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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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Lowcountry Immigration Coalition, *et al.* Plaintiffs,	:	No. 2:11-cv-02779-RMG
vs.	:	BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
Nikki Haley, in her official capacity as Governor of the State of South Carolina, *et al.* Defendants.	:	
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United States of America, Plaintiffs,	:	No. 2:11-cv-2958-RMG
vs.	:	BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
State of South Carolina and Nikki Haley, Defendants.	:	
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SUMMARY OF THE NATURE OF THE CASE

On June 27, 2011, South Carolina Governor Nikki Haley signed into law South Carolina Senate Bill 20 ("SB 20"). Scheduled to take effect on January 1, 2012, the South Carolina is the latest of several state statutes that attempt to enact a panoply of civil and criminal provisions targeting immigrants in their state. Federal courts have enjoined, in whole or in part the application of such laws in Arizona, Utah, Indiana, Georgia, and Alabama.[1] Like the other state statutes, the South Carolina law attempts to regulate broad swaths of human activity in an effort to discourage immigration considered by the state to be "illegal" but nonetheless permitted by federal law or policy. Like the other state statutes, the South Carolina law rests on a fundamentally flawed presumption- that an individual's immigration status is a fact that is fixed and easily ascertained, rather than a complex legal issue that is highly fluid. Amicus, the American Immigration Lawyers Association writes to demonstrate the complexity of U.S. immigration law and to correct the myths that underpin SB 20 and render it unworkable.

SB 20 broadly sweeps to regulate all facets of daily life in South Carolina in an effort to identify noncitizens that South Carolina does not want in the state. For example, Section 4 creates a new set of criminal provisions that apply to those who "came to, entered or remained in the United States in violation of law." Transporting, sheltering, concealing or harboring such an individual is a new criminal offense. It is also a criminal offense for such an individual who came to, entered or remained in the United States to allow herself to be transported, concealed, sheltered or harboring." Section 5 makes it a state offense for an individual not to carry certain federal documents on their person at all times in South Carolina. Section 6 requires South

[1] *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011); *Buquer v. City of Indianapolis*, __ F. Supp. 2d __, 2011 WL 2532935 (S.D. Ind. June 24, 2011);*Georgia Latino Alliance for Human Rights v. Deal*, __ F. Supp. 2d __, 2011 WL 2520752 (N.D. Ga. June 27, 2011); *U.S. v. Alabama*, No. 11-14532-CC, 2011 WL 4863957 (11th Cir. Oct. 14, 2011).

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Carolina law enforcement to determine whether any individual stopped in a law enforcement matter is "lawfully present " in the United States. The law provides a set of documents that would presumptively satisfy requests for proof of immigration status. However, many immigrants in lawful status may not have such documents, in which case, the officer is empowered to engage in a far wider and lengthier inquiry. Finally, Section 17 creates a new law enforcement unit within the South Carolina Department of Public Safety "to enforce immigration laws."

The South Carolina statute proceeds from a flawed assumption, that an individual's immigration status is fixed, clear and easily ascertainable. The reality is that an individual's immigration status is a complex legal judgment that may not be quickly determined in the course of a temporary law enforcement stop. A key characteristic of U.S. immigration law is that one's immigration status is not permanently fixed. U.S. immigration law allows for people to change their status, adjust their status, obtain asylum or other humanitarian relief. An individual's present status is not necessarily indicative of their previous status or a status that they may be in the process of obtaining.

In the face of an extraordinary complex federal immigration framework, SB 20 requires law enforcement to make such determinations within a "reasonable amount of time. See SB 20 Section 6(C)(2). In addition, since one's immigration status is subject to change, the law's requirement of criminal sanction of certain individuals who have "come to, entered or remained in the United States in violation of the law" could unreasonably prosecute and detain individuals who are, under any federal definition legally in the country.

