

24th JUDICIAL DISTRICT COURT FOR THE PARISH OF
JEFFERSON

STATE OF LOUISIANA

NO. 06-1726

DIVISION: "T"

STATE OF LOUISIANA

VERSUS

OMAR BARRIENTOS

**BRIEF AMICI CURIAE OF NATIONAL IMMIGRATION LAW
CENTER, ADVANCEMENT PROJECT, AMERICAN CIVIL LIBERTIES
UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT, AMERICAN
CIVIL LIBERTIES FOUNDATION OF LOUISIANA, FRIENDS AND FAMILIES
OF LOUISIANA'S INCARCERATED CHILDREN, NEW ORLEANS WORKER
CENTER FOR RACIAL JUSTICE, AND SAFE STREETS – STRONG
COMMUNITIES IN SUPPORT OF DEFENDANT¹**

Mr. Omar Barrientos, a Latino male, was stopped by the Jefferson Parish police for a routine traffic violation. After the police determined that Mr. Barrientos was not carrying a driver's license, he was charged under La. R.S. 100.13. This statute makes it a felony for "alien students" and "nonresident aliens" to drive a vehicle without documentation demonstrating that they are lawfully present in the United States. *See La. R.S. 100.13, Operating a vehicle without lawful presence in the United States.* In addition to the reasons discussed in the Defendant's Supplemental Memorandum, his Motion to Quash should be granted because La. R.S. 100.13 is preempted by federal immigration law.

¹ A Statement of Interest of the *Amici* is included as Appendix 1.

The Supremacy Clause provides that the federal Constitution and laws “shall be ... the Supreme Law of the Land” *U.S. Const. Art. VI, cl. 2*. A state law regulating the conduct of non-citizens must be invalidated if it (1) regulates immigration, which is the exclusive domain of the federal government under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101, *et seq.*; (2) operates in a field which Congress has occupied, or (3) otherwise conflicts with federal law. *See De Canas v. Bica*, 424 U.S. 351 (1976). A state statute that fails any one of these tests is preempted. *See LULAC v. Wilson*, 908 F.Supp. 755, 768 (C.D.Cal. 1995).

La. R.S. 100.13 unlawfully infringes on the federal government’s plenary power over immigration, violating the Supremacy Clause in three ways. First, La. R.S. 100.13 regulates immigration. Specifically, this statute requires state and local law enforcement officials to determine whether drivers are lawfully present in the United States, a specialized and complex task properly reserved to the federal government. These determinations must be made based on state-created immigration categories that are misleading and incompatible with federal immigration law. Second, La. R.S. 100.13 reflects overreaching by the Louisiana state legislature into the field of immigration regulation, which Congress occupied by promulgating the INA. Third, La. R.S. 100.13 interferes with the federal scheme for identifying individuals subject to removal and reporting them to the federal authorities.

I. LA. R.S. 100.13 CONSTITUTES AN IMPERMISSIBLE ATTEMPT TO REGULATE IMMIGRATION.

The first *De Canas* test requires an assessment of whether the state statute constitutes a “regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal

entrant may remain.” *De Canas*, 424 U.S. at 355. The INA grants the federal government exclusive authority to regulate immigration and preempts any state statute that attempts to do so. *See id.* at 354-55.

The INA specifically authorizes the Attorney General and the Secretary of Homeland Security to make determinations regarding immigration status. *See* 8 U.S.C. §§ 1103, 1252, 1357. The statute before the Court departs from this scheme by requiring state and local law enforcement officials, who lack the expertise and training of federal officials in applying immigration law and verifying the authenticity of immigration-related documents, to make independent determinations about drivers’ immigration statuses. La. R.S. 100.13 does not set forth any procedures for making such determinations, which can lead to arrest, detention, and reporting to federal immigration authorities for possible removal from the country. Given these severe consequences, determinations under La. R.S. 100.13 unquestionably affect the conditions under which immigrants – including legal entrants – can remain in the United States.

