No. 12-884

In the Supreme Court of the United States

ALABAMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 13 of Alabama House Bill 56, Ala. Act No. 2011-535, § 13, codified at Ala. Code § 31-13-13, which makes it a state crime to conceal, harbor, encourage to remain, or transport an alien who "has come to, has entered, or remains in the United States in violation of federal law," is preempted by federal law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 691 F.3d 1269. The opinion of the district court (Pet. App. 59a-202a) is reported at 813 F. Supp. 2d 1282.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2012. A petition for rehearing was denied on October 17, 2012 (Pet. App. 203a-204a). The petition for a writ of certiorari was filed on January 15, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." *Arizona* v. *United States*, 132

S. Ct. 2492, 2498 (2012). Pursuant to that power under the Constitution, Congress enacted the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and other federal immigration laws, which together constitute "a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *De Canas* v. *Bica*, 424 U.S. 351, 353, 359 (1976)). The Attorney General and the Secretary of Homeland Security principally administer that regime.

a. The INA authorizes criminal penalties against an individual who, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection * * * such alien." 8 U.S.C. 1324(a)(1)(A)(iii). The INA also authorizes criminal penalties against those who encourage or induce an alien to come to, enter, or reside in the United States without lawful authorization, 8 U.S.C. 1324(a)(1)(A)(iv); those who transport an alien within the United States in furtherance of the alien's violation of federal immigration laws, 8 U.S.C. 1324(a)(1)(A)(ii); and those who assist or conspire in the commission of those acts, 8 U.S.C. 1324(a)(1)(A)(v). Further, Congress has established penalties for smuggling or otherwise bringing aliens into the United States without lawful authorization, see 8 U.S.C. 1323, 1324(a)(1)(A)(i) and (2), and for knowingly aiding or assisting certain inadmissible aliens to enter unlawfully, 8 U.S.C. 1327.

Aliens themselves may be prosecuted for unlawful entry or re-entry into the United States. See 8 U.S.C. 1325, 1326. Federal law, however, does not make mere

unlawful presence in the United States a criminal offense. See *Arizona*, 132 S. Ct. at 2505. Rather, aliens unlawfully present in the country are subject to removal following federal administrative proceedings, 8 U.S.C. 1182, 1227 (2006 & Supp. V 2011), subject to judicial review in the federal courts of appeals, 8 U.S.C. 1252, and to detention in aid of removal, 8 U.S.C. 1226.

b. Federal immigration laws contemplate several ways in which States may cooperate with federal officials in immigration enforcement. State and local law-enforcement officers are expressly authorized to make arrests for violations of the INA's prohibition against smuggling, transporting, or harboring aliens. See 8 U.S.C. 1324(c). Similarly, state and local officers may (if authorized by state law) arrest and detain an alien who is illegally present in the United States, was previously convicted of a felony in the United States, and then departed or was removed. 8 U.S.C. 1252c. The prosecution of such violations, however, is a matter within the sole discretion of federal officials. See 8 U.S.C. 1329.

Congress also has authorized the Department of Homeland Security (DHS) to enter into formal cooperative agreements with States and localities, whereby appropriately trained and qualified state and local officers may perform specified functions of federal immigration officers. See 8 U.S.C. 1357(g)(1). The state and local officers' activities "shall be subject to the direction and supervision of the [Secretary of Homeland Security]." 8 U.S.C. 1357(g)(3).

A formal agreement is not required for state and local officers to communicate with the Secretary regarding the immigration status of individuals, 8 U.S.C. 1357(g)(10)(A), or "otherwise to cooperate with the [Sec-

retary]" in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States, 8 U.S.C. 1357(g)(10)(B). Consistent with that provision, DHS has invited, and receives, assistance in a variety of contexts from state and local officials without a formal agreement. See U.S. DHS, *Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters* (Sept. 2011), http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf; see also *Arizona*, 132 S. Ct. at 2507 (citing this guidance).

2. In June 2011, the Governor of Alabama signed into law House Bill 56 (H.B. 56). See Ala. Act No. 2011-535, codified at Ala. Code § 31-13-1 *et seq* (LexisNexis 2011 & Supp. 2012).[1] The express purpose of this law is to "reduce the number of illegal aliens in the State of Alabama," and the law requires state officials to provide quarterly reports to the legislature to describe "the status of the progress being made in th[at] effort." H.B. 56, § 24; see *id.* § 2. The Alabama law was intended, in the words of one of its primary sponsors, to "attack[] every aspect of an illegal alien's life" and thus "make it difficult for them to live here so they will deport themselves." Conor Friedersdorf, *Why Alabama's Immigration Bill Is Bad for Citizens*, The Atlantic (June 13, 2011), http://www.theatlantic.com/politics/archive/2011/06/why-alabamas-immigration-bill-is-bad-for-citizens/240297 (quoting bill's sponsor).