Immigration law does not have two simple categories of noncitizens, those here legally and those here illegally. Noncitizens who have fallen out of status or are between status can still

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be lawfully present because their stay is authorized by the Attorney General. *See Adjudicator's Field Manual* ("AFM") Ch. 40.9.[2] Even noncitizens who lack valid status and who are unlawfully present may still be permitted to remain in the U.S. while pursuing applications for immigration status or may be authorized to work in the U.S., even following the entry of a removal order. *See, e.g.,* 8 C.F.R. § 274a.12(c)(18) (allowing for work authorization for noncitizens that have been ordered removed but placed under an Order of Supervision). SB 20 upsets the Department of Homeland Security's stated policy of focusing its limited resources on "high priority" cases by exercising prosecutorial discretion in favor of lower priority removable aliens. *See* Memorandum, Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens," (June 17, 2011) [3] Memorandum, Morton, "Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs," (June 17, 2011)[4] *See also* Letter from Secretary Napolitano to Senator Richard Durbin (August 18, 2011)(announcing the creation of an inter-agency working group to review the cases of individuals in removal proceedings.)[5]

Should SB 20 become effective it will undoubtedly burden all South Carolina residents, not just those perceived to be foreign nationals in appearance, dress, language or race, including U.S. citizens and lawful permanent residents, subjecting them unreasonable searches and

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[2] *Available at* http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF (last accessed October 25, 2011)

[3] *Available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Exercising-Prosecutorial-Discretion-6-17-2011.pdf (last accessed November 9, 2011);

[4] *Available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Victims-Witnesses-Plaintiffs-6-17-2011.pdf (last accessed November 9, 2011);

[5] *Available at* http://www.aila.org/content/default.aspx?docid=36684. (last accessed November 9, 2011)

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seizures of the persons and vehicles, prolonged detentions, and result in unregulated, illegal racial profiling.

ARGUMENT

I. Unlawful Presence is not Synonymous with Lawful Status or Even Permission to Live or Work in the United States.

"Unlawful presence," a term used throughout SB 20, has a very specific and defined meaning under U.S. immigration law. The Immigration & Nationality Act ("INA") does not contain any definition of "lawful presence," but does define "unlawful presence" at 8 U.S.C. § 1182(a)(9)(B)(ii). This term of art is not one of general applicability, but has a very specific meaning for the purposes of inadmissibility under 8 U.S.C. § 1189(a)(9)(B). The accumulation of certain periods of unlawful presence results in bars against admission to the U.S. after an individual has departed the U.S. The term "unlawful presence" is not used elsewhere in the INA and, by its own definition, only applies to an individual who has left the United States. The determination of "unlawful presences" is only an issue that arises when an noncitizen seeks admission to the U.S. after having previously been in the U.S. and departed.

Implementation of SB 20 would create many scenarios where law enforcement officials would be called upon to make quick, summary judgments about a person's lawful, or unlawful presence in the United States. Yet, the actual law governing "unlawful presence" is lengthy and convoluted with technical provisions determining exactly when a person begins, and stops, accruing periods of unlawful presence. It is a quintessentially legal terms with no easily, readily identifiable way of determining whether someone is, or isn't, unlawfully present. The U.S. Citizenship & Immigration Service took over 51 pages in its "summary" guidance on unlawful presence. *Supra* n.2.

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Under U.S. immigration law, an individual may enter the U.S. in several distinct ways. Each method of entry creates an immigration status in the U.S. An individual may enter the U.S. as a: (1) non-immigrant, those admitted to the U.S. on a temporary basis for a limited purpose and duration; (2) immigrant, those admitted to the U.S. as lawful permanent residents; (3) entry without inspection, those who entered the U.S. illegally without inspection and admission by a U.S. immigration official; (4) various discretionary admissions, such as humanitarian parole or refugee. Each admission or entry carries with it a defined set of rights, limitations, and options. For example, a person admitted as a non-immigrant may change from one class of non-immigrant to another and may often seek extension of their status. *See* 8 U.S.C. § 1258. In addition, a non-immigrant may, and often does, seek to adjust their status to lawful permanent resident. *See* 8 U.S.C. § 1255. Even a non-immigrant who has allowed their status to lapse and remained in the U.S. beyond their period of authorized stay may adjust status and obtain permanent residence under a variety of circumstances. *See* 8 U.S.C. § 1255(a),(c),(i), and (k). Such an individual may be "unlawfully present" in the U.S. while, nonetheless, present in the United States under color of law.

