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SCHOOL ATTRITION THROUGH ENFORCEMENT: TITLE VI DISPARATE IMPACT AND VERIFICATION OF STUDENT IMMIGRATION STATUS

Abstract: In recent years, efforts in state legislatures to enact comprehensive immigration regulations have become increasingly pervasive. When Alabama enacted a comprehensive immigration law in 2011, it became only the third state in three decades to require public school personnel to inquire into schoolchildren’s immigration status. Although section 28 of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act differed significantly from its two more restrictive predecessors, which expressly denied a free public education to unlawfully present children, all three laws have been invalidated on equal protection grounds. Despite that result, this Note argues that the differences between Alabama’s provision and its predecessors may allow other state laws modeled after section 28 to survive constitutional scrutiny in the future. Consequently, this Note maintains that federal regulations promulgated under Title VI of the Civil Rights Act of 1964, which prohibit actions by recipients of federal funding that have a disproportionately adverse impact on individuals on the basis of their race, color, or national origin, provide a more promising avenue for the federal government to challenge state laws patterned on section 28 that tend to chill educational opportunity for Hispanic students.

INTRODUCTION

On June 9, 2011, Alabama governor Robert Bentley signed H.B. 56, the Beason-Hammon Alabama Taxpayer and Citizen Protection Act (“the Act”), into law.¹ Section 28 of the Act mandated that personnel at all public elementary and secondary schools in Alabama verify the immigration status of public school children at the time of enrollment.² Only thirty-four days before passage of the Act, the U.S. Department of Justice’s (DOJ) Civil Rights Division and the U.S. Department of Educa-

¹ Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535, 535 (codified at ALA. CODE §§ 31-13-1 to -30, 32-6-9 (2011)). See generally Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155 (2008) (discussing the Act’s philosophical underpinnings).

² ALA. CODE § 31-13-27, *invalidated* by Hispanic Interest Coal. of Ala. v. Governor of Ala. (*HICA II*), 691 F.3d 1236 (11th Cir. 2012).

tion's ("DOE") Office for Civil Rights issued joint guidance to public school districts across the country regarding nondiscriminatory student enrollment procedures.³ The letter declared that "[school] districts may not request information [regarding immigration status] with the purpose or result of denying access to public schools on the basis of race, color, or national origin."⁴ The joint guidance relied in part on the U.S. Supreme Court's 1982 decision in *Plyler v. Doe*, which held that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution does not permit a state to provide a free public education to its citizens while denying an equal education to children who are not lawfully present.⁵

This guidance was the federal government's initial response to school enrollment practices being considered or implemented around the country that, according to the Departments, tended to chill participation by students and their families in public education based on their actual or perceived immigration status.⁶ In addition to *Plyler*, the Departments also relied on Title VI of the Civil Rights Act of 1964, which has not yet been applied to a state law relating to immigration status in the context of primary and secondary public education.⁷

This Note argues that, notwithstanding section 28's invalidation on equal protection grounds by a panel of the U.S. Court of Appeals for the Eleventh Circuit,⁸ Title VI's disparate impact regulations provide a preferable means for the federal government to challenge similar state laws in the future.⁹ Constitutional challenges to a facially neutral state data-collection measure modeled on section 28 present significant limitations—both analytical and strategic—that may allow for a carefully

³ See "Dear Colleague" Letter from Russlyn Ali, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., Charles P. Rose, Gen. Counsel, U.S. Dep't of Educ., & Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice 1–2 (May 6, 2011), available at <http://www.ed.gov/about/offices/list/ocr/letters/colleague-201101.pdf> [hereinafter Dear Colleague Letter].

⁴ *Id.* (citing Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI); *Plyler v. Doe*, 457 U.S. 202 (1982); 28 C.F.R. § 42.104(b)(2) (2012) (DOJ's Title VI implementing regulation); 34 C.F.R. § 100.3(b)(2) (2012) (DOE's Title VI implementing regulation)).

⁵ See *id.* (citing *Plyler*, 457 U.S. at 230).

⁶ See Dear Colleague Letter, *supra* note 3, at 1; Christine Armario, *Feds: All Kids, Legal or Not, Entitled to School*, NBCNEWS.COM (May 6, 2011), <http://www.msnbc.msn.com/id/42938492>.

⁷ See *Plyler*, 457 U.S. at 230; *HICA II*, 691 F.3d at 1249; League of United Latin Am. Citizens v. Wilson (*LULAC*), 908 F. Supp. 755, 774, 785–86 (C.D. Cal. 1995), *aff'd on reconsideration in part*, 997 F. Supp. 1244 (C.D. Cal. 1997); Dear Colleague Letter, *supra* note 3, at 1.

⁸ *HICA II*, 691 F.3d at 1249.

⁹ See *infra* notes 125–250 and accompanying text.

crafted provision to withstand judicial review at trial or on appeal.¹⁰ In contrast, the effects-based inquiry permitted by a Title VI disparate impact claim avoids many of these difficulties, providing a clearer path to a successful challenge.¹¹ Aggressive enforcement of the Title VI disparate impact regulations, as hinted at by the DOE and DOJ in their joint guidance, will deter state lawmakers from repeating such ill-conceived forays into immigration regulation in the realm of primary and secondary public education.¹²

Part I of this Note examines the development of section 28 of the Act, its effect on Alabama's educators, students, and families, and its treatment by the federal courts.¹³ It further discusses similar provisions pending in state legislatures around the country as well as section 28's historical predecessors.¹⁴ Part II describes Title VI's conceptual origins in the Reconstruction era and its roots in equal protection jurisprudence.¹⁵ This Part then provides an overview of the divergent paths that Title VI disparate treatment and disparate impact claims have taken over the past forty years.¹⁶ Finally, Part III uses section 28 as a case study to analyze the merits of a Title VI disparate impact challenge to state laws mandating school verification of students' immigration status, concluding that it would provide a successful method for the federal government to prevent such a law from taking effect in our nation's public schools.¹⁷

I. PUBLIC SCHOOLS AS AGENTS OF STATE IMMIGRATION REGULATION

Title VI of the Civil Rights Act of 1964 regulates the activities of any entity receiving federal financial assistance.¹⁸ The Alabama State Department of Education and its subsidiary public school districts accept funding from the federal government and therefore must comply with

¹⁰ See *infra* notes 145–164 and accompanying text.

¹¹ See *infra* notes 165–250 and accompanying text.

¹² See Dear Colleague Letter, *supra* note 3, at 1.

¹³ See *infra* notes 22–64 and accompanying text.

¹⁴ See *infra* notes 65–82 and accompanying text.

¹⁵ See *infra* notes 87–97 and accompanying text.

¹⁶ See *infra* notes 98–124 and accompanying text.

¹⁷ See *infra* notes 125–250 and accompanying text.

¹⁸ Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006) (Title VI). Section 601 of Title VI mandates that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.*

the nondiscrimination requirements of Title VI.¹⁹ In determining whether section 28 of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act and similar proposed legislation in other states conforms to the requirements of Title VI, it is instructive to examine the legislative purposes and practical effects of section 28,²⁰ as well as the unsuccessful history of its two historical forebears.²¹

A. *Section 28 of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act*

Although unlawfully present individuals account for a smaller proportion of Alabama's population than the national average, a relatively rapid influx of immigrants into Alabama over the past decade helped to build support for the Act in the state legislature.²² Between 2000 and 2010—a period in which Alabama's overall population grew by 7.5%—the state's Hispanic population grew by 145%, from approximately 75,800 to approximately 185,600 residents.²³ Hispanic enrollment as a percentage of total enrollment in Alabama's public schools increased from 1.3% to 4.5% during this period.²⁴ In response to this demographic shift, lawmakers proposed several comprehensive immigration bills prior to 2010 that repeatedly stalled in a state legislature that Democrats had long controlled.²⁵ In 2010, however, Alabama voters

¹⁹ See *id.*; *Funds for State Formula-Allocated and Selected Student Aid Programs*, U.S. DEP'T EDUC. (Jan. 25, 2012), <http://www.ed.gov/about/overview/budget/statetables/12stbystate.pdf> (reporting that the DOE disbursed approximately \$3.1 billion to Alabama for the state's public educational programming in fiscal year 2010).

²⁰ See *infra* notes 22–64 and accompanying text.

²¹ See *infra* notes 65–82 and accompanying text.

²² See JEFFREY S. PASSEL & D'VERA COHN, PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 24 (2011), available at <http://www.pewhispanic.org/files/reports/133.pdf> (noting that unauthorized immigrants accounted for 3.7% of the U.S. population in 2010, compared to 2.5% of Alabama's population). From 2000 to 2010, authorities estimated that the population of unlawfully present residents in Alabama increased by nearly 500%. See *id.* at 23–24.

²³ See PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 2 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>; Catalina Jaramillo, *Alabama, un Dulce Hogar* [*Sweet Home Alabama*], EL DIARIO LA PRENSA (May 15, 2011), <http://www.impre.com/noticias/nacionales/2011/5/15/alabama-un-dulce-hogar-256052-1.html>.

