Perceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of American citizens abroad."); *Hines*, 312 U.S. at 64 ("One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.")

Section 14:100.13 imposes significant burdens on lawfully present aliens that are equal or greater to those imposed by state laws held preempted in *Arizona*, *Hines*, and *Takahashi*. Like the laws at issue in those cases, section 14:100.13 similarly undermines federal primacy and consistency in international relations. For these and other reasons set forth in the defendants' applications for supervisory writs, section 14:100.13 is plainly preempted by the federal alien registration scheme and as an impermissible burdening of lawfully present aliens in Louisiana.

II. Section 14:100.13 is conflict-preempted because it undermines the comprehensive federal scheme in which unlawful presence is solely a civil violation, and not a crime.

Although section 14:100.13(A) requires virtually all non-citizens in Louisiana to carry proof of lawful presence in this country—and therefore subjects them all to inquisitorial police practices, arrest, and detention, as discussed in Part I, *supra*—it singles out for criminal punishment in subsections (B) and (C) those non-citizens whom state and local officials believe lack lawful presence. Under federal law, however, unlawful presence is only a *civil* violation with attendant consequences—potentially including deportation ("removal")—deliberately restricted to the immigration system. Because Louisiana's attempt to punish violators of federal immigration law conflicts with the immigration enforcement scheme crafted by Congress, it is preempted.

A. Section 14:100.13 singles out undocumented immigrants for criminal punishment.

"The function of statutory interpretation and the construction to be given to legislative acts rests with the judicial branch of the government." *State v. Dick*, 2006-2223 (La. 01/26/2007), 951 So. 2d 124, 130. "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La. Civ. Code art. 9. "[T]he paramount consideration in statutory interpretation is ascertainment of the legislative intent and the reason or reasons which prompted the legislature to enact the law." *State v. Johnson*, 2003-2993 (La. 10/19/2004), 884 So. 2d 568, 575.

Section 14:100.13 is part of the 2002 "Prevention of Terrorism on the Highways Act" (hereinafter referred to as "the Act"). It is entitled "Operating a vehicle without lawful presence in the United States," and provides, in its entirety:

A. No alien student or nonresident alien shall operate a motor vehicle in the state without documentation demonstrating that the person is lawfully present in the United States.

B. Upon arrest of a person for operating a vehicle without lawful presence in the United States, law enforcement officials shall seize the driver's license and immediately surrender such license to the office of motor vehicles for cancellation and shall immediately notify the INS of the name and location of the person.

C. Whoever commits the crime of driving without lawful presence in the United States shall be fined not more than one thousand dollars, imprisoned for not more than one year, with or without hard labor, or both.

The text of section 14:100.13 is plain: subsection (A) mandates that most non-citizens[10] carry when driving documents that prove their own lawful presence, while subsections (B) and (C) punish only those individuals who drive "without lawful presence in the United States."

The State maintains that "[i]f a non-resident alien or alien student, who is legally present in the United States, simply forgets his or her proof of lawful presence at home and goes for a drive, then that person violates La. R.S. § 14:100.13(A)." State's Resp. to Ramírez Writ Application at 4 (emphasis in original). Although, as explained fully in Part I, *supra*, this burden on lawfully present immigrants is preempted as an intrusion on the federal government's authority over registration matters, the State fails to acknowledge that subsection (A) does not specify any punishment for a violation of that subsection alone. Rather, subsections (B) and (C), which prescribe punishments, apply only to immigrants who are "without lawful presence" in this country.[11] Thus, the application of punishments under the section explicitly turns on the unlawfulness of an individual's presence in the United States; and punishing a lawfully present non-citizen under subsection (B) or (C) would render meaningless the phrase "without lawful presence" found in each provision. *See McLane Southern, Inc. v. Bridges*, 2011-1141 (La. 01/24/2012), 84 So. 3d 479, 483 ("Courts should give effect to all parts of a statute and should not give a statute an interpretation that makes any part superfluous or meaningless, if that result can be avoided.").