Like the provisions of Arizona law enjoined by this Court last Term in *Arizona* v. *United States*, *supra*, the Alabama statute creates a state offense for failure to complete or carry an alien registration document, see

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[1] This new law was amended in part the following year by House Bill 658 (H.B. 658). See Ala. Act No. 2012-491.

H.B. 56, § 10, and imposes criminal penalties on aliens for working or seeking to perform work without authorization from the federal government, see *id.* § 11. The Alabama law also sanctions employers who hire unauthorized workers by imposing financial penalties on them if they claim tax deductions for compensation paid to such workers and by exposing them to private lawsuits for hiring or retaining an unauthorized alien rather than hiring or retaining a citizen. *Id.* §§ 16, 17(a)-(b). Other provisions prohibit Alabama courts from giving effect to certain contracts entered into by an unlawfully present alien, *id.* § 27, and require the parents of all public schoolchildren born outside the United States to document or attest to their and their children's lawful presence in this country, *id.* § 28.

At issue here is the anti-harboring provision in the Alabama scheme. Section 13 of H.B. 56 makes it a state crime to conceal, harbor, encourage to remain, or transport an alien who "has come to, has entered, or remains in the United States in violation of federal law," including by renting housing to an "unlawfully present" alien. H.B. 56, § 13(a).[2]

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[2] H.B. 658 amended Section 13 to declare that its prohibitions "should be interpreted consistent with 8 U.S.C. § 1324(a)(1)(A)"; to add an exemption for religious organizations; and to move the criminal prohibition on providing rental accommodations to a new section of the law. See Ala. Act No. 2012-491, § 1 (amending Ala. Code § 31-13-13 (LexisNexis 2011)), § 6 (new housing provision); see also Pet. App. 4a. Alabama has stipulated that the existing injunction against Section 13(a) extends to the new section's rental prohibition, so the court of appeals has treated the federal government's original challenge to Section 13 as including a challenge to the current rental prohibition. See Pet. App. 20a n.9. Petitioners do not seek review in this Court of any issues concerning the rental prohibition. See Pet. 10 n.*.

3. The United States filed this action to enjoin various provisions of H.B. 56 as preempted by federal law and sought a preliminary injunction. See Pet. App. 8a-9a.

The district court preliminarily enjoined four provisions in the Alabama law: the provision making it a state crime for unlawfully present aliens to work or attempt to seek work, see H.B. 56, § 11(a); the provision making it a state crime to conceal, harbor, encourage, or transport unlawfully present aliens, see *id.* § 13; and the two employer-sanctions provisions, see *id.* §§ 16, 17. See Pet. App. 57a-58a, 105a-123a, 147a-180a. The court declined to preliminarily enjoin the other challenged provisions. *Id.* at 58a, 64a.

As relevant here, the district court found that the United States was likely to succeed on the merits of its preemption challenge to Section 13, on the ground that Alabama "is attempting to * * * impose penalties and burdens on aliens that conflict with the purposes and objectives of Congress." Pet. App. 155a (internal quotation marks and citation omitted). The court rejected petitioners' contention that Section 13 is consistent with federal law, explaining that "[a]lthough Section 13 purports to regulate the same conduct covered by 8 U.S.C. § 1324, its language actually prohibits conduct allowed under federal law and criminalizes conduct that is lawful under federal law." *Id.* at 153a.