²⁴ See *Public Data Reports*, ALA. ST. DEP'T EDUC., <http://www.alsde.edu/PublicDataReports> (last visited Jan. 22, 2013) (select “Enrollment by Ethnicity & Gender (State Level)” from the drop-down menu; then click “Go”; then click “View Report” for the 2000–2001 and 2010–2011 school years).

²⁵ See Philip Rawls, *Alabama Reconsiders Tough Immigration Law*, AUGUSTA CHRON. (Ga.), Dec. 8, 2011, at A4, available at 2011 WLNR 25628879.

elected a Republican majority to both houses of the legislature for the first time since Reconstruction.²⁶ H.B. 56 was introduced on the first day of the Alabama legislature's 2011 regular session and easily passed both houses three months later.²⁷ The majority of the Act, including section 28, was slated to take effect on September 1, 2011.²⁸

Section 28 required all public elementary and secondary schools in Alabama to determine whether each enrolling student was born outside the jurisdiction of the United States or whether he or she was the child of an alien not lawfully present in the United States.²⁹ Parents were required to present school officials with an original or certified copy of the child's birth certificate at the time of enrollment.³⁰ If the parent failed to produce a birth certificate, or if school officials determined after review of the birth certificate that the student was not born in the United States or that he or she was the child of an alien not lawfully present, additional documentation was requested.³¹ In the absence of adequate evidence indicating otherwise, school officials were required to presume that the student was unlawfully present for purposes of reporting to the local school district.³²

Section 28 did not authorize school officials to deny enrollment to these students, however, nor did it require them to report students to

²⁶ *Id.*

²⁷ See Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535, 535 (codified at ALA. CODE §§ 31-13-1 to -30, 32-6-9 (2011)); David White, *Undocumented Immigrants Would Be Guilty of a Crime*, PRESS-REG. (Mobile, Ala.), June 3, 2011, at A2, available at 2011 WLNR 11606258 (noting that the state Senate approved H.B. 56 by a vote of 25-7 after the House of Representatives approved the bill by a vote of 67-29).

²⁸ 2011 Ala. Acts 535 § 34.

²⁹ ALA. CODE § 31-13-27(a)(1). The provision also mandated that school officials determine whether an enrolling child qualified for English as a Second Language ("ESL") or other remedial services. *Id.* Although the requirement to determine whether an enrolling student "is the child of an alien not lawfully present in the United States" implied a threshold determination of a parent's immigration status, section 28 specified no method by which schools could make such a finding. See *id.* § 31-13-27. The term "parent," as it is used here, included guardians and legal custodians as well as biological or adoptive parents. See *id.* § 31-13-27(a)(3).

³⁰ *Id.* § 31-13-27(a)(2).

³¹ *Id.* § 31-13-27(a)(3). Specifically, a parent in this situation had thirty days to verify the child's citizenship or lawful immigration status by presenting school personnel with an official document establishing the child's status and attesting, under penalty of perjury, that the document stated the child's true identity. *Id.* §§ 31-13-27(a)(3) to -27(a)(4)(b). Alternatively, if a parent had no available documentation of a child's citizenship or immigration status, the parent could sign a declaration under penalty of perjury attesting to the child's lawful presence. *Id.*

³² *Id.* § 31-13-27(a)(5).

immigration or law enforcement authorities.³³ Section 28 mandated that each school district compile the data reported by each of its public schools and forward the aggregate data to the State Board of Education.³⁴ The Board was required to submit an annual public report to the legislature specifying, among other things, the number of enrolled students in each public school who are U.S. citizens, lawfully present aliens by federal immigration status, and students presumed to be aliens not lawfully present.³⁵ The Act directed the Board of Education to construe section 28 in conformity with federal law and to apply its provisions “without regard to race, religion, gender, ethnicity, or national origin.”³⁶

Republican state senator Scott Beason added section 28 near the conclusion of legislative negotiations between the House of Representatives’ version of the proposed bill, H.B. 56, and the Senate version, S.B. 256, ostensibly to permit state government to analyze the impact of undocumented immigrants on public school budgets.³⁷ According to the primary legislative sponsor of H.B. 56, House majority leader Micky Hammon, Senator Beason added section 28 to increase understanding of the costs of educating children who are not lawfully present in the United States at taxpayer expense.³⁸ The two legislative sponsors also

³³ See *id.* § 31-13-27.

³⁴ *Id.* §§ 31-13-27(b) to -27(c).

³⁵ ALA. CODE §§ 31-13-27(d)(1) to -27(d)(2) (2011). The report would also include the number of students in each category receiving ESL services, an analysis of the current and expected impact of the enrollment of public school students who are unlawfully present in the United States on the quality of public education that U.S. citizens receive, and the itemized costs to Alabama and its localities of providing various educational services to students who are not lawfully present. *Id.* §§ 31-13-27(d)(2) to -27(d)(4).

³⁶ *Id.* §§ 31-13-27(g) to -27(h). This provision implied conformity with the U.S. Supreme Court’s decision in *Plyler*, prohibiting school officials from denying equal educational access to undocumented students. See 457 U.S. at 230. In addition to the aforementioned provisions, section 28 also forbid public disclosure of information that could personally identify a student, except pursuant to federal law allowing for communication between state and local government agencies and the U.S. Department of Homeland Security, contingent on the Alabama attorney general’s grant of a waiver of confidentiality. ALA. CODE § 31-13-27(e).

³⁷ M.J. Ellington, *Immigration Guidelines for Schools by August 1*, DECATUR DAILY, June 28, 2011, available at 2011 WLNR 12841649. S.B. 256, which was not enacted, would have made it illegal for any alien not lawfully present in the United States to “[p]articipat[e] in any extracurricular activity outside of the basic course of study in any primary, secondary, or postsecondary educational program,” but specifically noted that such children were eligible for a basic primary and secondary public education. S.B. 256 §§ 7(a), 8(3), 2011 Leg., Reg. Sess. (Ala. 2011).

³⁸ Ellington, *supra* note 37. Governor Bentley echoed this intent at the time he signed H.B. 56 into law. See Bob Johnson, *Ala. Governor Signs Tough Illegal Immigration Law*, TIMES ARGUS (Barre-Montpelier, Vt.), June 10, 2011, available at 2011 WLNR 11613293. These statements are borne out by the express legislative findings in the preamble to H.B. 56:

hoped that section 28 would help officials identify U.S. citizen school children whose parents are not lawfully present in the United States.³⁹ Hammon, the chairman of the legislative committee from which H.B. 56 emerged, stated that his objective with respect to H.B. 56 was to enact a law making those not lawfully present in the United States “know they are not welcome here so they will want to leave.”⁴⁰ Although he acknowledged that enforcement of the Act would place additional costs on state and local government, Hammon stated that savings in public education and other government functions would counterbalance the financial burden once undocumented immigrants in Alabama began leaving the state as a result of other restrictions that the Act imposed on the daily lives of undocumented immigrants.⁴¹

On July 8, 2011, a coalition of advocacy organizations sued Governor Bentley in federal district court and moved to preliminarily enjoin enforcement of section 28 on the ground that it mandated discrimination on the basis of alienage and immigration status in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.⁴² The motion was denied for lack of standing, and the plaintiffs appealed.⁴³ Three weeks later, the DOJ’s Civil Division sued

Because the costs incurred by school districts for the public elementary and secondary education of children who are aliens not lawfully present in the United States can adversely affect the availability of public education resources to students who are United States citizens or are aliens lawfully present in the United States, the State of Alabama determines that there is a compelling need for the State Board of Education to accurately measure and assess the population of students who are aliens not lawfully present in the United States.

ALA. CODE § 31-13-2.

³⁹ See *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1189 n.20 (M.D. Ala. 2011) (“[P]eojoratively, these children are referred to as ‘anchor babies,’ which, as Representative Hammon explained, . . . [refers to] illegal immigrants . . . [who] have babies that are U.S. citizens, and that gives them a reason . . . to stay.” (citing Hammon hearing testimony)).

⁴⁰ M.J. Ellington, *Legislature to Focus on Immigration, Education*, DECATUR DAILY, Feb. 27, 2011, available at 2011 WLNR 3866463.

⁴¹ See Kim Chandler, *House to Vote on Immigration Bill*, BIRMINGHAM NEWS, Apr. 5, 2011, at 3, available at 2011 WLNR 6660792; see also *Two Sides Begin Fight over Illegal Immigration*, MONTGOMERY ADVERTISER, Mar. 3, 2011, available at 2011 WLNR 4143740 (noting that Hammon had determined, in reviewing unspecified data in 2009, that the cost of educating children unlawfully present in Alabama was approximately \$200 million per year).

⁴² Complaint at 4, 108, *Hispanic Interest Coal. of Ala. v. Bentley (HICA I)*, No. 5:11-CV-2484-SLB, (N.D. Ala. Sept. 28, 2011). The Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

⁴³ *HICA I*, 2011 WL 5516953, at *50–52.