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[10] The definitions of "alien student" and "nonresident alien" exempt from subsection (A)'s document-carrying requirement non-citizens who have "acquired INS permanent resident status," unless they are "attending an institution of education in the state," in which case they still must carry documents proving their lawful presence. La. R.S. § 14:100.11(2), (5).

[11] Just like section 14:100.13, the only individuals who actually could be punished under Section 3 of Arizona's law (the alien registration provision discussed in Part I *supra*) were those believed to be unlawfully present. *See* Ariz. Rev. Stat. § 13–1509(F) ("This section does not apply to a person who maintains authorization from the federal government to remain in the United States."). Thus, the fact that the statute may not result in the actual prosecution of lawfully present aliens matters not at all to the preemption analysis discussed in Part I, *supra*. *See generally Arizona*, 132 S. Ct. at 2501-03.

Other portions of the Act confirm that the Legislature's purpose was to punish undocumented immigrants for driving in the State; its statement of findings and purpose explain that the Legislature:

> finds that it is imperative that state laws be enacted . . . to uncover those . . . who seek to gain drivers' licenses or identification cards for the purposes of masking their *illegal status* in this state. Accordingly, the legislature finds that state law must be strengthened with a comprehensive framework . . . to make operating a motor vehicle in this state *when not lawfully present in the United States* a crime.

La. R.S. § 14:100.11(B) (emphases added).[12]

In sum, the interpretation of section 14.100.13 that most accords with the statutory text and legislative intent is that it targets those individuals who "[o]perat[e] a vehicle without lawful presence in the United States," and thus imposes state criminal liability based on a federal civil violation.

B. Section 14:100.13 is conflict preempted because it premises criminal liability on unlawful presence and authorizes state officers to make arrests therefor when Congress has deliberately chosen to do neither.

As explained above, section 14:100.13 criminalizes unlawful presence under certain circumstances—when driving. Although the State can make (and has made[13]) it a crime to drive without a license, and can (and does[14]) deny driver's licenses to non-citizens who are not lawfully present, its attempt to premise criminal liability on an individual's unlawful presence poses an obstacle to the system of immigration enforcement that Congress has chosen, whereby unlawful presence is dealt with only through federal civil processes, and was deliberately *not* made a crime.

In *Arizona*, the Supreme Court held that Section 5(C) of Arizona's S.B. 1070—which made it a crime for "an unauthorized alien" to work in the state—was conflict preempted. 132 S. Ct. at 2503-05. The Court explained that while federal law makes it a crime for employers to knowingly *hire* unauthorized aliens, "Congress made a deliberate choice" to impose only *civil* penalties on non-citizens who engage in unauthorized work in the comprehensive federal scheme regulating employment of non-citizens. *Id.* at 2504. *Arizona* accordingly held that because "Congress decided it would be inappropriate

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[12] The Legislature's focus on those with "illegal status" explains the requirements in subsection (B) of section 14:100.13 that law enforcement officers, upon arresting someone for operating a vehicle without lawful presence in the United States, "seize the driver's license and immediately surrender such license to the office of motor vehicles for cancellation and immediately notify the INS of the name and location of the person [arrested]." The requirement to notify INS (now Immigration and Customs Enforcement (ICE)) is obviously aimed at alerting federal immigration officials of the presence of individuals in this country without immigration status—a rationale that would not apply to the hypothetical lawfully present non-citizen who merely drove without her documentation demonstrating lawful presence.

[13] *See* La. R.S. §§ 32:402, 32:411.1. Such state regulation deals squarely with driving and safety concerns related to licensed drivers. Section 14:100.13, in contrast, deals with an exclusively federal concern—immigration enforcement.

[14] *See* La. R.S. § 32:409.1.

to impose criminal penalties on aliens who seek or engage in unauthorized employment[,] . . . a state law to the contrary is an obstacle to the regulatory system Congress chose," and is therefore conflict preempted.[15] *Id.* at 2505.