The district court also found Section 13 likely preempted because it "creates an Alabama-specific harboring scheme that remove[s] any federal discretion and impermissibly places the entire operation—from arrest to incarceration—squarely in the State's purview." Pet. App. 164a (brackets in original; internal quotation marks and citation omitted). The court then

concluded that the balance of equities favored preliminarily enjoining this provision. *Id.* at 164a-165a; see *id.* at 119a-123a.[3]

4. Following the district court's ruling, this Court decided *Arizona* v. *United States*, *supra*. As relevant here, the Court held that three provisions of Arizona S.B. 1070, 2010 Ariz. Sess. Laws 450, are preempted by federal law: Section 3 of S.B. 1070, which, like Section 10 of Alabama's H.B. 56, made it a state crime for an unauthorized alien to fail to register with the federal government or carry federal registration documents; Section 5(C), which, like Alabama's Section 11, made it a crime for an unauthorized alien to apply for or perform work in the State; and Section 6, which authorized a state officer to make a warrantless arrest of an alien when the officer has probable cause to believe the alien had committed a public offense that would make him removable from the United States. *Arizona*, 132 S. Ct. at 2501-2507.[4]

In so holding, the Court rejected Arizona's argument that these provisions are consistent with federal immigration law and constituted permissible cooperation under the INA. *Arizona*, 132 S. Ct. at 2502-2503, 2505.

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[3] After the district court's decision, the court of appeals entered an order preliminarily enjoining Section 10 (alien registration) and Section 28 (school documentation) of Alabama's H.B. 56 pending appeal. See 443 Fed. Appx. 411, 420 (11th Cir. 2011).

[4] The Court held that the Ninth Circuit had erred in affirming an injunction barring implementation of Section 2(B) of S.B. 1070, which (like Section 12 of Alabama's H.B. 56) requires state officers to make reasonable efforts to determine an individual's immigration status if they have reasonable suspicion to believe the person is unlawfully present in the United States, because "[t]here is a basic uncertainty about what the law means and how it will be enforced." *Arizona*, 132 S. Ct. at 2507-2510.

The Court reaffirmed the United States Government's "broad, undoubted power" over immigration, derived from Congress's power under the Constitution to "establish a uniform Rule of Naturalization," Art. I, § 8, Cl. 4, as well as the National Government's "inherent power as sovereign to control and conduct relations with foreign nations." 132 S. Ct. at 2498. The Court explained that Congress has created an "extensive and complex" regime that establishes the conditions on which aliens may be admitted to the United States and determines appropriate consequences for aliens who enter or reenter the United States unlawfully, and the Court recognized that implementation of this regime requires the ongoing exercise of "broad discretion" by federal officials. *Id.* at 2499.

5. Following this Court's decision in *Arizona*, the court of appeals affirmed the preliminary injunction in this case in part, reversed in part, dismissed in part, and remanded. Pet. App. 1a-56a. The court held that in light of this Court's decision in *Arizona*, "most of the challenged provisions cannot stand" and that "the United States is likely to succeed on its preemption claims regarding sections 10 [registration], 11(a) [employee sanctions], 13(a) [harboring, concealing, encouraging, and transporting], 16 [employer sanctions], 17 [employer sanctions], and 27 [contracts]." *Id.* at 10a-11a.[5]

The court upheld the district court's preliminary injunction against enforcement of Section 13 on the grounds that the criminal prohibition on concealing, harboring, encouraging, or transporting unlawfully present

[5] The court of appeals dismissed as moot the United States' appeal with regard to Section 28 of H.B. 56, the school documentation provision, because the court had enjoined that provision in a companion suit brought by private plaintiffs. Pet. App. 11a.

aliens is field and conflict preempted. Pet. App. 20a-28a. Relying on its decision in *Georgia Latino Alliance for Human Rights* v. *Governor of Ga.*, 691 F.3d 1250 (11th Cir. 2012) (*GLAHR*), which invalidated a similar provision of Georgia law, the court held that the INA creates a comprehensive and exclusive federal scheme for punishing the concealing, harboring, encouraging, and transporting of persons not lawfully present in this country. Pet. App. 21a-22a (citing 8 U.S.C. 1324, 1329). The court explained that "[r]ather than authorizing states to prosecute for these crimes, Congress chose to allow state officials to arrest for § 1324 crimes, subject to federal prosecution in federal court." *Id.* at 22a (quoting *GLAHR*, 691 F.3d at 1264). But, the court noted, the role of the States is "limited to arrest" for violations of these federal laws. *Ibid.* (quoting *GLAHR*, 691 F.3d at 1264). The court compared Section 13 to the state alien registration scheme invalidated by this Court in *Arizona*, explaining that Alabama, like Arizona, may not "enact[] concurrent state legislation in this field of federal concern." *Id.* at 25a.