While the statute defines an individual as unlawfully present if "present in the United States after the expiration of the period of authorized stay by the Attorney General or is present in the United States without being admitted or paroled," whether an individual is unlawfully present is a complex legal determination. *See* Donald Neufeld, Lori Scialabba, and Pearl Chang, Consolidation of Guidance Concerning Unlawful Presence for the Purposes of INA §§ 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) (May 6. 2009) /*supra n.2*/ (outlining the differences between "unlawful status" and "unlawful presence" under federal law and the complexities in determining the same.) To begin with, the statute provides a number of exceptions to unlawful

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presence, with exceptions for asylum seekers, minors, equitable tolling, and the victims of abuse. *See* 8 U.S.C. § 1182(a)(9)(B)(iii). In addition, long-standing interpretations by the immigration agency have exempted many individuals who may have violated their immigration status from accruing unlawful presence. For example, F-1 students or Canadian visitors, who are admitted for "duration of status" but who have violated their status, are not deemed to have accrued any unlawful presence until the immigration agency or an immigration judge in removal proceedings determines that there was a violation. See Memo, Michael A. Pearson, Period of Stay Authorized by the Attorney General after Tolling Period for Purposes of the INA (March 3, 2000). AFM Ch. 40.9.2(b)(1)(E) *supra* n.2. It is only after such a legal determination that such an individual is considered to be "unlawfully present" in the U.S. and potentially subject to bars on admissions should she depart the U.S. In many instances, only a court is authorized to make a final determination on the lawfulness of someone's presence in the U.S., after years of litigation.

An individual who is unlawfully present in the U.S. or who entered the U.S. without inspection may, nonetheless, be in the U.S. under the color of law, entitled to seek and receive permanent residence, and to obtain temporary employment authorization. An individual who is unlawfully present in the U.S. is not necessarily barred from seeking adjustment of status to permanent residence in the U.S. on the basis of a family or employment petition. *See* 8 U.S.C. § 1255(a), (i) & (k). An unlawfully present individual remains eligible to seek asylum 8 U.S.C. § 1158 and cancellation of removal under 8 U.S.C. § 1229(b). While these applications are under consideration, the individual is allowed to remain in the U.S. and even may receive employment authorization. 8 C.F.R. § 274a.12(c)(9) (work authorization during pending adjustment of status application) and (c)(10) (work authorization during pending cancellation of removal application).

Further muddying the concept of lawful and unlawful presence is that the USCIS guidance published in AFM, Ch. 40.9 is just that, guidance. It is not binding on the USCIS (see

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page 51 of the memo) and other agencies within the Department of Homeland Security have refused to recognize its authority. *See* Michigan AILA CBP Liaison Committee, Response to Question 7 (Nov. 23, 2010), AILA InfoNet Doc. No. 11080850 (posted 08/08/2011)[6]. The Ninth Circuit has even gone so far as to reject the USCIS' guidance as "agency dicta and conclusory, *ipse dixit* assertions" lacking thoroughness, validity, and persuasiveness. *Carrillo de Palacios v. Holder*, 651 F.3d 969, 977 n.4 (9th Cir. 2011). The agencies and courts charged with interpreting and enforcing the immigration laws cannot even agree on lawful and unlawful presence. It is simply a fantasy to expect that state law enforcement officials will be able to make uniform judgments consistent with prevailing federal law, even when consulting with federal immigration officials who are not empowered to make the final determinations.

Section 6 transforms routine law enforcement encounters into potentially long-lasting and intrusive seizures as law enforcement officers struggle to ascertain an individual's immigration status. This is due to the fact that, as a practical matter, many who are legally in the country, whose stay here is authorized or permitted, or who are here under the color of law, will not have the documents necessary to establish the presumption and will consequently be subjected to the more lengthy set of inquiries under Section 6(c)(1).