The same analysis demonstrates why state laws that premise criminal liability on unlawful presence are preempted. First, there is no question that the Immigration and Nationality Act (INA) is a "comprehensive federal scheme" to address the national issue of unlawfully present aliens and other concerns implicated by immigration. *See id.* at 2498-99; *United States v. South Carolina* ("*South Carolina I*"), 840 F. Supp. 2d 898, 919 (D.S.C. 2011). Through the INA, Congress has chosen to make mere unlawful presence grounds for a civil removal proceeding, rather than to criminalize it. *See* 8 U.S.C. §§ 1182(a)(6)(A)(i) & 1227(a)(1)(B), (C); *Arizona*, 132 S. Ct. at 2505 ("As a general rule, it is not a crime for a removable alien to remain present in the United States."). Indeed, Congress has on multiple occasions chosen not to enact legislation that would have made unlawful presence a crime. *See* Amici Curiae Br. of Members of Congress in Supp. of Respondent at 24, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1044369 at *24 ("Congress has repeatedly considered and rejected legislation that would [have criminalized unlawful presence]."); *see also South Carolina I*, 840 F. Supp. 2d at 919 ("[T]he federal government has studiously avoided making unlawful presence a federal crime.").[16]

Section 14:100.13 upsets this deliberately crafted, comprehensive scheme by singling out drivers for criminal punishment based on their unlawful presence. In so doing, it "seek[s] to criminalize what Congress has chosen to treat only as a civil offense," *South Carolina I*, 840 F. Supp. 2d at 919, "interfer[ing] with the careful balance struck by Congress" with respect to unlawfully present non-citizens. *Arizona*, 132 S. Ct. at 2505. Because "Congress decided it would be inappropriate to impose criminal penalties on aliens" who are here without lawful presence, "[i]t follows that a state law to the

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[15] *Arizona* also noted that "[a]lthough § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement," which "can be fully as disruptive to the system Congress enacted as conflict in overt policy." 132 S. Ct. at 2505 (citation and quotations marks omitted).

[16] As explained by William J. Burns, Deputy Secretary of State:

> Unlawful presence is a basis for removal, not retribution. This is a policy that is . . . consonant with multilateral resolutions expressing the view that an individual's migration status should not in itself be a crime . . . . [,] has been the subject of repeated international discussions, and is firmly grounded in the United States' human rights commitments as well as our interest in having our own citizens treated humanely when abroad.

Burns Decl. ¶ 35, *United States v. Alabama*, No. 2:11cv2746 (N.D. Ala. Aug. 1, 2011), ECF No. 2-1, *available at* http://www.justice.gov/opa/documents/ex1-burns-declaration.pdf.

contrary is an obstacle to the regulatory system Congress chose," and therefore "is preempted."[17] *Id.*

Section 14:100.13 conflicts with federal law in another way as well: it authorizes Louisiana law enforcement officers to arrest drivers whom they suspect are unlawfully present in the United States. But, as explained in *Arizona*, federal law permits state and local officers to make immigration-related arrests only in "specifie[d] limited circumstances" not present here. *Id.* at 2506. Thus, in *Arizona*, the Court struck down a provision of Arizona law (Section 6 of S.B. 1070) because it would have allowed Arizona police to arrest certain individuals they suspected of being removable aliens. *Id.* at 2505-08.

Section 14:100.13 is preempted for the same reasons. None of the "limited circumstances" in which federal law allows for state or local immigration arrests involve simply driving without lawful presence (or documentation).[18] Louisiana therefore may not grant its officers authority to make a "unilateral decision . . . to arrest an alien for being removable" while driving "absent any request, approval, or other instruction from the Federal Government," 132 S. Ct. at 2707, whether by directly authorizing such arrests or by enacting a criminal law that achieves the same end. Indeed, because the authority created by section 14:100.13 "could be exercised without any input from the Federal Government about whether an arrest is warranted in a particular case," it would "allow the State to achieve its own immigration policy" — an outcome that obviously violates the Supremacy Clause. *Id.* at 2506. Finally, just like the preempted Arizona provision, Louisiana's law requires state and local officers to make "significant[ly] complex[]" immigration determinations for which they are not trained, including determinations about whether the driver is an "alien student" or a "nonresident alien" and whether the individual has presented a documents sufficient to prove his/her lawful presence, making conflicts with federal law imminent. *Id.*; *see also* Part III.B, *infra*. This is not the federal immigration enforcement scheme established by Congress, and *Arizona* compels the conclusion that Louisiana's law