Alabama and moved to preliminarily enjoin enforcement of various portions of the Act, including section 28, on the ground that federal law⁴⁴ and foreign policy preempted them.⁴⁵ On September 28, 2011, in *United States v. Alabama (Alabama I)*, the U.S. District Court for the Northern District of Alabama held that section 28 did not require school officials to determine the immigration status of students' parents, did not create registration requirements for aliens different than those Congress had already established, and, in fact, did not attempt to register anyone.⁴⁶ Thus, the court held that federal law did not preempt section 28.⁴⁷ As a result of the court's ruling, section 28 went into effect in all Alabama public schools on September 29, 2011.⁴⁸ Two weeks later, the U.S. Court of Appeals for the Eleventh Circuit granted the United States' motion to enjoin section 28 pending appeal.⁴⁹

During the latter half of 2011, educators across Alabama publicly voiced their concerns regarding the responsibilities placed on them by section 28, its likely impact on local students and families, and the potential for a breakdown in trust between schools and immigrant communities.⁵⁰ While section 28 was in effect for the first two weeks of Oc-

⁴⁴ See Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101–1537 (2006 & Supp. V 2012); Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1324a–1324b; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (codified as amended in scattered sections of 7, 8, 18, 20, and 22 U.S.C.).

⁴⁵ *United States v. Alabama (Alabama I)*, 813 F. Supp. 2d 1282, 1292 (N.D. Ala. 2011). The court temporarily enjoined the disputed portions of the Act on August 29, 2011 to allow sufficient time for consideration of the complaint. *Id.*

⁴⁶ *Id.* at 1347–48.

⁴⁷ *Id.* at 1348. The court came to this conclusion by comparing section 28 to the facts of *Hines v. Davidowitz*, a 1941 U.S. Supreme Court case that concerned an attempt by the state of Pennsylvania to require all aliens over the age of eighteen to register annually with the state and carry an alien registration card. See *id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 56–67 (1941)). According to the *Alabama I* court, the lack of a registration scheme in section 28 meant that it did not stand as an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress” as expressed in the INA. *Id.* (quoting *Hines*, 312 U.S. at 66–67). Further, the court determined that the Act as a whole did not “conflict[] with Congressional intent regarding national foreign policy goals or with an international agreement identify[ing] a federal foreign relation policy.” *Id.* at 1311 (second alteration in original) (internal quotation marks omitted). Accordingly, the court held that section 28 was not preempted. *Id.* at 1348.

⁴⁸ *United States v. Alabama (Alabama II)*, 443 F. App'x 411, 419 (11th Cir. 2011).

⁴⁹ *Id.* at 419–20 (holding that the United States had demonstrated a substantial likelihood of prevailing on the merits, a substantial risk of irreparable injury absent injunction, no substantial harm to other interested persons, and no harm to the public interest).

⁵⁰ See, e.g., Brian Anderson, *Alabama School Board Lacks Policy for Required Immigration Checks*, ANNISTON STAR (Anniston, Ala.), June 27, 2011, available at 2011 WLNR 12746232 (quoting an Alabama school superintendent's opinion that section 28 was “in conflict with federal laws . . . [and] places additional burdens on the schools. . . . It sounds like we'll

tober, public school officials reported a substantial drop in attendance and enrollment among Hispanic students across Alabama.⁵¹ In one school with a sixty-five percent Hispanic population, 200 out of 900 students failed to show up for school when section 28 went into effect, and some parents thought that school resource officers would come to their homes to arrest their children.⁵² In another school, 58 of 223 Hispanic students withdrew or were absent on the day section 28 went into effect.⁵³ Absences after initial enforcement were highest in counties with large Hispanic populations.⁵⁴

Officials at the DOE and DOJ closely monitored the impact of section 28 in Alabama.⁵⁵ On October 31, 2011, in an action unrelated to

become immigration police”); Kim Chandler, *Schools Start Checking Citizenship Status*, BIRMINGHAM NEWS, Sept. 30, 2011, at 4, available at 2011 WLNR 20451314 (quoting Alabama Association of School Boards executive director Sally Howell’s statement that “[f]or most school officials, the concern is that parents may withdraw students or not enroll students. . . . We’re concerned about the chilling effect on attendance and registration of students that we are required by law to serve”); Marie Leech, *School Board Blasts Immigration Law*, BIRMINGHAM NEWS, Nov. 9, 2011, at 1, available at 2011 WLNR 23230011 (reporting that the Birmingham Board of Education agreed to pass a resolution condemning the Act after hearing comments from residents calling section 28 “hateful”). *But see* Patrik Jonsson, *Is Alabama Immigration Law Creating a ‘Humanitarian Crisis’?*, CHRISTIAN SCI. MONITOR, Oct. 6, 2011, available at 2011 WLNR 20502360 (quoting Alabama state senator and former history teacher Rusty Glover’s statement that it is “heartbreaking to read about [children being pulled out of school], but it’s going to be an immigration bill or it’s not going to be one”).

⁵¹ See, e.g., Jay Reeves, *Hispanics Disappear in Ala.—Judge’s OK of Tough Immigration Law Scares Them Away from Public Schools*, COM. APPEAL (Memphis), Oct. 1, 2011, at A4, available at 2011 WLNR 20227234 (noting that, on the day section 28 went into effect, there was a “sudden exodus” of Hispanic children from public schools around the state in an effort to avoid drawing the attention of authorities, including the absence or withdrawal of more than 200 Hispanic students in Montgomery County, the withdrawal of 35 students in Albertville, and the withdrawal of about 20 students in Shelby County); Jaclyn Zubrzycki, *Immigration Statute Has Alabama Schools in Legal Balancing Act*, EDUC. WEEK, Oct. 12, 2011, at 16, available at 2011 WLNR 21906125 (noting that the Alabama State Department of Education reported that more than 2200 of Alabama’s 34,000 Hispanic students were absent from school on the Monday after section 28 went into effect, and the state’s rate of absenteeism among Hispanic students continued to rise throughout that week).

⁵² Stacy Teicher Khadaro, *Appeals Court Curtails Alabama Immigration Law, for Now*, CHRISTIAN SCI. MONITOR, Oct. 14, 2011, available at 2011 WLNR 21102027.

⁵³ Editorial, *Targeting Schoolchildren*, WASH. POST, Oct. 1, 2011, at A16.

⁵⁴ Mark Guarino, *Hispanics Leave School in Face of Alabama’s Tough Immigration Law*, CHRISTIAN SCI. MONITOR, Oct. 1, 2011, available at 2011 WLNR 20130661 (reporting 200 students absent in Huntsville and 107 absent in Albertville).

⁵⁵ See, e.g., Mary Orndorff, *Justice Probing ‘Troubling’ School Complaints*, BIRMINGHAM NEWS, Nov. 17, 2011, at 1, available at 2011 WLNR 23947551 (quoting Assistant U.S. Attorney General Thomas Perez’s statement that “we are hearing very troubling reports of children who are not going to school or are walking an hour each way to school because their parents are afraid to drive them”); Brett Zongker, *Teachers in Middle of Debate over Immigrant Kids*, ASSOCI-

the Civil Division's ongoing preemption challenge, the DOJ's Civil Rights Division sent a letter to superintendents of public school districts in Alabama requesting student attendance data in various demographic categories to determine whether the districts were in compliance with federal antidiscrimination law.⁵⁶ After initially refusing to cooperate with federal authorities,⁵⁷ the Alabama State Department of Education complied with their request.⁵⁸ The data revealed that the statewide absentee rate had tripled for Hispanic students following implementation of section 28, while 13.4% of the state's Hispanic schoolchildren had withdrawn from school.⁵⁹ In contrast, the corresponding figures for other student groups had remained relatively static.⁶⁰ The Civil Rights Division, announcing its intention to continue the investigation, implied that these findings might indicate a violation of the Title VI regulations prohibiting actions producing a disparate impact on protected classes.⁶¹

On August, 20, 2012, the U.S. Court of Appeals for the Eleventh Circuit's decision in *Hispanic Interest Coalition of Alabama v. Governor of Alabama (HICA II)* effectively made the Civil Rights Division's ongoing investigation moot.⁶² A panel of the Eleventh Circuit reversed the lower court's finding that no plaintiff had standing to challenge section 28, and further held that section 28 violated the Equal Protection Clause under the framework established in *Plyler*.⁶³ The court determined that

ATED PRESS, July 6, 2011, *available at* http://blog.al.com/wire/2011/07/teachers_in_middle_of_debate_o.html (quoting U.S. Secretary of Education Arne Duncan's statement that he is monitoring developments in Alabama amid concern that the law will "have a chilling effect. . . . To have more students leave school or more students drop out . . . would not be good for children, communities or the country").

⁵⁶ "Dear Superintendent" Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice (Nov. 1, 2011), *available at* <http://blogs.usdoj.gov/blog/archives/1710> (requesting data on students' race, national origin, English proficiency, enrollment status, and number of unexplained absences over a two-year period before and after enforcement of section 28).

⁵⁷ See Jerry Markon, *Justice Dept., Alabama in Standoff on Immigration*, WASH. POST, Nov. 18, 2011, at A3.

⁵⁸ See Letter from Thomas E. Perez, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Thomas R. Bice, Superintendent of Educ., Ala. State Dep't of Educ. I (May 1, 2012), *available at* <http://media2.fox10tv.com/DOJ%20to%20state%20super.pdf>.

⁵⁹ *Id.* at 2.

⁶⁰ *Id.*

⁶¹ See *id.* at 3 (citing 28 C.F.R. § 42.104(b)(2) (2012); 34 C.F.R. § 100.3(b)(2) (2012)).