The court of appeals also concluded that Section 13 conflicts with federal law. The court explained that Section 13 authorizes the State of Alabama to bring prosecutions for crimes covered by the INA without regard to the enforcement priorities established by the relevant federal agencies. Pet. App. 26a. The court also observed that Section 13 goes beyond the prohibitions of federal law, which concern encouraging or inducing illegal entry into the United States, 8 U.S.C. 1324(a)(1)(A)(iv), by making it a crime to encourage unlawfully present aliens to move from State to State. Pet. App. 26a. The court further noted that Section 13 conflicts with federal law by criminalizing conspiracy to

transport an unlawfully present alien (which effectively "prohibit[s] an unlawfully present alien from even agreeing to be a passenger in a vehicle"), whereas "unlawfully present aliens who are transported" generally "are not criminally responsible for smuggling under" federal law. *Id.* at 27a (internal quotation marks and citation omitted). The court similarly determined that Section 13's prohibition on entering into a rental agreement with an unlawfully present alien "effectuates an untenable expansion of the federal harboring provision." *Ibid.*

6. Petitioners filed a petition for rehearing en banc, which was denied, with no judge in regular active service calling for a vote on the petition. Pet. App. 203a-204a.

ARGUMENT

Petitioners renew their contention (Pet. 4, 17-27) that federal law does not preempt Section 13 of Alabama's H.B. 56. The decision of the court of appeals is correct. The court faithfully applied this Court's recent decision in *Arizona* v. *United States*, 132 S. Ct. 2492 (2012), and correctly concluded that Section 13 is preempted by federal law. Moreover, the decision below does not conflict with a decision of any other court of appeals or state court of last resort. Several cases are pending in the courts of appeals that implicate the question presented, and this Court should await resolution of those cases rather than intervening now, especially since this case is in an interlocutory posture. Further review is therefore unwarranted.

1. The court of appeals correctly held that Section 13 of H.B. 56 is preempted because that provision represents a clear intrusion into an area occupied by Congress through the INA and conflicts with federal law.

a. As this Court recognized in *Arizona*, "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens." 132 S. Ct. at 2498. The "power to restrict, limit, [and] regulate * * * aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation"; "whatever power a state may have is subordinate to supreme national law." *Hines* v. *Davidowitz*, 312 U.S. 52, 68 (1941).

This exclusive allocation of authority to the federal government reflects in part the extent to which the regulation of immigration is intertwined with the conduct of foreign relations and the National Government's ability to speak "with one voice" in dealing with other nations. *Arizona*, 132 S. Ct. at 2506-2507. As this Court explained: "Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Id.* at 2498.

Cognizant of these significant national interests, Congress has "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country.'" *Chamber of Commerce* v. *Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *De Canas* v. *Bica*, 424 U.S. 351, 353, 359 (1976)). This "extensive and complex" regulatory scheme establishes the conditions on which aliens may be admitted to the United States and determines appropriate consequences for aliens who enter or reenter this country unlawfully. *Arizona*, 132 S. Ct. at 2499. As the Court recognized, implementation of this comprehensive federal regime re-

quires the ongoing exercise of "broad discretion" by the federal officials charged with its administration. *Ibid.*

b. The court of appeals correctly concluded that Section 13 is field preempted. The federal government's exclusive authority to regulate the terms and conditions of an alien's entry, movement, and residence in the United States includes the authority to establish criminal sanctions against third parties who facilitate an alien's violation of those terms and conditions and the authority to decide whether and how such criminal sanctions may be imposed. See *Chy Lung* v. *Freeman*, 92 U.S. 275, 280 (1876). As the court of appeals explained, Congress has used this authority to "provide[] a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens." Pet. App. 21a (quoting *Georgia Latino Alliance for Human Rights* v. *Governor of Ga.*, 691 F.3d 1250, 1263 (11th Cir. 2012) (*GLAHR*)).

In particular, Congress has established a comprehensive set of criminal penalties for an individual who "conceals, harbors, or shields from detection" an alien "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law," 8 U.S.C. 1324(a)(1)(A)(iii); for those who encourage or induce an alien to come to, enter, or reside in the United States without lawful authorization, 8 U.S.C. 1324(a)(1)(A)(iv); for those who transport an alien within the United States in furtherance of the alien's violation of federal immigration laws, 8 U.S.C. 1324(a)(1)(A)(ii); and for those who assist or conspire in the commission of those acts, 8 U.S.C. 1324(a)(1)(A)(v). Congress also has established penalties for smuggling or otherwise bringing aliens into the United States without lawful authoriza-

tion, 8 U.S.C. 1323, 1324(a)(1)(A)(i) and (2), and for knowingly aiding or assisting certain inadmissible aliens to enter unlawfully, 8 U.S.C. 1327. Aliens themselves may be prosecuted for unlawful entry or re-entry into the United States. 8 U.S.C. 1325, 1326. But "it is not a crime for a removable alien to remain present in the United States." *Arizona*, 132 S. Ct. at 2505.