To enforce La. R.S. 100.13, a law enforcement official must first ascertain whether a driver is an “alien student” or a “nonresident alien,” raising serious concerns about whether agents are engaging in racial profiling in deciding whom to stop for alleged traffic violations in the first place. These state-created categories are incompatible with federal immigration law. The ability to classify non-citizens according to their immigration statuses is a critical element of the federal government’s exclusive authority to regulate immigration. As the Supreme Court has stated:

[A]lienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may

independently exercise a like power. *Plyler v. Doe*, 457 U.S. 202, 219 n. 19 (1982).

The states do not have any authority to legislate in this area. *See id.* at 225.

Moreover, these state-created categories do not appear in the INA, and they are extremely misleading. The term “nonresident alien” is defined in La. R.S. 100.12 (Definitions) as “any person who is not a United States citizen and who is a citizen of any country other than the United States, who is physically present in the United States and who has not acquired INS [Immigration and Naturalization Service] permanent resident status.” *La. R.S. 100.12(5)*. This definition includes numerous categories of immigrants – such as refugees, asylees, persons granted withholding of removal, parolees, and persons granted temporary protected status – who are authorized to reside in the United States, in some cases permanently. *See* 8 U.S.C. §§ 1157, 2258, 1182(d)(5), 1231(b)(3), 1254a. The term “alien student” is defined in La. R.S. 100.12 even more broadly to include “any person who is attending an institution of education in the state who is not a citizen of the United States.” *See La. R.S. 100.12(2)*. This definition includes all noncitizen students in the state, including lawful permanent residents and even noncitizen U.S. nationals, who are not considered “aliens” under federal law. *See* 8 U.S.C. § 1101(a)(3).

After somehow identifying a driver as an “alien student” or a “nonresident alien,” a law enforcement official must determine whether the driver is carrying proof of lawful immigration status. If not, the law enforcement official must arrest the driver and notify the INS (now, the Department of Homeland Security) of the driver’s name and location. *See La. R.S. 100.13(B)*. In other words, a driver’s inability to produce immigration documents upon demand to a law enforcement official is construed to imply that the

driver lacks any lawful immigration status. This inference is neither mandated nor supported by the INA because many alien students and nonresident aliens, as defined in La. R.S. 100.12, have lawful immigration status. Moreover, local law enforcement officials enforcing La. R.S. 100.13 have no training or experience in making these complex immigration determinations and are thus more likely to make assumptions regarding the individual's immigration status based on the person's race, ethnicity, or nationality.

Although La. R.S. 100.13 states that it is intended to fight terrorism, the statute's true purpose is revealed by its notification requirement, which requires law enforcement officials to notify DHS of individuals arrested under La. R.S. 100.13 in order to enable DHS to initiate removal proceedings against undocumented drivers. *See La. R.S. 100.11, Legislative findings; purpose, 100.13(B)*. Taken together, the classification, arrest, and notification requirements of La. R.S. 100.13 constitute a regulation of immigration. *See LULAC*, 908 F.Supp. at 770 (“[D]eterminations of immigration status by state agents amounts to immigration regulation whether made for the purposes of notifying aliens of their unlawful status and reporting their presence to the INS or for the limited purpose of denying benefits.”). The INA thus preempts La. R.S. 100.13 under the first *De Canas* test.

II. CONGRESS OCCUPIED THE FIELD OF IMMIGRATION REGULATION BY PROMULGATING THE INA, WHICH ALREADY OBLIGATES CERTAIN IMMIGRANTS TO CARRY THEIR IMMIGRATION DOCUMENTS.

Under the second *De Canas* test, a state statute is preempted where Congress intended to “occupy the field” which the state statute attempts to regulate and to preclude even a harmonious state regulation. *De Canas*, 424 U.S. at 357-58. Congress has fully occupied the field of immigration regulation by promulgating the INA. *See Takahashi v.*

Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (stating that Congress has enacted “a comprehensive legislative plan for the nation-wide control and regulation of immigration and naturalization”); *see also LULAC*, 908 F.Supp. at 786 (“The State is powerless to enact its own scheme to regulate immigration or to devise immigration regulations which run parallel to or purport to supplement the federal immigration laws.”). The only provision of the INA which obligates *certain* immigrants to carry their immigration documents is 8 U.S.C. § 1304(e):

Every alien, *eighteen years of age and over*, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d). Any alien who fails to comply with the provisions of this subsection shall be guilty of a *misdemeanor* and shall upon conviction for each offense be fined not to exceed \$100 or be imprisoned not more than thirty days, or both. (Emphasis added.)