These additional inquiries are likely to be lengthy as the federal government average approximately eighty minutes to reply to immigration status queries from state and local police. CITE. Frequently, an inquiry to immigration yields a "no match" record, indicating that the immigration agency has no record of the particular individual. While it may seem to assume that a "no match" indicates an individual who entered the U.S. by evading inspection by immigration authorities, it is also possible that the "no match" means that the person is a citizen of the United

[6] Available at http://www.aila.org/content/default.aspx?docid=36564 (last visited October 25, 2011).

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States, as there is no central repository of U.S. citizens. Thus, those selected for more searching inquiries and who could be subjected to the most prolonged seizures could be American citizens.

II. SB 20 Supplants Federal Expertise over Immigration Matters

Section 6 of SB 20 provides when a law enforcement officer "lawfully stops, detains, investigates, or arrests a person for a criminal offense and during the commission of the stop, detention, investigation or arrest the officer has reasonable suspicion to believe that the person is unlawfully present in the United States, the officer shall make a reasonable efforts, when practicable, to determine whether the person is lawfully present in the United States." An individual's production of certain official documents will create a presumption of lawful presence in the U.S. These documents include: (1) a driver's license or picture identification issued by the SC Department of Motor Vehicles; (2) a driver's license or picture identification issued by another state; (3) a picture identification issued by the United States, including a passport or military identification; or (4) a tribal picture identification. If an individual cannot produce any of the above documentation, the law enforcement officer is instructed to "make a reasonable effort, when practicable, to verify the person's lawful presence" through a variety of inquiries to other law enforcement agencies.

It is worth noting that production of a document issued by an actual federal immigration agency does create a presumption of lawful presence in South Carolina. In other words, state and not federal officials will be making the initial determination of someone's federal immigration status.

III. SB 20 Will Result in the Detention of or Denial of Benefits of Lawful Nonimmigrants

Although lawfully in the United States, many non-immigrants will not possess any of the documents that SB 20 utilizes to establish a presumption of legal status in the U.S. For example,

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although authorized to be employed in the U.S., most non-immigrants authorized to be employed in the U.S. are not issued any picture identification by the U.S. government,. Rather they are allowed to be employed, and complete an I-9 employment eligibility form, through their visa and I-94 proof of admission. *See I-9 Handbook*, available at http://www.uscis.gov/files/form/m-274.pdf. Without photo identification from the U.S. government, many states are now refusing to issue driver's licenses or state identifications without federal photo identification and a social security number.

The spouse of an H-1B non-immigrant is authorized to enter the U.S. for the same period of time as the H-1B employee. However, such an individual, admitted in H-4 status, is not authorized to be employed in the U.S. and thus has no federal photo identification. *See* 8 C.F.R. § 274a.12. As she is not permitted to be employed, the Social Security Administration will not issue a social security number to the H-4 non-immigrant. Electronic Fact Sheet, *available at* http://ssa.gov/pubs/10096.html#2 (last visited October 25, 2011). Without a social security number, the H-4 non-immigrant will be ineligible for a state identification in many states, including South Carolina. SC Code 56-1-90. Such an individual, legally in the United States, would be unlikely to be able to produce the documentation required by SB 20 to prove her lawful status in the U.S. and would be subject to a prolonged seizure while South Carolina sought to confirm her immigration status.[7]

[7]Ironically, all that South Carolina would be able to ascertain through the methods in Section 6(C)(a)-(d) is that she was lawfully admitted in H-4 status with the right to remain so long as her husband maintained his H-1B status. None of these databases, however, would be able to ascertain whether she was no longer in status, perhaps due to divorce or the termination of her husband's employment, and subject to removal. See 8 U.S.C. § 1227(a)(2)(C). Thus, while it would be difficult for the H-4 nonimmigrant to prove her lawful status, it would be very difficult for SC to determine that she is in violation of her status once it confirmed her lawful admission.