The federal regime "tracks smuggling and related activities from their earliest manifestations (inducing illegal entry and bringing in aliens) to continued operation and presence within the United States (transporting and harboring or concealing aliens)." *United States* v. *Sanchez-Vargas*, 878 F.2d 1163, 1169 (9th Cir. 1989). As the court of appeals explained, Congress contemplated only a limited role for the States: "Rather than authorizing states to prosecute for these crimes," Congress decided only to "allow state officials to *arrest* for § 1324 crimes, subject to prosecution in federal court" by federal officials. Pet. App. 22a (emphasis added; citation omitted).

The *Arizona* Court's conclusion that Arizona's state alien registration law is preempted reinforces the conclusion that Section 13 of Alabama's H.B. 56 also is preempted. See Pet. App. 23a-25a. As with the related field of alien registration, the federal statutory provisions governing the concealing, harboring, encouraging, and transporting of unlawfully present aliens provide a "full set of standards" which are "designed as a 'harmonious whole.'" *Arizona*, 132 S. Ct. at 2502 (quoting *Hines*, 312 U.S. at 72). Because Congress has occupied this entire field, "even complementary state regulation is impermissible." *Ibid.* As this Court explained, it is no answer that the state provision "has the same aim as federal law and adopts its substantive standards." *Ibid.*

Because federal law already contains a "comprehensive" regime for regulating alien registration, the state regulation would be impermissible even if it faithfully "parallel[ed] * * * federal standards." *Ibid.*

c. The court of appeals also correctly concluded that Section 13 stands as an obstacle to the operation of federal law. In some instances, it imposes new criminal penalties for conduct that Congress has made criminal under federal law, while in others, it criminalizes conduct that Congress has not made illegal. As this Court's decision in *Arizona* makes clear, a State may not pursue its own policies of immigration enforcement by enacting state criminal prohibitions that seek to supplant or elaborate upon the comprehensive regulation already enacted by Congress.

As an initial matter, permitting state officials to bring criminal charges in state courts against those suspected of unlawfully assisting aliens present in the United States in violation of federal law, wholly outside of federal control, would conflict with federal prerogatives in this area. See *Arizona*, 132 S. Ct. at 2504. As this Court explained, "conflict in the method of enforcement * * * can be fully as disruptive to the system Congress enacted as conflict in overt policy." *Id.* at 2505 (internal quotation marks and citation omitted). If petitioners' position were accepted, every state and local government would be free to enact its own varying criminal immigration penalties, whatever the effect on the operation of the federal immigration scheme. This Court recognized in *Arizona* that such a scheme cannot stand for that very reason. See *id.* at 2502 ("If § 3 of the Arizona statute were valid, every State could give itself independent authority to prosecute federal registration violations, diminishing the Federal Government's control over

enforcement and detracting from the integrated scheme of regulation created by Congress.") (brackets, internal quotation marks, and citation omitted).[6] Alabama's assertion of independent authority in this area of comprehensive control over immigration under the INA is particularly anomalous because (as explained above) Congress has specifically provided that state and local officials have the authority to arrest for violation of the federal provisions criminalizing such conduct, 8 U.S.C. 1324(c); see *Arizona*, 132 S. Ct. at 2506, but Congress did not authorize any state action other than arrests, see Pet. App. 22a.

Accordingly, Alabama's harboring statute would be preempted even if it were congruent with federal law and even if it were clear that state courts would construe it in a manner consistent with federal law. But as the court of appeals correctly observed, the federal and state schemes are not congruent. Pet. App. 26a. For example, Section 13 criminalizes the activity of encouraging or inducing certain aliens to come to or reside in Alabama. See Ala. Code § 31-13-13(a)(2) (LexisNexis Supp. 2012). By contrast, federal law—which regulates the borders of the entire Nation rather than the borders of individual States—does not impose any criminal penalties on those who encourage or induce an alien to enter a particular State or move from one State to another.