⁶² See 691 F.3d at 1249.

⁶³ *Id.* at 1245–49 (citing *Plyler*, 457 U.S. at 215–30). In light of this determination, the Eleventh Circuit dismissed the Civil Division's preemption challenge as moot. *United States v. Alabama (Alabama III)*, 691 F.3d 1269, 1297 (11th Cir. 2012) As of January 2013, Alabama has filed a petition for a writ of certiorari seeking review of the Alabama III court's invalidation of a provision relating to the harboring of unlawfully present immi-

section 28's facially neutral data collection and reporting methods substantially interfered with undocumented students' access to a primary and secondary public education in Alabama without serving any substantial state interest that might warrant the interference.⁶⁴

B. *Similar Attempts to Involve Educators in State Immigration Regulation*

The Act is not the first, or last, attempt by state officials around the country to involve public primary and secondary school personnel in state regulation of immigration.⁶⁵ It is, however, only the third state statute of its kind to be enacted; earlier constitutional challenges invalidated the other two.⁶⁶

In 1975, the Texas legislature passed a law withholding state funding for the education of children not lawfully present in the United States and authorizing Texas's public schools to deny enrollment to these children.⁶⁷ Seven years later, in *Plyler*, the U.S. Supreme Court held that these provisions violated the Fourteenth Amendment.⁶⁸ The

grants. See ALA. CODE § 31-13-13 (2011). The petition has not yet been assigned a docket number or United States Law Week citation, but is available at <http://www.ago.alabama.gov/File-Immigration-US-Cert-Petition>.

⁶⁴ *HICA II*, 691 F.3d at 1245. The Eleventh Circuit subsequently denied Alabama's petition for rehearing en banc, and as this Note goes to press, the state has not filed a petition for a writ of certiorari to challenge the Eleventh Circuit's decision regarding section 28. See Hispanic Interest Coal. of Ala. v. Governor of Ala., Nos. 11-14535 & 11-14675-CC (11th Cir. Nov. 27, 2012) (order denying petition for rehearing en banc).

⁶⁵ See, e.g., *State Bills on Access to Education for Immigrants—2012*, NAT'L IMMIGR. L. CENTER, 7–8 (Sept. 25, 2012), <http://www.nilc.org/document.html?pid=604> (collecting bills introduced in 2012 legislative sessions in Arizona, Mississippi, Missouri, and Virginia requiring school personnel to inquire into students' immigration status and calculating state aid to school districts based solely on the number of lawfully present students); *State Bills on Access to Education for Immigrants—2011*, NAT'L IMMIGR. L. CENTER, 8–10 (Oct. 19, 2011), <http://www.nilc.org/document.html?pid=114> (collecting bills introduced in 2011 legislative sessions in Alabama, Arizona, Georgia, Maryland, North Carolina, Oklahoma, Tennessee, Texas, and Virginia requiring school personnel to inquire into students' immigration status, report students who fail to present documents to law enforcement, require unlawfully present students to pay fees for nonacademic activities, calculate state aid based solely on the number of lawfully present students, and prevent noncitizens and the children of noncitizens from enrolling in school).

⁶⁶ See *Plyler*, 457 U.S. at 230 (declaring unconstitutional portions of TEX. EDUC. CODE ANN. § 21.031 (West 1975)); *LULAC*, 908 F. Supp. at 774 (declaring unconstitutional CAL. EDUC. CODE § 48215 (West 2006)); see also *Pena v. Bd. of Educ. of Atlanta*, 620 F. Supp. 293, 304 (N.D. Ga. 1985) (holding that a municipal policy, requiring that parents of children holding specified nonimmigrant visas pay tuition in order for their children to attend public school, violated the Equal Protection Clause).

⁶⁷ TEX. EDUC. CODE ANN. § 21.031, *invalidated in part by Plyler*, 457 U.S. 202.

⁶⁸ 457 U.S. at 230. In light of its equal protection ruling, the *Plyler* Court did not consider the plaintiffs' additional claim that federal law and policy preempted the state statu-

Court determined that state restrictions on access to a free public education for unlawfully present children triggered intermediate scrutiny under the Equal Protection Clause.⁶⁹ Therefore, Texas was required to show that the restrictions furthered a “substantial goal” of the state in order to be deemed constitutionally permissible.⁷⁰ The Court ultimately determined that Texas had failed to demonstrate that the restrictions served any substantial state interest.⁷¹ Thus, its statutory restrictions were unconstitutional.⁷²

Twelve years later, California voters passed Proposition 187, a state initiative to “establish a system of required notification by and between such agencies [of local, state, and federal government] to prevent illegal aliens in the United States from receiving benefits or public services.”⁷³ Section 7 of the initiative required California’s public schools to verify the immigration status of all enrolled students and their parents, deny educational services to unlawfully present students, and report all unlawfully present students or parents to federal immigration authorities.⁷⁴ In 1995, in *League of United Latin American Citizens v. Wilson (LULAC)*, the U.S. District Court for the Central District of California held that section 7 of Proposition 187 violated the Equal Protection Clause of the Fourteenth Amendment and that federal law additionally preempted it in several respects.⁷⁵

tory provisions. *See id.* at 210 n.8. In dicta, however, the Court noted that it could identify no congressional objective to conserve state educational funds by denying a free public education to unlawfully present children, implying that the preemption claim would similarly prevail. *See id.* at 225–26. *But cf. LULAC*, 908 F. Supp. at 779–80 (noting that verification of students’ federal immigration status by school personnel, standing alone, would not be preempted by federal law).

⁶⁹ *See id.* at 219–24 (noting that the children in *Plyler* were, for the most part, not responsible for their disabling condition, and that a public education, although not a fundamental right under the Constitution, is necessary to ensure that all children have an opportunity to succeed and contribute to civil society (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973))).

⁷⁰ *Id.* at 224.

⁷¹ *Id.* at 227–30; *see infra* notes 213–219 and accompanying text (discussing the *Plyler* Court’s consideration of Texas’s asserted interests).

⁷² *Plyler*, 457 U.S. at 230.

⁷³ Prop. 187, 1994 Cal. Legis. Serv. § 7 (West).

⁷⁴ CAL. EDUC. CODE § 48215 (West 2006), *invalidated by LULAC*, 908 F. Supp. 755.

⁷⁵ 908 F. Supp. at 774, 785–86 (citing *Plyler*, 457 U.S. at 205). The court found that several provisions of section 7 were preempted as impermissible state regulations of immigration. *Id.* at 774, 778–79. Nonetheless, it also found that federal immigration law did not preempt provisions of section 7 requiring verification of students’ federal immigration status in order to deny them educational services. *Id.* This was a moot point in light of the court’s equal protection ruling. *See id.* at 774, 779–80.

In striking down the state educational provisions at issue in *Plyler* and *LULAC*, the Supreme Court and U.S. District Court for the Central District of California relied primarily on the Equal Protection Clause and secondarily on preemption doctrine to hold that the state immigration laws governing public education in those cases were unconstitutional.⁷⁶ Title VI played no role in either case.⁷⁷

The challenges to section 28 of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act brought by the DOJ's Civil Division and a coalition of private plaintiffs relied on these same constitutional grounds.⁷⁸ Although a panel of the Eleventh Circuit held that section 28 violated the Equal Protection Clause, the law's provisions—which were facially neutral and required neither the reporting of individuals to immigration or law enforcement authorities nor the denial of a free public education to any child—did not constitute the same express denial of a free public education as in *Plyler* and *LULAC*.⁷⁹ Given that *Plyler* is considered by some to be an outlier in the Supreme Court's equal protection jurisprudence and its holding has been limited to its specific facts, a challenge premised on *Plyler* to section 28 or a variant thereof may provide an opportunity for the high court to reconsider that decision—an outcome few advocates for undocumented children would relish.⁸⁰ In contrast, no court has yet considered Title VI as an alternative challenge to state immigration laws applied to public primary and secondary educational institutions.⁸¹ Such a challenge would likely be successful, while avoiding the constitutional difficulties discussed above.⁸²

II. TITLE VI AND SIMILAR CIVIL RIGHTS CAUSES OF ACTION

Before appraising the viability of a Title VI challenge to future state immigration laws relating to public education,⁸³ it is instructive to exam-

⁷⁶ See *Plyler*, 457 U.S. at 230; *LULAC*, 908 F. Supp. at 774, 785–86.

⁷⁷ See *Plyler*, 457 U.S. at 230; *LULAC*, 908 F. Supp. at 774, 785–86.

⁷⁸ See *Alabama I*, 813 F. Supp. 2d at 1292; *HICA I*, 2011 WL 5516953, at *7–8.

⁷⁹ See ALA. CODE § 31-13-27 (2011); *Plyler*, 457 U.S. at 230; *HICA II*, 691 F.3d at 1249; *LULAC*, 908 F. Supp. at 774, 785–86.

⁸⁰ See *infra* notes 156–164 and accompanying text (discussing the implications of a contemporary equal protection claim premised on *Plyler*).

⁸¹ See *Plyler*, 457 U.S. at 230; *HICA II*, 691 F.3d at 1249; *LULAC*, 908 F. Supp. at 774, 785–86.