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Noncitizens whose underlying nonimmigrant status has expired but who have pending applications to extend, change, or adjust their status are authorized to remain in the U.S. and even to continue working pursuant to their prior status but may be removable at the same time. *See Bokhari v. Holder*, 622 F.3d 357 (5th Cir. 2010) (noncitizen authorized to live and work in the U.S. while timely extension of status application was pending lacked a valid status and was therefore removable). Sorting out the "lawfulness" of these noncitizens will take more than a momentary consultation between a state official and a federal immigration enforcement agency - it will take months or years while various federal offices adjudicate applications for relief and, potentially, the courts consider the individual's eligibility to remain here.

IV. SB 20 Will Result in the Detention of or Denial of Benefits to Lawful Immigrants

Many individuals are admitted to the United States as lawful permanent residents on the basis of immigrant visas obtained abroad. Upon their admission, they are processed for form I-551 a permanent resident identification card. This card contains a photo identification and demonstrates lawful admission for permanent residence. However, there is often a lag between when the immigrant is admitted to the United States and when the card shows up in the mail. The lag is usually about one month, during which time, the immigrant only has a document showing admission as a permanent resident. Again, such a document is usually not adequate to obtain a driver's license. It is not a photo-based identification and would not satisfy the documentary requirements of SB 20. Thus, while waiting for the photo identification, a permanent resident would not be able to produce evidence of their lawful residence and would be subjected to the more lengthy and intrusive verification process, a process that can take over an hour.

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Permanent residents would not be free from a burdensome verification process. A permanent resident with an expired, lost or old "green card" is still a permanent resident and not deportable from the United States. *See* 8 U.S.C. § 1227 (listing categories of individuals subject to removal from the U.S.) Moreover, permanent residents who are deportable from the U.S. would not even be identified under this statute. Permanent residents who may be deportable due to convictions for certain crimes may still present valid documentary evidence to satisfy Section 6. This new section would do nothing to aid in identifying those who are deportable and may present a danger to the community, but will rather unreasonably detain those with old or incomplete documentation.

V. SB 20 Will Result in the Detention of or Denial of Benefits to other Noncitizens Authorized or Permitted to Live or Work in the United States

Asylum seekers are another group of people who are allowed to remain in the United States, yet will not necessarily be able to provide documentation to satisfy Section 6 of SB 20. As stated above, asylum is available to any individual physically present in the United States regardless of their immigration status. 8 U.S.C. § 1158. The filing of an application for asylum actually serves to stop the accrual of unlawful presence, if any. 8 U.S.C. § 1182(a)(9)(B)(iii)(II). Nonetheless, an asylum applicant cannot seek employment authorization until her application for asylum has been pending for at least 150 days. 8 C.F.R. § 208.7(a). Asylum seekers who waive an expedited hearing on their application may never be able to obtain employment authorization during the many years that their asylum claims will be pending in the court system. Thus, for many months or possibly years after applying for asylum, an asylum applicant will be unable to produce any documentation required by Section 6 to show that she is lawfully in the U.S. Again, the more lengthy inquiries would then kick in. It is highly foreseeable that such inquiries would take longer than the average time period as the only evidence of the person's status as an asylum

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seeker would come from one of the application processing centers of the CIS. Thus, an asylum seeker, one of the most vulnerable of all immigrants would be subjected to a particularly lengthy verification process, although legally in the country.

Individuals who overstayed visas or entered without inspection, but are, nonetheless, legally permitted to be in the U.S., would also face a prolonged verification process. Such individuals may be eligible to seek adjustment of status to permanent residence. *See* 8 U.S.C. §§ 1255(i) & (k). Yet, they will not necessarily be able to obtain a photo identification sufficient to satisfy Section 6 until their application has been pending for at least ninety days. Although they may seek federal employment authorization, a documentation that would satisfy Section 6, the CIS routinely takes up to three months to process the card after the individual applies for permanent residence. The filing of the application for residence makes an individual present under color of law, but leaves them without documentation to prove it for a number of months. Thus, such individuals would also be more than momentarily inconvenienced by South Carolina's statutory scheme.