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[6] Petitioners contend (Pet. 23-24) that the court of appeals erred in concluding that Section 13 undermines the federal government's discretion in prosecution of immigration-related offenses because States often prosecute crimes that the federal government chooses not to prosecute. But petitioners' contention misses the point, which is that the federal government has *exclusive* authority over immigration, which it has exercised through the comprehensive framework of the INA, and regulation by the States would undermine the uniformity and integrity of the federal regime.

See 8 U.S.C. 1324(a)(1)(A)(iv). Although federal law includes criminal penalties for transporting and harboring unlawfully present aliens, 8 U.S.C. 1324(a)(1)(A)(ii)-(iii), such violations relate to the alien's unlawful presence within the borders of the Nation, not within the borders of individual States.[7] The court of appeals correctly concluded that because Section 13 "mandates enforcement of additional or auxiliary regulations that the INA does not contemplate, they are conflict preempted." Pet. App. 28a (internal quotation marks and citation omitted).

2. Petitioners contend (Pet. 16-17, 19-20, 24-25) that this Court's decision in *Arizona* is inapplicable because the Court did not consider an anti-harboring provision like Section 13. But the *Arizona* Court set out the framework for analyzing preemption challenges of this type and found preempted a state alien registration scheme that is similar in pertinent respects to the provision at issue here. Federal law provides a "comprehensive" framework governing the activities regulated by Section 13, just as it provided such a framework for alien registration in Arizona. 132 S. Ct. at 2502. Section 13, like Arizona's alien registration provision, purported to supplement and complement federal law, but the

[7] Petitioners now contend that Section 13 "is most naturally read as prohibiting lawful residents from causing unlawfully present aliens to enter 'the state' only when those persons are simultaneously entering, in the statutes' words, 'the United States . . . in violation of federal law.'" Pet. 26 (quoting Ala. Code. § 31-13-13(a)(2); emphasis omitted). Petitioners did not present that argument to the court of appeals, and a newly minted dispute about the construction of the state statute presents no basis for the Court's review. In any event, Section 13 would still be preempted because it intrudes upon federal enforcement discretion in this area of comprehensive federal regulation.

Court held that state enforcement and additional state penalties would "frustrate federal policies." *Id.* at 2503. The Court explained, for example, that implementation of Arizona's provision purporting to allow state officers to arrest individuals suspected of being removable from the United States "would allow the State to achieve its own immigration policy." *Id.* at 2506. That reasoning is directly applicable to Section 13. As with the alien registration provision in *Arizona*, the alien harboring offenses at issue here are offenses against the United States in the exercise of its comprehensive and exclusive power over immigration, and those offenses are subject to a calibrated set of federal penalties enforced by federal officials in federal courts. The States have no authority to regulate the relationship between the United States and the aliens covered by that comprehensive regulatory scheme. See *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001).

Petitioners contend that the alien registration scheme in *Arizona* is distinguishable from Section 13 because Arizona's law "add[ed] a state-law penalty for conduct proscribed by federal law," whereas Section 13 "do[es] not simply impose state-law penalties for what are really violations of federal law" but instead "proscribe the harboring, transportation, and inducement conduct in question." Pet. 24-25 (internal quotation marks and citation omitted). But that assertion hardly helps petitioners, because Congress occupied the field in criminalizing these activities, leaving no room for state provisions with "the same aim as federal law," *Arizona*, 132 S. Ct. at 2502, and because Section 13 creates new state crimes that go beyond federal law, evidencing a state policy judgment that conflicts with the choices

Congress made in enacting the federal scheme, Pet. App. 27a-28a.

Petitioners also assert (Pet. 22-23) that they have a "freestanding interest[]" in prosecuting the concealment, harboring, encouraging, and transporting of unlawfully present aliens because "harboring and concealment have their most significant practical effects on the States and localities where these activities occur." But as the Court recognized in *Arizona*, the fact that immigration policy is "importan[t]" to the States does not provide them license to second-guess the "pervasive[] * * * federal regulation" in this area, 132 S. Ct. at 2499-2500, and the vesting of exclusive enforcement authority in federal officials.[8]

Although petitioners purport to be regulating the conduct of Alabama's own citizens, it is beyond serious dispute that Section 13 seeks to address immigration, rather than purely local conduct; petitioners themselves describe it as one part of Alabama's "multifaceted statute[] on illegal-immigration issues," Pet. 3, enacted with the express purpose of "reduc[ing] the number of illegal aliens in the State of Alabama," H.B. 56, § 24. As the court of appeals explained, Alabama's Section 13 cannot stand in light of the INA's "comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens." Pet. App. 21a

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[8] Petitioners' reliance (Pet. 22-23) on *Fox* v. *Ohio*, 46 U.S. (5 How.) 410 (1847), is misplaced. In that case, the Court found an "obvious difference" between the counterfeiting of money and the passing of counterfeit money; "[t]he former is an offence directly against the government," and "the other is a private wrong, by which the government may be remotely" reached. *Id.* at 433. By contrast, under the INA, Congress has recognized that alien harboring offenses are offenses "directly against" the United States and has comprehensively addressed those offenses.