La. R.S. 100.13 conflicts with 8 U.S.C. § 1304(e) by targeting a much broader group of drivers – namely, all those under age eighteen who qualify as “alien students” or “nonresident aliens” – and by categorizing an individual’s failure to carry documents as a felony, which is subject to much steeper penalties, including a fine of up to \$1,000, imprisonment of up to one year, or both.² *See La. R.S. 100.13*. Because states do not have authority to legislate in these areas, the INA also preempts La. R.S. 100.13 under the second *De Canas* test.³

² The argument for federal preemption is particularly compelling in a case where a state imposes penalties for immigration violations which exceed those that the defendant would face under federal immigration law. *See State of New Hampshire v. Barros-Batistele, et al.*, available at http://www.nh.gov/judiciary/district/criminal_trespass_decision.pdf#search=%22jaffrey-peterborough%20district%20court%22 (granting motion to dismiss criminal trespass charges as “unconstitutional attempts to regulate in the area of enforcement of immigration violations, an area where Congress must be deemed to have regulated with such civil sanctions and criminal penalties as it feels are sufficient”).

³ Admittedly, courts tend to grant greater deference to statutes that address purely local problems. *See, e.g., Leclerc v. Webb*, 419 F.3d 405 (5th Cir. 2005) (finding that the INA did not preempt a Louisiana law limiting state Bar membership to U.S. citizens and “resident aliens” on the ground that it was designed to address local problems arising from the transitory status of nonimmigrant aliens, which could impede the Bar’s regulatory and disciplinary efforts). Clearly, La. R.S. 100.13 does not address purely local problems

III. LA. R.S. 100.13 INTERFERES WITH THE FEDERAL SCHEME FOR IDENTIFYING INDIVIDUALS SUBJECT TO REMOVAL AND REPORTING THEM TO THE FEDERAL AUTHORITIES.

A state statute is preempted under the third *De Canas* test if it impedes federal objectives, including by “interfer[ing] with the methods by which the federal statute was designed to reach [a] goal.” *De Canas*, 424 U.S. at 363; *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). In other words, a state statute is preempted if it conflicts with federal law. *LULAC*, 908 F.Supp. at 768. For this reason, the court in *LULAC* held that the INA preempted a California statute which required state officials to identify persons present in the United States in violation of state-created immigration criteria or federal immigration laws, report immigration status information to state and federal authorities, and cooperate with federal immigration authorities regarding persons whose immigration status was suspect. *Id.* at 777. Like the statute at issue in *LULAC*, La. R.S. 100.13 “contradict[s] the INA’s mandate that the procedure outlined in the INA ‘shall be the sole and exclusive procedure for determining the deportability of the alien.’” *Id.*; citing 8 U.S.C. § 1252(b).⁴

As previously discussed, La. R.S. 100.13 creates a new procedure for identifying individuals subject to removal and reporting them to federal authorities. *See La. R.S. 100.13*. This procedure interferes with the INA’s methods by delegating to state and local law enforcement officials tasks which federal law delegates exclusively to federal agents. Consequently, La. R.S. 100.13 is also preempted under the third *De Canas* test.

because it requires reporting to the Department of Homeland Security, a federal government agency. L.A. R.S. 100.13 also constitutes a much more direct regulation of immigration status by criminalizing certain categories of immigrants for failing to carry satisfactory proof of immigration status.

⁴ 8 U.S.C. § 1252(b) has since been recodified as 8 U.S.C. § 1229a(a)(3), which refers to removal rather than deportation from the United States.