VI. SB 20 Will Result in the Detention of or Denial of Benefits to United States Citizens

U.S. citizens are also at peril of unreasonable seizure and detention. Many U.S. citizens will be unable to produce the documents listed in Section 6. Further inquiries are unlikely to result in any definitive conclusion as to citizenship status as there is no centralized citizenship database. Moreover, there are classes of individuals who, though born abroad, are U.S. citizens but have no proof of their status. ICE has arrested thousands of U.S. citizens and subjected many of them to prolonged detentions, and even removals, before their statuses are clarified. http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf at pages 4-5.

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Citizenship is not a characteristic apparent to the eye or dependent upon a person's appearance insofar as it is a legal determination. U.S. citizens are not required to carry proof of their citizenship while inside the U.S. Therefore, it is unlikely that, in a routine encounter with a law enforcement officer, a U.S. citizen will possess a birth certificate, US passport, naturalization certificate or other certificate of citizenship to demonstrate US citizenship.

Moreover, alienage determinations are complex because they are inherently legal rather than factual determinations. Congress has constitutional power over nationality law which determines whether a foreign born person is a US citizen and "citizenship law is probably the area of law where statutes remain relevant the longest, because even the most ancient and long-repealed statutes can still apply in a current case." Mautino, Acquisition of Citizenship, Immigration Briefings (April 1990). Similarly, US treaties and international covenants- which change over time- are dispositive as to a person's citizenship status, regardless of the place of birth. *See e.g. Sabangan v. Powell*, 375 F.3d 818 (9th Cir. 2004) (person born in Commonwealth of Northern Mariana Islands (CNMI) after January 9, 1978 is a U.S. citizen by virtue of covenant between U.S. and CNMI.)

Birth in the United States certainly is a clear indicator that a person is not a foreign national. *See* US Const. amend XIV, 1. But foreign birth is not a certain indicator of alienage. Acquisition of citizenship at birth depends upon numerous factors, such as parents' respective citizenship (8 U.S.C. § 1401(c)-(e), (g)-(h)); the duration and timing of their residence in the United States (§ 1401(d)-(e), (g)-(h); their marital status at the time of the individual's birth (§ 1409); the year in which the person was born (§ 1401(h)); the place where the person was born (§1041(c)-(e), (g)-(h)); and, in some situations, even the date on which a child born out of wedlock was legitimated (§ 1409)-none of which can be ascertained or observed by police in any

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contact or that could give rise, constitutionally, to any suspicion of alienage. See generally, 8 U.S.C. § 1401(c)-(h)(establishing conditions under which children born in- wedlock outside the U.S. acquire citizenship at birth) and § 1409 (establishing conditions under which children born out of wedlock outside the United States acquire US citizenship at birth). Hence, persons born outside of the United States may still be U.S. citizens. *Id*.

Anyone can assert U.S. citizenship, and a law enforcement officer may be hard pressed to identify a legitimate reason why such an assertion is untrue. Race, ethnic appearance, and language are not reliable indicators of alienage. *See, e.g., U.S. v. Montero-Camarago*, 208 F.3d 1122, 1132 (9th cir. 2000)(en banc) ("The likelihood that in an area in which the majority - or even a substantial part- of the population is Hispanic, any given person of Hispanic ancestry in in fact, an alien, let alone, an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.") *cert. denied*, 531 US 889 (2000); *U.S. v. Manzo-Jurado*, 457 F.3d 928, 932 (9th Cir. 2006)(ruling that individual's appearance as a Hispanic work crew, inability to speak English, proximity to the border and unsuspicious behavior did not establish reasonable suspicion of illegal presence.)

The citizenship question is further obscured because certain individuals may not possess any documentation establishing their U.S. citizenship (because none is required). Foreign birth is not dispositive on the question of alienage and it is an inappropriate factor for South Carolina to utilize. For example, a foreign born child automatically derives US citizenship by operation of law if a parent naturalizes before the child reaches the age of 18 and certain other conditions are met. *See* 8 U.S.C. § 1431(a). Yet, that individual may not possess a certificate of citizenship, a U.S. passport, or other document as evidence of his status. Indeed, he may not realize he is, in fact, a U.S. citizen. *See, e.g., United States v. Smith-Baltiher*, 424 F.3d 913, 920-

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21 (9th Cir. 2005) (rejecting government's claim in an illegal re-entry case that an individual could not assert derivative citizenship status because, inter alia, he did not have a certificate of citizenship). Likewise, an individual may automatically acquire U.S. citizenship through birth abroad to a U.S. citizen parent, and may not know that he is a U.S. citizen or may not possess citizenship documentation. *See* 8 U.S.C. §§ 1401, 1409 (setting out various conditions whereupon individuals may acquire U.S. citizenship at birth). *See also* 8 U.S.C. § 1431(b) (setting forth conditions whereupon adopted alien children acquire U.S. citizenship automatically).