⁸² See *infra* notes 125–250 and accompanying text.

⁸³ See ALA. CODE § 31-13-27 (2011), *invalidated by* Hispanic Interest Coal. of Ala. v. Governor of Ala. (*HICA II*), 691 F.3d 1236 (11th Cir. 2012); *supra* note 65 (discussing representative bills recently proposed in various state legislatures).

ine the history of the federal statute and its constitutional forebears.⁸⁴ As Section A illustrates, Title VI traces its origins to the aspirations underlying the Equal Protection Clause of the Fourteenth Amendment, reflected by its evolution in close alignment with equal protection jurisprudence.⁸⁵ Section B describes how Title VI has developed *independently* of the Equal Protection Clause, particularly with respect to its regulatory prohibition of actions having a disproportionately adverse impact on protected populations.⁸⁶

A. *The Evolution of Equal Protection Jurisprudence as a Precursor to the Civil Rights Act of 1964: 1868–1964*

Although the Civil Rights Act of 1964 is often seen as a legislative reflection of social forces originating during the civil rights movement of the 1950s and 1960s, its underlying policy concerns may be traced back nearly a hundred years to the ratification of the Reconstruction Amendments to the U.S. Constitution.⁸⁷ Section 1 of the Fourteenth Amendment mandates that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁸⁸ In its earliest interpretations, the U.S. Supreme Court applied this language broadly to protect the rights of racial and ethnic minorities.⁸⁹ The Court’s 1896 decision in *Plessy v. Ferguson*, however, signaled a decades-long decline of the Equal Protection Clause as a tool to redress discriminatory conduct by state institutions.⁹⁰

⁸⁴ See *infra* notes 87–124 and accompanying text.

⁸⁵ See *infra* notes 87–97 and accompanying text.

⁸⁶ See *infra* notes 98–124 and accompanying text.

⁸⁷ See U.S. CONST. amend. XIII (abolishing slavery); *id.* amend. XIV (guaranteeing, among other things, birthright citizenship and equal protection of the laws); *id.* amend. XV (establishing universal male suffrage).

⁸⁸ *Id.* amend. XIV, § 1 (adopted in 1868).

⁸⁹ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (holding that a facially neutral ordinance applied with discriminatory animus to Chinese nationals violated the Equal Protection Clause); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (holding that exclusion of a particular race from jury service violated the Equal Protection Clause).

⁹⁰ See 163 U.S. 537, 550–51 (1896), *overruled by* *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (noting that the Equal Protection Clause “was relegated to decades of relative desuetude” in the era following *Plessy*). The *Plessy* Court held that the Fourteenth Amendment was not intended “to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.” *Plessy*, 163 U.S. at 544 (citing *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849)). The decision established the “separate but equal” doctrine to analyze a state’s disparate treatment of residents under the Fourteenth Amendment. See *id.* at 551–52. *Plessy* provided the legal justification for racial segregation in a variety of public facilities, includ-

Beginning in 1938, the Court began to curtail deference to state and local policies under *Plessy's* “separate but equal” doctrine in a series of decisions concerning segregation and exclusion of minority students in public institutions of higher education.⁹¹ These cases presaged the overruling of *Plessy* in the U.S. Supreme Court’s landmark 1954 decision, *Brown v. Board of Education (Brown I)*, in which the Court held that racial segregation in state-supported public elementary and secondary schools violated the Equal Protection Clause.⁹² Assuming that segregated schools could be equal in all tangible respects, the Court emphasized the intangible impact of school segregation—particularly the psychological harm done to minority children by policies widely viewed as an affirmation of the inferior status of those children.⁹³

Despite the Court’s mandate for “good faith compliance [with *Brown I*] at the earliest practicable date,”⁹⁴ there was little immediate movement toward desegregation of public schools in the South.⁹⁵ As a result, Congress introduced legislation intended to provide a more robust method of enforcing *Brown I* on recalcitrant Southern states.⁹⁶

ing schools. See, e.g., *Gong Lum v. Rice*, 275 U.S. 78, 86–87 (1927) (upholding a public school’s exclusion of a child of Chinese origin on the ground that an equal education was available to her in a school designated for nonwhite students); *Cumming v. Bd. of Educ.*, 175 U.S. 528, 545 (1899) (dismissing an equal protection challenge when a public school district closed its only high school for nonwhite students for economic reasons while continuing to operate a public high school for white students).

⁹¹ See *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950) (holding that policies affording different treatment to black and white students in a state graduate school violated the Equal Protection Clause); *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950) (holding that a separate law school established for black students who were otherwise qualified to attend the state’s flagship public law school provided unequal educational opportunities and therefore violated the Equal Protection Clause); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631, 632–33 (1948) (holding that the state’s provision of a legal education to whites but not to blacks violated the Equal Protection Clause); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938) (same). These decisions drew support from a 1938 Supreme Court case proposing “more searching” judicial scrutiny under the Equal Protection Clause of state policies discriminating against “discrete and insular minorities.” See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁹² See 347 U.S. at 491–92, 494–95 (citing *McLaurin*, 339 U.S. 637; *Sweatt*, 339 U.S. 629; *Sipuel*, 332 U.S. 631; *Gaines*, 305 U.S. 337); see also *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (remanding for the creation of locally responsive remedies to implement *Brown I* “with all deliberate speed”).

⁹³ See *Brown I*, 347 U.S. at 492–94 (citing *McLaurin*, 339 U.S. 637; *Sweatt*, 339 U.S. 629).

⁹⁴ *Brown II*, 349 U.S. at 299–300.

⁹⁵ See Letter from Senator Thomas J. Dodd (Conn.) to Senator Everett M. Dirksen (Ill.) 1 (May 23, 1963), available at <http://www.congresslink.org/civil/cr2.gif> [hereinafter *Dodd Letter*] (noting that nine years after *Brown I*, less than one percent of African American students in the South attended desegregated schools).

⁹⁶ See H.R. 7152, 88th Cong. (1963); *Dodd Letter*, *supra* note 95, at 1 (discussing the introduction of a civil rights bill “intended to implement [*Brown I*] authoriz[ing] the At-

Republicans and Northern Democrats reached a compromise with Southern Democrats to produce a comprehensive civil rights bill that President Lyndon B. Johnson signed into law as the Civil Rights Act of 1964 on July 2, 1964.⁹⁷

B. *Disparate Treatment vs. Disparate Impact*

One of the key sections of the Civil Rights Act of 1964 is section 601 of Title VI, which prohibits discriminatory treatment on the basis of race, color, or national origin by programs or activities receiving federal financial assistance.⁹⁸ Many federal departments and agencies have promulgated regulations pursuant to section 602 of Title VI to enforce section 601.⁹⁹ Title VI claims may allege intentional discrimination (“disparate treatment,” which is generally analyzed in the same manner as an equal protection claim),¹⁰⁰ or, in the absence of a manifest intent, may be premised on a practice’s discriminatory effect on a protected class (“disparate impact”).¹⁰¹ Each legal theory has traced a divergent path in the federal courts over the past half century.¹⁰²

torney General . . . to institute a civil action against any person who deprives or threatens to deprive any individual of the right of equal protection of the laws with respect to public school attendance”); *see also* H.R. Doc. No. 88-124, at 12 (1963), *reprinted in* 1963 U.S.C.C.A.N. 1526, 1534 (statement of President John F. Kennedy) (urging Congress to enact H.R. 7152 because “justice requires that public funds . . . not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination”).

⁹⁷ *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.); Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining “Discrimination,”* 70 *Geo. L.J.* 1, 9, 28–30 (1981) (discussing the key compromise in the development of Title VI that provided discretion to executive agencies to promulgate regulations, with the approval of the President, interpreting the meaning of “discrimination” as it appeared in section 601 of Title VI). President Jimmy Carter later delegated approval authority for Title VI’s implementing regulations to the U.S. Attorney General. *See* Exec. Order No. 12,250, § 1-101, 3 C.F.R. 298 (1980).

⁹⁸ *See* 42 U.S.C. § 2000d (2006). In contrast, the Equal Protection Clause applies only to state actors. *See* U.S. CONST. amend. XIV, § 1; *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

⁹⁹ *See infra* note 101 (discussing federal agencies’ issuance of Title VI disparate impact regulations). Section 602 of Title VI provides authority to promulgate these regulations. 42 U.S.C. § 2000d-1.

¹⁰⁰ *See* 42 U.S.C. § 2000d; *infra* notes 103–109 and accompanying text.