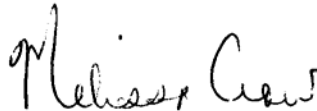
CONCLUSION

For the foregoing reasons, La. R.S. 100.13 is preempted by the INA. Moreover, *Amici* share grave concerns that the Louisiana statute at issue here will result in increased discrimination against communities of color, particularly those that are perceived to be “foreign-looking” or “foreign-sounding.” Therefore, the defendant’s Motion to Quash should be granted.

Respectfully submitted this 27th day of September,

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SAFE STREETS – STRONG COMMUNITIES

INTEREST OF THE *AMICI CURIAE*

The National Immigration Law Center (NILC) is a national legal advocacy organization whose mission is to protect and promote the rights and opportunities of low-income immigrants and their family members. Founded in 1979, NILC has earned a national leadership reputation for its expertise in the complex, overlapping areas of immigration, employment, and public benefits law. Community groups, legal aid programs, advocates, labor unions, service providers, and policymakers around the country depend on NILC's training, technical assistance, and publications to understand the effects of immigration-related laws on the low-income immigrants with whom they work. NILC works to protect immigrants' rights through policy analysis, advocacy, and impact litigation. Since Hurricane Katrina, NILC has worked consistently to address the particular needs and challenges confronting low-income immigrants in the Gulf Coast.

Advancement Project is a democracy and justice organization which works with communities seeking to build a fair and just multi-racial democracy in America. Advancement Project works to protect the civil rights of communities of color through legal advocacy. Since October 2005, Advancement Project has assisted community-based organizations in the Gulf Coast to file systemic litigation on behalf of survivors of Hurricane Katrina on voting rights, housing, and other issues involving the vindication of people's constitutional rights. Advancement Project has been dedicated to ensuring fair and just treatment of immigrant laborers in post-Hurricane Katrina New Orleans.

The American Civil Liberties Foundation Immigrants' Rights Project is a project of the American Civil Liberties Union (ACLU), a national nonprofit, nonpartisan

organization of more than 400,000 members, with the aim of enforcing and protecting the constitutional and civil rights of immigrants through a nationwide program of litigation and advocacy.

The ACLU Foundation of Louisiana has participated in many of the leading Constitutional cases litigated in Louisiana. The ACLU of Louisiana is the state affiliate of the ACLU. The ACLU Foundation of Louisiana is the nonprofit public education and litigation arm of the affiliate. Since its founding in 1920, the ACLU has been a foremost champion of immigrants' rights. The ACLU has over 400,000 members and, at any given moment, is involved in hundreds of cases around the nation. The ACLU has appeared before the United States Supreme Court more than any other organization other than the federal government. An essential feature of the ACLU is its commitment to defend the Bill of Rights. As a non-profit, non-partisan organization, it has defended the civil liberties of all segments of the population without regard to their affiliation.

Families and Friends of Louisiana's Incarcerated Children (FFLIC) is a statewide membership based organization dedicated to improving the lives of all of Louisiana's children, especially those who are incarcerated or are at risk of incarceration. FFLIC New Orleans is working to rebuild a strong membership of parents to fight for a just and equitable rebuilding that prioritizes education and programs for youth and families over prisons and jails.

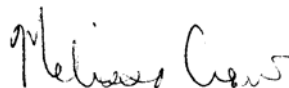
The New Orleans Worker Center for Racial Justice has recently formed to be an independent, but collaborative, community-based organization advocating for and organizing workers in post-Katrina New Orleans in a multi-racial, multi-industry context. The Center organizes survivors of Hurricane Katrina who are locked out of life and work

in New Orleans and new migrant workers who are locked into exploitative working conditions. The Center is building a multi-racial base of workers to fight for a just reconstruction.

Safe Streets – Strong Communities is a New Orleans based membership organization whose mission is to create safe streets and strong communities for everyone, regardless of our race or economic status. Safe Streets works to create a criminal justice system that increases public safety, reduces public corruption and makes efficient use of taxpayer dollars based on principles of civil rights, good government and research-driven best practices.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief *Amici Curiae* in Support of Defendant was served to all counsel of record, via facsimile and Federal Express, this 27th day of September, 2006.



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