These facts make clear that in a large number of encounters where a South Carolina officer has an articulable reasonable suspicion that a person may be in the country unlawfully, the documentation the South Carolina law relies upon to prove lawful presence may be unavailable to a large portion of the state's population. This lack of documentation will result in prolonged stops and seizures during which time an officer attempts to verify the immigration status of the individual. As the discussion above indicates, such verification processes are often lengthy and both over-inclusive and under-inclusive. Government databases may fail to recognize United States citizens, while at the same time failing to identify an individual who is not only deportable, but among the select classes of deportable individuals whose removal the U.S. government has chosen to prioritize. The South Carolina statute makes it highly likely that many individuals who are in the United States under color of U.S. immigration law will be unreasonably detained during a lengthy verification process.

VII. Section 4's Harboring Provisions Reflect a Dangerous Misunderstanding of the Realities of Immigration Law

Section 4 of SB 20 makes it crime for individuals to transport, move, harbor, shelter, or conceal persons who "came to entered or remained in the United States in violation of law." It

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also criminalizes the act of allowing oneself to be transported, moved, harbored, sheltered or concealed if that individual "came to, entered or remained in the United States illegally." Here, once again, the statute fails to acknowledge the fluid nature of U.S. immigration law. Under U.S. immigration law, many individuals who "came to, entered or remained in the U.S. in violation of law" have since obtained lawful immigration status. By operating exclusively retrospectively to determine if someone, at some time in the past, committed an immigration violation, the law fails to acknowledge that many such individuals could be legally in the U.S. today. In other words, the law places a burden on all its citizens not only to try to understand an individual's current immigration status, but also to understand their previous immigration status, no matter how long ago.

Many individuals who have "come to, entered or remained in the United States in violation of law" have since regularized their immigration status with the federal government. Congress has provided multiple means for such individuals to obtain lawful residence in the U.S.

For example, adjustment of status is the process outlined in 8 U.S.C. § 1255 that allows individuals in the United States to adjust their immigration status to that of a lawful permanent resident. Generally, in order to be eligible to adjust status, an individual must have been inspected and admitted or paroled into the United States to seek adjustment of status. 8 U.S.C. § 1255(a). In addition, Congress placed other limitations on eligibility to adjust status by excluding individuals, among other things, who overstayed their period of admission, worked without authorization or entered in specific non-immigrant statuses. 8 U.S.C. § 1255(c). However, Congress has specifically exempted the immediate relatives of United States citizens from these additional exclusions. The spouses, parents and children of United States citizens may obtain lawful permanent residence if they were admitted or paroled into the U.S., and even

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if they remained in the U.S. in violation of U.S. immigration law. Id. In addition, Congress has enacted 8 U.S.C. § 1255(i), which allows individuals who may have: (1) entered without inspection; (2) overstayed the term of admission on a temporary visa; or (3) worked without authorization to adjust status to permanent resident by meeting certain conditions despite these violations of U.S. immigration law. Congress determined that these individuals should still have the opportunity to obtain residence, assuming certain conditions are met. Even though Congress has restricted the use of 8 U.S.C. § 1255(i) over the last two decades, its continued existence demonstrates a Congressional determination that such individuals should be allowed under some circumstances to adjust status to that of a lawful permanent resident. Congress was similarly generous with 8 U.S.C. § 1255(k) which allows the beneficiaries of employment-based immigrant petitions to adjust their status to permanent residence even if they violated the terms of their visa or overstayed, provided such overstay is for less than 180 days.