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[17] The same analysis recently lead to a preliminary injunction of a South Carolina statute that criminalized, *inter alia*, unlawfully present persons "allow[ing] themselves to be transported." *United States v. South Carolina* ("*South Carolina II*"), ___ F. Supp. 2d ___, 2012 WL 5897321, at *3-4 (D.S.C. 2012) (citation omitted). In concluding that the South Carolina law was preempted, the court explained that "[t]he *Arizona* decision only served to underscore that, in a realm where Congress has enacted a comprehensive framework for addressing a national issue and judged that a particular activity is best enforced as a civil matter, any effort by a State to criminalize that activity creates a 'conflict in the method of enforcement' that stands as 'an obstacle to the regulatory system Congress chose' and is, therefore, 'preempted by federal law.'" *Id.* at *3 (quoting *Arizona*, 132 S. Ct. at 2505).

[18] As explained in *Arizona*, those circumstances are set forth in 8 U.S.C. §§ 1357(g) (pursuant to a formal agreement with the Attorney General), 1103(a)(10) (pursuant to Attorney General authority in the event of an "imminent mass influx of aliens off the coast of the United States"), 1252c (authority to arrest in specific circumstance after consultation with the federal government), and 1324(c) (authority to arrest for bringing in and harboring certain aliens). *See* 132 S. Ct. at 2506.

is conflict preempted.

III. Section 14:100.13 is field preempted because its state-created classification scheme undermines the federal adjudicative scheme for determining individuals' immigration status and will require Louisiana courts to adjudicate status in criminal proceedings.

The federal government unquestionably occupies the field of immigrant classification. States enjoy no power to classify immigrants and state attempts to classify immigrants in a manner independent of federally recognized categories are preempted. *Plyler v. Doe*, 457 U.S. 202, 225 (1982); *Hispanic Interest Coal. of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1242 (11th Cir. 2012). Accordingly, the classifications mandated by section 14:100.13 are especially problematic for two key reasons. First, section 14:100.13 classifications, particularly its wholly state-created category "without lawful presence," do not track and in fact are inconsistent with federal classifications, subjecting lawfully present individuals to the dangers of misclassification and attendant penalties under the statute. Second, section 14:100.13 impermissibly requires state officials, without federal guidance or control, to classify immigrants in order to determine whether a particular driver was obligated to carry proof of lawful presence pursuant to section 14:100.13 and/or was "without lawful presence."

A. Section 14:100.13 relies on state-created classifications inconsistent with federal law, posing a significant danger of misclassification.

Section 14:100.13's use of the phrase "without lawful presence" has no reference to or counterpart in federal immigration law. Federal immigration law does not define a category of aliens "without lawful presence." Indeed, the INA uses the phrase "unlawful presence" only in the narrow and technical context of a statute that establishes bars on the admission of a person who has previously been "unlawfully present" in the United States for certain periods of time. The phrase is explicitly restricted to that context, and its application depends on factors that cannot be quickly and definitively ascertained, such as whether the person "has a bona fide application for asylum pending." 8 U.S.C. § 1182(a)(9)(B)(ii) (defining "unlawful presence" "[f]or purposes of this paragraph"). As the U.S. Department of Homeland Security recently explained:

> There is a significant difference between "unlawful presence" and "unlawful status." Unlawful presence refers to a period an individual is present in the United States (1) without being admitted or paroled or (2) after the expiration of a period of stay authorized by the Department of Homeland Security (such as after the period of stay authorized by a visa has expired). Unlawful presence is relevant only with respect to determining whether the inadmissibility bars for unlawful presence, set forth in the Immigration and Nationality Act at Section 212(a)(9), apply to an individual if he or she departs the United States and subsequently seeks to re-enter. (These unlawful presence bars are commonly known as the 3- and 10-Year Bars.)