(citation omitted). But to the extent that those involved in harboring activities commit other offenses under state law, the State has ample authority to prosecute them.

3. Petitioners do not contend that the court of appeals' decision conflicts with a decision of another court of appeals or a state court of last resort. Indeed, they acknowledge that the Eleventh Circuit is the first such court to address whether a state anti-harboring statute is preempted by federal law. See Pet. i, 4; see also *GLAHR*, *supra*.

Petitioners assert a conflict between the decision below and the decision of the intermediate Arizona appellate court in *State* v. *Flores*, 188 P.3d 706 (Ariz. Ct. App. 2008). But a conflict between a federal court of appeals and an intermediate state appellate court does not warrant this Court's review. See Sup. Ct. R. 10. In any event, that case concerned an Arizona law that has been amended by Arizona's S.B. 1070, and the validity of the current Arizona law is currently being litigated in the Ninth Circuit. See p. 20, *infra*. Moreover, *Flores* was decided without the benefit of this Court's decision in *Arizona*, and it is far from clear that *Flores* would come out the same way today. Compare, *e.g.*, *Flores*, 188 P.3d at 712 (upholding Arizona law because "Arizona's objectives mirror federal objectives"), with *Arizona*, 132 S. Ct. at 2502-2503 (rejecting Arizona's argument that its "provision has the same aim as federal law and adopts its substantive standards" because that argument "ignores the basic premise of field preemption" and "is unpersuasive on its own terms").

Petitioners' primary submission is that this Court's review is warranted because the question whether federal law preempts Section 13 of Alabama's H.B. 56 pre-

sents an issue of nationwide importance. See Pet. 28-30. As an initial matter, the current legal climate is quite unlike the legal climate when this Court was considering the certiorari petition in *Arizona*. Now that the Court has set out the applicable framework for evaluating preemption claims in this context, it is appropriate for the courts of appeals to apply the principles set out in *Arizona* to discrete contexts.

It is true that several States have enacted provisions like Section 13 that prohibit concealing, harboring, transporting, or inducing unlawfully present aliens. See Pet. 8 (citing laws from ten States). But aside from the court below, no other court of appeals has yet had the opportunity to determine the validity of these laws in light of this Court's decision in *Arizona*. As explained *supra* (pp. 11-19), the Court's decision in *Arizona* is directly applicable to such laws, because Congress has comprehensively regulated harboring activities just as it has comprehensively regulated alien registration.

There are several cases pending where the courts of appeals will soon apply *Arizona* to laws like Section 13. The United States and several private parties have challenged the similar provision in Arizona's S.B. 1070 as preempted by federal law, and oral argument has been scheduled to be held in the private parties' case. See *Valle del Sol, Inc.* v. *Whiting*, No. 12-17152 (9th Cir.) (oral argument scheduled for April 2, 2013). Similarly, the United States has challenged a South Carolina anti-harboring provision, and oral argument in the Fourth Circuit is scheduled to occur in May. See *United States* v. *South Carolina*, No. 12-1096 (4th Cir.) (oral argument scheduled for May 14, 2013).[9] If the courts of

[9] The United States and private plaintiffs also have challenged a Utah anti-harboring provision as preempted by federal law. The

appeals in those cases reach a different conclusion than the Eleventh Circuit, then this Court would have the benefit of those courts' analyses if the Court determined the question presented warranted plenary review. If those courts agree with the Eleventh Circuit, then it would be clear that, as the United States contends, the result in this case follows from *Arizona*. In all events, the courts of appeals should be permitted the opportunity to apply this Court's decision in *Arizona* in the other pending cases before this Court intervenes. Further review is therefore unwarranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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district court has not yet ruled on the government's request for a preliminary injunction in those cases. See *United States* v. *Utah*, No. 2:11-cv-01072 (D. Utah); *Utah Coalition of La Raza* v. *Herbert*, No. 2:11-cv-00401 (D. Utah).