In addition, as discussed above, any individual physically present in the United States may seek asylum. When a person files an application for asylum, that person ceases to accrue unlawful presence (if they were accruing it at the time of application) and the initiation of removal proceedings is generally enjoined until the USCIS asylum office has had a chance to adjudicate the claim to asylum. *See* 8 U.S.C. § 1182(a)(9)(B)(iii)(II). Such individual applicants for asylum may have "come to, entered or remained in the United States in violation of law." There is nothing in U.S. immigration law that would deny an individual, otherwise eligible for asylum, from receiving asylum in the United States based upon their manner of entry or their remaining in the U.S. in violation of law.

Congress has also made protections for the victims of crime and human trafficking available to anyone in the United States regardless of whether they came to, entered or remained

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in the U.S. in violation of law. Such individuals are eligible for certain visas while in the United States and can ultimately petition for residence.

Congress has empowered the immigration agency to provide Temporary Protected Status (TPS) to the nationals of certain countries to allow them to remain in the United States where the Secretary of Homeland Security has determined that it would be inhumane to return them to their home country. *See* 8 U.S.C. § 1254(a). This benefit is available to individuals who "came to, entered or remained in the U.S. in violation of law."

Thus, it is clear that many individuals who are legally in the United States pursuant to the laws established by Congress may have, at some point in their stay in the United States "come to, entered or remained in the U.S. in violation of law." Such individuals may be here in temporary status, such as TPS, as lawful permanent residents, or as citizens. The South Carolina law cuts too broadly. By looking exclusively backward, South Carolina cannot claim to be enforcing laws concomitantly with U.S. immigration law. Rather, the South Carolina statute is at direct odds with the federal immigration scheme. U.S. immigration law allows individuals targeted by the South Carolina law to fix their immigration status, whereas, the South Carolina law penalizes individuals, even those who may have gotten right with U.S. law, for acts committed long ago and already taken into account by U.S. immigration authorities.

VIII. SB 20 is at odds with the federal government's ability and need to prioritize immigration enforcement by permitting low priority removable noncitizens to remain here temporarily.

The federal government's August 18, 2011 announcement that it will deprioritize the deportation of hundreds of thousands of people facing deportation illustrates how people who are technically subject to deportation can nonetheless be permitted to stay in the United States. *See* Cecilia Muñoz, *The White House Blog, Immigration Update: Maximizing Public Safety and*

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Better Focusing Resources (Aug. 18, 2011, 2:00 PM)[8], Even prior to the August 18, 2001 policy, the federal government had the discretion to "forego . . . removal proceedings in individual cases" when "such forbearance will further federal immigration priorities." *Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-CV-1804-TWT, 2011 WL 2520752, at *25 (N.D.Ga. June 27, 2011) (declaration of Daniel H. Ragsdale, Executive Associate Director for Management and Administration at U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security). The result is that "ICE does not seek to arrest, detain, remove, or refer for prosecution, all aliens who may be present in the United States illegally." *Id.* at *29.

SB 20 fails to account for noncitizens who, while technically subject to removal, have been allowed to remain here with either the explicit or implicit consent of the federal agencies charged with enforcing the immigration laws. This consent is not some amnesty but rather a recognition of the practical and logistical impossibilities of removing every removal noncitizen as well as the effect of such action on the families, communities, and employers left behind.

CONCLUSION

The South Carolina law will subject many hundreds of thousands of people who have obtained legal immigration status in the U.S. to new criminal penalties for immigration violations deemed by Congress not sufficiently serious to warrant exclusion from certain immigration benefits. Congress has clearly provided several mechanisms for those who "came to entered or remained in the United States in violation of law." South Carolina should not be free to ignore that Congressional prerogative, a prerogative that is squarely constitutionally assigned to the federal congress and not the states. This is especially so where the South

[8] *Available at* http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources. (last accessed November 9, 2011)

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Carolina statute has the potential to subject untold thousands of individuals to criminal liability for violations of U.S. immigration law that the U.S. immigration authorities have already reckoned with.

Respectfully submitted this 10th day of November 2011, by counsel for Amicus Curiae,

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