Department of Homeland Security, "Frequently Asked Questions about Deferred Action for Childhood

Arrivals," Jan. 18, 2013, at Q6, *available at* http://www.dhs.gov/deferred-action-childhood-arrivals; *see also* Decl. of Bo Cooper (Former INS Commissioner) ¶ 7, *Friendly House v. Whiting*, No. 10-CV-1061 (D. Ariz. June 21, 2010), ECF No. 235-4 (explaining that the INA "does not include a definition or category establishing when a person is 'unlawfully present in the United States' that could be used in administering [state laws that use that term]"), *available at* http://bit.ly/12HJmEN. The term "unlawfully present" in federal immigration law is therefore only relevant to the narrow question of whether a bar to re-entry applies to a particular individual; it is not itself a category of immigration status and does not equate to a determination that an individual is actually removable from the United States. *See* Cooper Decl. ¶¶ 8-9.

Notably, the phrase "without lawful presence" is also not defined anywhere in the statute. Section 14:100.12 defines "[d]ocumentation demonstrating lawful presence in the United States" as "a document demonstrating lawful presence in the United States as determined by the Department of Public Safety and Corrections pursuant to R.S. 32:409.1(A)(2)(d)(vi)." La. R.S. 32:409.1(A)(2)(d)(vi), in turn, requires the department to create a list of "acceptable documents demonstrating lawful presence." The documentation list used by the department to determine whether an individual had satisfactorily demonstrated lawful presence for the purposes of section 14:100.13 excluded many federally issued documents which indicate lawful presence, such an Employment Authorization Document (EAD).[19]

But even if the department's list were more complete, it would still be problematic in light of the fact that many individuals who lack lawful immigration status may be permitted by the federal government to remain present in the United States for humanitarian or other discretionary reasons. *See United States v. Alabama*, 691 F.3d 1269, 1294-95 (11th Cir. 2012); *Central Ala. Fair Housing Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1182-83 (M.D. Ala. 2011). The decision whether to initiate removal proceedings, and even whether to remove someone who has a final order, is discretionary and not absolute. *See Arizona*, 132 S. Ct. at 2499; *Central Ala. Fair Housing Ctr.*, 835 F. Supp. 2d at 1177-78, 1182-83. And certain removable aliens, such as victims of domestic violence, victims of crimes like human trafficking, and certain crime victims who assist in criminal prosecutions, are eligible for a path to lawful status. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(T)-(U); *Central Ala. Fair Housing Ctr.*, 835 F. Supp. 2d at 1178. In some cases, such as the visa waiver program and certain types of prosecutorial discretion

[19] For unknown reasons, the list itself has been entirely removed from the department website (and not replaced), leaving state and local officials with absolutely *no* guidance. The now-removed list, however, was reproduced as Appendix 7 of the Applicant-Defendant's Opening Br. on Appeal in *State v. Gomez*, No. KA 12-1357 (La. App. 3 Cir., filed Dec. 17, 2012), *available at* http://bit.ly/159Ktz2.

exercised by the federal Department of Homeland Security (DHS), individuals have been granted federal permission to remain in the United States but may lack documentation of this permission. *South Carolina I*, 840 F. Supp. 2d at 917; *see also* Decl. of Lori Scialabba (Deputy Director of U.S. Citizenship and Immigration Services), *United States v. Alabama*, No. 2:11cv2746 (N.D. Ala. Aug. 1, 2011), ECF No. 2-9, *available at* http://bit.ly/ZankLQ.

Section 14:100.13 thus impermissibly creates a scheme whereby immigrant individuals who are permitted by the federal government to remain in the country are subject to arrest, prosecution, jail time, fines, and cancellation of their drivers' licenses for doing so. This undermines federal authority to exercise discretion, particularly in humanitarian circumstances, to allow individuals without lawful immigration status to live and move about the country unmolested in circumstances deemed appropriate by the federal government. *Arizona*, 132 S. Ct. at 2499; *South Carolina I*, 840 F. Supp. 2d at 917.