¹⁰¹ *See* 42 U.S.C. § 2000d-1. In his dissent in the U.S. Supreme Court’s 1983 decision in *Guardians Ass’n v. Civil Service Commission of New York City*, Justice Thurgood Marshall noted that every Cabinet department and approximately forty federal agencies had promulgated disparate impact regulations pursuant to section 602 of Title VI. 463 U.S. 582, 619 (1983) (Marshall, J., dissenting). These agency regulations are generally still in force in nearly identical form, and have been upheld as a lawful implementation of Title VI’s statutory language. *See* David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 *TEX. L.*

1. Disparate Treatment Under Title VI

Despite the persistence of racial segregation in America's public educational institutions in the 1960s and 1970s, the federal courts failed to clarify the scope of disparate treatment under section 601 of Title VI for the first fourteen years of the Civil Rights Act's existence.¹⁰³ In 1978, in *Regents of the University of California v. Bakke*, the U.S. Supreme Court held that the prohibition on "discrimination" in Title VI was to be interpreted coextensively with the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments.¹⁰⁴ Thus, the required elements of a disparate treatment claim under Title VI and a violation of the Equal Protection Clause of the Fourteenth Amendment are the same.¹⁰⁵ In 1976, in *Washington v. Davis*, and again in 1977, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the U.S. Supreme Court held that proof of discriminatory intent is a necessary element of a successful equal protection challenge to a facially neutral law.¹⁰⁶ *Bakke* and the Court's subsequent opinions interpreting section 601 of Title VI relied on the reasoning in *Davis* and *Arlington Heights* to hold that section 601 itself prohibits only intentional, not disparate impact, discrimination.¹⁰⁷ The Court has been clear, however, that parties

REV. 1197, 1261 n.244 (2004) (collecting regulations); *infra* note 111 and accompanying text.

¹⁰² See *infra* notes 103–124 and accompanying text.

¹⁰³ See *Bakke*, 438 U.S. at 284–87.

¹⁰⁴ *Id.* at 287; accord *Guardians*, 463 U.S. at 610–11 (Powell, J., concurring).

¹⁰⁵ See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) ("[D]iscrimination that violates the Equal Protection Clause . . . committed by an institution that accepts federal funds also constitutes a violation of Title VI."). Of course, the sets of individuals and agencies subject to the two provisions are not identical. Compare U.S. CONST. amend. XIV, § 1 (binding all state actors), with 42 U.S.C. § 2000d (binding all recipients of federal financial assistance). The Equal Protection Clause protects a much broader range of discrete groups that may be subject to unlawful discrimination. Compare U.S. CONST. amend. XIV, § 1 (guaranteeing "any person within [a state's] jurisdiction the equal protection of the laws") (emphasis added), with 42 U.S.C. § 2000d (prohibiting discrimination against any person "on the ground of race, color, or national origin").

¹⁰⁶ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); *Washington v. Davis*, 426 U.S. 229, 242 (1976). *Arlington Heights* outlined a non-exhaustive list of factors that courts may consider when determining whether an impermissible discriminatory intent played some role in a legislative body's passage of a law. See 429 U.S. at 266–68. These factors are: (1) the actual effects of the law; (2) the historical background of the law; (3) the sequence of events leading to the law's passage; (4) procedural and substantive departures from typical decision-making practices; and (5) the legislative history. *Id.*

¹⁰⁷ See *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001); *Guardians*, 463 U.S. at 610–611 (Powell, J., concurring in judgment); *id.* at 612 (O'Connor, J., concurring in judgment); *id.* at 642 (Stevens, J., dissenting); *Bakke*, 438 U.S. at 287.

who demonstrate the requisite intent necessary to make a Title VI disparate treatment claim have an implied private right of action under section 601¹⁰⁸—a benefit foreclosed under disparate impact theory.¹⁰⁹

2. Disparate Impact Under Title VI

In contrast to Title VI disparate treatment claims, which may be brought directly under section 601, claims of disparate impact discrimination must be premised on the federal regulations implementing Title VI's statutory mandate in the context of activities falling within the relevant agency's jurisdiction.¹¹⁰ These regulations prohibit actions by recipients of federal funding "hav[ing] the effect of subjecting individuals to discrimination because of their race, color, or national origin, or hav[ing] the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."¹¹¹

Until recently, federal courts generally resolved Title VI disparate impact claims under the presumption that a private right of action was available under the regulations.¹¹² This came to an abrupt end in 2001 when, in *Alexander v. Sandoval*, the U.S. Supreme Court held that Title VI's statutory text manifests no congressional intent to create a private

¹⁰⁸ See 42 U.S.C. §§ 2000d, 2000d-7; *Sandoval*, 532 U.S. at 279–80; *Cannon v. Univ. of Chi.*, 441 U.S. 677, 710–11 (1979).

¹⁰⁹ See *infra* notes 112–114 and accompanying text.

¹¹⁰ See, e.g., *Sandoval*, 532 U.S. at 280–81.

¹¹¹ See *supra* note 101 (referencing agency regulations that use this language to prohibit disparate impact discrimination under Title VI within the agency's jurisdiction). The Supreme Court initially incorporated this effects-based test into section 601 itself. See *Lau v. Nichols*, 414 U.S. 563, 566–68 (1974), *abrogated by Guardians*, 463 U.S. 582 (1983). Nevertheless, the Court rejected this interpretation in 1983 when, in *Guardians*, it reached the same result as the *Lau* Court on the basis of Title VI's disparate impact regulations—which, it determined, constitute a permissible administrative construction of section 601—rather than by reading a disparate impact standard into the statutory text. *Guardians*, 463 U.S. at 584, 592–93; *id.* at 618–24 (Marshall, J., dissenting); *id.* at 643–45 (Stevens, J., dissenting); see also *Sandoval*, 532 U.S. at 281 n.1 (noting the “settled principle” that the Court's interpretation of statutes such as Title VI prior to *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), need not be reconsidered after *Chevron* in light of regulations already in force when the interpretation was made); *Alexander v. Choate*, 469 U.S. 287, 293 & n.9 (1985) (citing the *Guardians* Court's holding that “actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI”).

¹¹² See *Sandoval*, 532 U.S. at 293; *infra* note 119 (collecting representative cases in the public educational context). Members of the Supreme Court directly addressed this question only once during this era, when two Justices in *Guardians* affirmed the existence of such a private right of action in dicta. See 463 U.S. at 593–95 (opinion of White, J.); *id.* at 627–28 (Marshall, J., dissenting).

right of action under implementing regulations promulgated pursuant to section 602, and therefore no such private right exists.¹¹³ The *Sandoval* Court thus sharply constrained the ability of private parties to seek redress for disparate impact discrimination under the Title VI regulations, leaving that power solely with the various federal departments and agencies that had originally promulgated them.¹¹⁴

Although *Sandoval* had a profound impact on private plaintiffs, it did not affect the federal government's power to seek redress on behalf of individual victims.¹¹⁵ Recipients of federal funding must sign an assurance that they will comply with Title VI regulations as a condition of receiving federal funds.¹¹⁶ If the recipient fails to provide such assurance, or fails to comply with the Title VI regulations after notice of an administrative finding of noncompliance, the agency may terminate federal funding or initiate judicial proceedings to enjoin practices having a discriminatory effect.¹¹⁷

3. The Title VI Disparate Impact Burden-Shifting Framework

The federal courts have borrowed the elements of a Title VI disparate impact claim from Title VII¹¹⁸ employment discrimination cases.¹¹⁹

¹¹³ 532 U.S. at 293. This reasoning similarly appears to foreclose private enforcement of the disparate impact regulations pursuant to 42 U.S.C. § 1983. *See id.* at 290–91; *see also* *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (holding that a private litigant may bring suit under § 1983 only to enforce private rights that Congress has unambiguously created). Upon examining the text and structure of sections 601 and 602 of Title VI, the *Sandoval* Court discerned that Congress's intent was not to provide a private right of action in the implementing regulations separate and apart from that available in section 601 to victims of disparate treatment. *See id.* at 288–89. Any language within the regulations purporting to create such a private right was thus ineffectual. *Id.* at 291.

¹¹⁴ *See id.* at 288–91.

¹¹⁵ *See id.*

¹¹⁶ *E.g.*, 34 C.F.R. § 100.4 (2012) (DOE regulation).

¹¹⁷ *E.g.*, *Gardner v. Alabama ex rel. Dep't of Pensions & Sec.*, 385 F.2d 804, 817 (5th Cir. 1967); 34 C.F.R. § 100.8 (DOE regulation). This process comports with the contractual nature of Spending Clause legislation—such as Title VI—by ensuring that both the grantee and grantor are aware of their rights and obligations before the terms of the contract bind them both. *See* U.S. CONST. art. I, § 8, cl. 1; *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

¹¹⁸ Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006) (Title VII) (prohibiting employment discrimination based on race, color, religion, sex, or national origin).

¹¹⁹ *See, e.g.*, *Powell v. Ridge*, 189 F.3d 387, 393–94 (3d Cir. 1999); *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 n.14 (11th Cir. 1993); *United States v. League of United Latin Am. Citizens*, 793 F.2d 636, 648–49 (5th Cir. 1986); *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985), *abrogated by* *Lee v. Etowah Cnty. Bd. of Educ.*, 963 F.2d 1416 (11th Cir. 1992); *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 982 & nn.9–10 (9th Cir. 1984).