Section 14.100.13's classifications are also problematic because federal immigration law does not recognize the categories of "alien students" or "nonresident aliens" set forth in La. R.S. § 14:100.12. The conflict between federal and state classifications is evident in section 14:100.13's effective subdivision of the federally created category of lawful permanent resident (LPR). Section 14:100.12's definition of "alien student" broadly encompasses all non-citizen students, including LPRs, and subjects them to section 14:100.13's requirements and penalties, even while the definition of "nonresident aliens" purportedly excludes LPRs from the purview of the statute. This means that a LPR taking a single class at Louisiana State University is subject to the harsh mandate and penalties of section 14:100.13, while a LPR living in Baton Rouge without "attending an institution of education in the state," La. R.S. § 14:100.12, is not. Amplifying the confusion, a LPR student, even while consistently maintaining her federal status, might only be required by the statute to carry proof of status awhile driving for a part of the year when he or she is actually "attending" a university in the state, *see id.*, only to fall out of the law's purview during the summer or a semester off, or if she transfers to an out-of-state university. Section 14:100.13 thus divides a single, coherent, uniform federal classification—lawful permanent resident—into multiple categories with significantly different obligations under state law, which creates confusion and unsettles expectations as to how these LPRs (among others) will be treated.

Federal law does not intend that federally designated LPRs be treated differently, and uniform, even-handed treatment of similarly classified noncitizens is central to the comprehensive federal classification scheme. *See Arizona*, 132 S. Ct. at 2502. If all states are allowed to create their own

categories of aliens, significant inconsistencies in alien classification from state to state will inexorably develop, undermining the uniformity of the federal government's extensive alien classification scheme. *See id.*; *League of United Latin Am. Citizens v. Wilson* ("*LULAC*"), 908 F. Supp. 755, 770 (C.D. Cal. 1995). Noncitizens and government entities that interact with them need to be able to rely on a consistent and uniform scheme of alien classification absent the confusion of multiple, state-created categories that have different, state-specific requirements from which severe consequences may flow. Section 14:100.13 undermines and conflicts with the comprehensive federal scheme for classifying aliens and is preempted.

B. Section 14:100.13 impermissibly requires state and local officials, including judges and juries, to determine immigration status without federal guidance or control.

Section 14:100.13 also impermissibly requires state and local law enforcement officials, state judges and state juries to apply the problematic state-created classifications discussed in III.A *supra* to determine whether any immigration-related documentation furnished by "alien students" and "nonresident aliens" sufficiently "demonstrat[es] that the person is lawfully present." Federal immigration judges, and not state and local officials, are the only ones empowered to ascertain an individual's immigration status and to determine whether an individual is removable from the United States. *See* 8 U.S.C. § 1229; *Alabama*, 691 F.3d at 1294-95 ("Congress further provided that the determination of removability typically must be made by an immigration judge consistent with the procedures set forth in the INA."); *Central Ala. Fair Housing Ctr.*, 835 F. Supp. 2d at 1177-78 (discussing federal authorities' "detailed procedures" for determining when an unauthorized alien is removable); *LULAC*, 908 F. Supp. at 770 ("[S]tate agents are unqualified—and also unauthorized—to make independent determinations of immigration status. Congress has exclusively reserved that power to the INS and to immigration judges pursuant to the INA."). Section 14:100.13's mandate that state and local officials, using state classifications, determine individuals' immigration status for the purpose of arresting, charging, and adjudicating the guilt of individuals charged under the statute, intrudes on and threatens the uniformity of the comprehensive federal scheme for classifying immigrants and further demonstrates that the federal alien classification scheme preempts section 14:100.13.

CONCLUSION

For the foregoing reasons, this Court should hold that Section 14:100.13 is field- and conflict-preempted by federal law.

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VERIFICATION AND CERTIFICATION

COMES NOW Meredith B. Stewart, being duly sworn, and states that she has reviewed the forgoing brief, that all the facts therein are true and accurate to the best of her information and belief; that she has notified or will notify the parties listed below that this brief has been filed; and that she will cause, a true and accurate copy of this brief to be served forthwith on the parties listed below:

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