In 1975, in *Albemarle Paper Co. v. Moody*, the U.S. Supreme Court held that the plaintiff in a Title VII disparate impact suit must first show, by a preponderance of the evidence, that an employment practice adversely affects members of the protected class at a significantly higher rate than the overall pool of employees or applicants.¹²⁰ The size of the adverse effect need only be large enough for a court to infer that there is a causal link between the practice and the disproportionate outcome.¹²¹ If the plaintiff succeeds at this first step, the burden shifts to the defendant to demonstrate that the employment practice is either job-related or a business necessity to avoid liability.¹²² If the defendant makes this showing by a preponderance of the evidence, the burden shifts back to the plaintiff to prove that the defendant's proffered justification is merely a pretext to discriminate, or that a feasible alternative employment practice would serve the employer's legitimate needs equally well while entailing less of an adverse impact on members of the protected class.¹²³ In analyzing Title VI disparate impact claims in the context of public education, courts have made only minor changes to this burden-shifting framework.¹²⁴

¹²⁰ 422 U.S. 405, 425–26 (1975) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–05 (1973)). This standard must be met by direct, not merely circumstantial, evidence. See *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir. 1981).

¹²¹ See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–95 (1988) (noting, in the context of Title VII, that “statistical disparities must be sufficiently substantial that they raise . . . an inference of causation,” but refusing to apply any mathematical standard); *Cureton v. Nat'l Collegiate Athletic Ass'n (Cureton I)*, 37 F. Supp. 2d 687, 697–98 (E.D. Pa. 1999), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999) (applying this principle to Title VI disparate impact claims). *But cf.* 29 C.F.R. § 1607.4(D) (2012) (requiring that an employer's facially neutral selection criteria result in applicants of a protected class being selected at a rate less than four-fifths that of another class before an inference of disparate impact is raised).

¹²² *Albemarle Paper*, 422 U.S. at 426.

¹²³ *Id.* at 426. Congress has since codified much of this burden-shifting framework. See Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k) (2006).

¹²⁴ See, e.g., *Powell*, 189 F.3d at 396–97 (considering the effect of educational funding practices on students rather than the effect of employment practices on workers); *League of United Latin Am. Citizens*, 793 F.2d at 649 (considering whether a challenged test is a reasonable measure of a bona fide educational, rather than occupational, qualification); *Ga. State Conference of Branches of NAACP*, 775 F.2d at 1417–18 (comparing Title VII cases defining “business necessity” to the defendant's alleged “educational necessity” (citing *Bd. of Educ. v. Harris*, 444 U.S. 130, 151 (1979))).

III. TITLE VI DISPARATE IMPACT REGULATIONS AS APPLIED TO STATE IMMIGRATION LAWS IN PUBLIC SCHOOLS: A CASE STUDY

This Part uses section 28 of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act as a case study to predict the effectiveness of Title VI disparate impact challenges to future state immigration laws involving public schools.¹²⁵ Section A argues, as a threshold matter, that Hispanic schoolchildren in Alabama, rather than unlawfully present schoolchildren, represent a protected class that could have presented a successful disparate impact claim to the federal government.¹²⁶ Section B then examines the analytical and strategic obstacles facing a constitutional challenge to future policies akin to section 28.¹²⁷

As previously discussed, the DOE and DOJ—and potentially a federal court exercising judicial review over final agency action—would conduct a three-step burden-shifting analysis to decide the merits of a disparate impact claim brought by members of a class protected by Title VI.¹²⁸ Accordingly, Section C of this Part contends that Hispanic students in Alabama and their families would have prevailed at each step of the disparate impact framework, by demonstrating: (1) the disproportionately adverse impact section 28 imposed on Hispanic students;¹²⁹ (2) the lack of a legitimate educational necessity underlying the law;¹³⁰ and (3) the pretextual nature of Alabama's asserted interests, as the less harmful alternate methods available to the state reveal.¹³¹

A. Title VI Protects Alabama's Hispanic Schoolchildren

The threshold question in any Title VI inquiry is whether the aggrieved party fits within one of the statute's protected classes—those based on race, color, or national origin.¹³² As previously discussed, section 28 required classification of enrolling students by federal immigra-

¹²⁵ See *infra* notes 132–250 and accompanying text.

¹²⁶ See *infra* notes 132–144 and accompanying text.

¹²⁷ See *infra* notes 145–164 and accompanying text; see also *supra* notes 87–109 and accompanying text (describing equal protection and Title VI disparate treatment claims).

¹²⁸ See *supra* notes 118–124 and accompanying text.

¹²⁹ See *infra* notes 170–197 and accompanying text.

¹³⁰ See *infra* notes 198–236 and accompanying text.

¹³¹ See *infra* notes 237–250 and accompanying text.

¹³² See 42 U.S.C. § 2000d (2006).

tion status,¹³³ also known as alienage, which courts have not considered to be synonymous with national origin.¹³⁴ In 1973, in *Espinoza v. Farah Manufacturing Co.*, the U.S. Supreme Court held that discrimination by private employers on the basis of citizenship did not violate Title VII's prohibition on national origin discrimination in hiring.¹³⁵ The *Espinoza* Court interpreted "national origin" in the context of Title VII to include either the country in which an individual was born or the lands from which his or her ancestors came to the United States.¹³⁶ This definition does not necessarily overlap with an individual's citizenship.¹³⁷ Courts considering Title VI claims have interpreted "national origin" in a similar fashion.¹³⁸ This distinction between immigration status and national origin would foreclose any Title VI challenge premised on state discrimination on the basis of alienage.¹³⁹

By shifting the focus from section 28's text to the law's effects, however, one may discern a group of students who fall under Title VI's protection and who were disproportionately impacted by the school

¹³³ ALA. CODE § 31-13-27 (2011), *invalidated by* *Hispanic Interest Coal. of Ala. v. Governor of Ala. (HICA II)*, 691 F.3d 1236 (11th Cir. 2012); *see supra* notes 29–36 and accompanying text.

¹³⁴ *See, e.g., Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95–96 (1973) (holding that citizenship and national origin are not equivalent under Title VII); *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1272 (Mass. 2011) (holding that alienage and national origin are not equivalent under the Massachusetts Constitution).

¹³⁵ 414 U.S. at 95–96.

¹³⁶ *See id.* at 88.

¹³⁷ *See id.* The *Espinoza* Court conceded that discrimination on the basis of citizenship would be unlawful if it was accomplished with "the purpose or effect" of discriminating based on the individual's national origin. *Id.* at 92.

¹³⁸ *See, e.g., Bronson v. Bd. of Educ.*, 550 F. Supp. 941, 959 (S.D. Ohio 1982) ("There is no indication that 'national origin' [within the meaning of Title VI] was intended to include . . . groups such as Appalachians who do not possess a national origin distinguishable from that of other citizens of the United States."). Congress, in attempting to import constitutional norms into Title VI, may have failed to include "alienage" alongside "race, color, or national origin" because alienage classifications under state law had not yet been subjected to strict scrutiny pursuant to the Equal Protection Clause when the Civil Rights Act was passed in 1964. *Compare* *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (first subjecting alienage classifications to strict scrutiny), *with* *Oyama v. California*, 332 U.S. 633, 646–47 (1948) (first subjecting national origin classifications to strict scrutiny), *and* *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (first subjecting race and color classifications to strict scrutiny).

¹³⁹ *Compare* ALA. CODE § 31-13-27 (2011) (classifying students according to "citizenship or immigration status," and mandating enforcement "without regard to race, religion, gender, ethnicity, or national origin"), *with* 42 U.S.C. § 2000d (2006) (prohibiting discrimination on the grounds of "race, color, or national origin" without mention of alienage, citizenship, or immigration status).

verification program.¹⁴⁰ Individuals of Hispanic origin are a protected class under Title VI,¹⁴¹ and a large majority of unlawfully present individuals in Alabama and throughout the United States are Hispanic.¹⁴² During the two weeks that section 28 was in force, numerous public reports revealed a substantial decline in enrollment and attendance among Hispanic students in Alabama's public schools without any concurrent decline among non-Hispanic students.¹⁴³ This data provides strong support for a disproportionately adverse impact on the enrollment and attendance of Hispanic students as compared to non-Hispanic students, particularly in schools and districts with large Hispanic populations.¹⁴⁴

B. Disparate Impact's Advantages over Constitutional Claims

In 2012, in *Hispanic Interest Coalition of Alabama v. Governor of Alabama (HICA II)*, a panel of the U.S. Court of Appeals for the Eleventh Circuit invalidated section 28 on equal protection grounds following a pre-enforcement challenge to its provisions.¹⁴⁵ Nevertheless, *HICA II*'s analytical soundness is debatable, and constitutional challenges to future laws modeled after section 28 will continue to present unique obstacles that Title VI disparate impact claims would avoid.¹⁴⁶ Indeed, section 28 was designed to sidestep the constitutional pitfalls that have

¹⁴⁰ See *supra* notes 51–54, 59–60 and accompanying text (noting the significant change in Hispanic students' attendance and withdrawal rates after section 28 went into effect).

¹⁴¹ See, e.g., *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 585–86 (1983) (recognizing a valid Title VI claim brought by black and Hispanic police officers).

¹⁴² See *Cent. Ala. Fair Hous. Ctr. v. Magee*, 835 F. Supp. 2d 1165, 1188 (M.D. Ala. 2011) (noting that between 65% and 77% of unlawfully present individuals in Alabama are Hispanic); PASSEL & COHN, *supra* note 22, at 11, 13 (noting that, as of 2010, 81% of unauthorized immigrants across the United States came from Latin American countries and 87% of children with at least one unauthorized immigrant parent had parents originally from Latin American countries).

¹⁴³ See *supra* notes 51–54, 59–60 and accompanying text.

¹⁴⁴ See *supra* notes 51–54, 59–60 and accompanying text.

¹⁴⁵ 691 F.3d at 1249. The Eleventh Circuit subsequently dismissed the DOJ's preemption challenge to section 28 as moot. *United States v. Alabama (Alabama III)*, 691 F.3d 1269, 1297 (11th Cir. 2012). The court noted in passing that the equal protection and preemption claims necessarily overlapped due to the language of the federal immigration law at issue. *Id.* (citing 8 U.S.C. § 1643(a)(2) (2006), which provides that no federal law "may be construed as addressing alien eligibility for a basic public education . . . under *Plyler v. Doe*"). This reasoning implies that preemption challenges to future state laws modeled after section 28 will trigger an equal protection analysis under the framework established by the U.S. Supreme Court in the 1982 case, *Plyler v. Doe*. See *id.*

¹⁴⁶ See *infra* notes 148–164 and accompanying text.

invalidated similar laws in the past, and comparable challenges to laws based on section 28 may reach different outcomes.¹⁴⁷

As an initial matter, and in contrast to laws expressly mandating different treatment for similarly situated individuals, a facially neutral law will trigger equal protection analysis only when it results in a disparate impact on a class of individuals and arises from the legislature's intent to harm that class.¹⁴⁸ Thus, contrary to the result in *HICA II*, a pre-enforcement—as opposed to as-applied—equal protection challenge to a facially neutral law such as section 28 should fail, since the fact-finder would lack evidence regarding the law's disparate impact.¹⁴⁹

Second, although legislative intent in an as-applied equal protection challenge may be proven pursuant to the framework laid out in the U.S. Supreme Court's 1977 decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, proving that lawmakers acted because of an invidious purpose is inherently difficult.¹⁵⁰ The *HICA II* court avoided this difficulty by addressing only one of the five elements of the *Arlington Heights* framework—section 28's actual effects—without

¹⁴⁷ See Campbell Robertson, *Critics See 'Chilling Effect' in Alabama Immigration Law*, N.Y. TIMES, Oct. 28, 2011, at A14 (reporting that section 28's author considered the provision constitutional "[b]ecause no one is actually barred from attending school and the data is not passed on to law enforcement. . . . But [the data] also potentially enables a fresh challenge to Plyler v. Doe"); George Talbot, *Out of Kansas, the Mind Behind the Law*, HUNTSVILLE TIMES, Oct. 16, 2011, at 1A, available at 2011 WLNR 21292125 (noting that Alabama state senator Scott Beason consulted with constitutional law professor Kris Kobach "to weed out provisions [of H.B. 56] that would be unlikely to meet approval by the courts"); see also *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (declaring unconstitutional portions of TEX. EDUC. CODE ANN. § 21.031 (West 1975) on equal protection grounds); League of United Latin Am. Citizens v. Wilson (*LULAC*), 908 F. Supp. 755, 774, 785–86 (C.D. Cal. 1995), *aff'd on reconsideration in part*, 997 F. Supp. 1244 (C.D. Cal. 1997) (declaring unconstitutional CAL. EDUC. CODE § 48215 (West 2006) on equal protection and preemption grounds).

¹⁴⁸ See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1.2, at 686–87 (4th ed. 2011); *supra* note 106 and accompanying text. If both intent and impact are satisfied by a preponderance of the evidence, the equal protection challenge will nevertheless fail if the state proves that it would have taken the same action had the discriminatory purpose not been considered. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270–71 n.21 (1977).

¹⁴⁹ See 691 F.3d at 1247 & n.9; *supra* note 106 and accompanying text. At a minimum, this principle would appear to require a remand to the trial court for presentation of specific evidence regarding section 28's effects during the two weeks it was in force. See *supra* notes 51–54, 59–60 and accompanying text.

¹⁵⁰ See 429 U.S. at 264–65; CHERMERINSKY, *supra* note 148, § 9.3.3.2, at 729–34 (noting that mere knowledge that a law will disparately impact a class of people is insufficient absent proof that lawmakers acted *because of* this expected effect) (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)); *supra* note 106 (outlining the *Arlington Heights* framework).

citing to *Arlington Heights* or expressly determining that the legislature acted with a discriminatory intent.¹⁵¹

The court in *HICA II* came closest to making a determination regarding intent when it noted that “[o]ther sections of H.B. 56 compel the conclusion that . . . section 28 targets the population of undocumented school children in Alabama.”¹⁵² Statutory language in other sections of the Act certainly indicates an intent to “make life harder” on all unlawfully present residents of Alabama in the hope that they will leave the state.¹⁵³ In light of the specific evidence relating to section 28, however, evidence regarding the general purposes of the entire Act provides only tangential support for finding a discriminatory purpose in the public school provisions.¹⁵⁴ Regardless, other states may easily avoid the issue by passing a self-contained bill modeled on section 28 rather than including the same provision within an omnibus immigration law containing other, more overtly discriminatory measures.¹⁵⁵

Third, the *HICA II* court invoked the U.S. Supreme Court’s 1982 decision in *Plyler v. Doe* as the relevant precedent, but failed to note that

¹⁵¹ See *HICA II*, 691 F.3d at 1247 & n.9 (discussing the speculated and actual effects of section 28, but failing to examine the provision’s historical background, the sequence of events leading to its passage, any procedural and substantive departures from the Alabama legislature’s typical decision-making practices, or the provision’s legislative history). The *Arlington Heights* Court noted that discriminatory purpose will rarely be proven based solely on a law’s effects; additional evidence will be required absent an exceedingly stark discriminatory impact. See 429 U.S. at 266 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). The impact of section 28, albeit significant, does not approach the discriminatory impact at issue in the cases cited by the Court in *Arlington Heights*. See *id.*; *supra* notes 51–54, 59–60 and accompanying text.

¹⁵² See *HICA II*, 691 F.3d at 1246.

¹⁵³ See, e.g., ALA. CODE § 31-13-2 (2011) (“[I]t is a compelling public interest to discourage illegal immigration by requiring all agencies . . . to fully cooperate with federal immigration authorities in the enforcement of federal immigration laws . . . [and to enforce other measures] necessary to ensure the integrity of various governmental programs.”). Similar sentiments may be discerned in legislators’ statements with respect to the Act as a whole. See *supra* notes 39–41 and accompanying text (noting the remarks of Alabama state representative Micky Hammon).

¹⁵⁴ See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507, 2522 (2011) (“[I]t is a commonplace of statutory construction that the specific governs the general.” (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992))). Specifically, nothing in section 28’s statutory language indicated a purpose to actively discriminate against a minority group; on the contrary, the provision specifically forbid such discrimination. See ALA. CODE §§ 31-13-27(g) to -27(h). Likewise, no such intent can be discerned in the comments of legislators active in section 28’s drafting and passage. See *id.* § 31-13-27; *supra* notes 37–38 and accompanying text.

¹⁵⁵ Cf. *supra* note 65 (referencing several self-contained bills similar to section 28 that have been introduced in state legislatures around the country since 2011).

Plyler has long been limited to its specific facts.¹⁵⁶ In contrast to the state laws at issue in *Plyler* and the U.S. District Court for the Central District of California's 1995 decision in *League of United Latin American Citizens v. Wilson (LULAC)*, section 28 did not permit schools to deny a free public education to any child who otherwise met the age and residency requirements for enrollment.¹⁵⁷ Prior to *HICA II*, no court had applied *Plyler* in any situation other than the express denial of a free public education to unlawfully present children.¹⁵⁸ Section 28, as written, was applicable to all students "without regard to race, religion, gender, ethnicity, or national origin," and was intended to be construed "in conformity with federal law."¹⁵⁹ Further, it did not require disclosure of individually identifying information to immigration or law enforcement officials.¹⁶⁰

¹⁵⁶ See, e.g., *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988) ("We have not extended [*Plyler*] beyond the unique circumstances that provoked its unique confluence of theories and rationales.") (internal citations and quotation marks omitted).

¹⁵⁷ Compare ALA. CODE § 31-13-27 (providing no authorization to deny enrollment to any student), with CAL. EDUC. CODE § 48215 (West 2006), *invalidated by LULAC*, 908 F. Supp. 755 (forbidding the admission of unlawfully present students), and TEX. EDUC. CODE ANN. § 21.031 (West 1975), *invalidated in part by Plyler*, 457 U.S. 202 (authorizing the denial of a free public education to unlawfully present students). Equal protection violations in the school context have generally been limited to absolute denials of education, rather than less severe claims of educational inequity. See Nicole Liguori, Note, *Leaving No Child Behind (Except in States That Don't Do as We Say): Connecticut's Challenge to the Federal Government's Power to Control State Education Policy Through the Spending Clause*, 47 B.C. L. REV. 1033, 1040-41 (2006).

¹⁵⁸ See *Plyler*, 457 U.S. at 230; *LULAC*, 908 F. Supp. at 774, 785-86; see also Emily Barbour, Note, *Separate and Invisible: Alternative Education Programs and Our Educational Rights*, 50 B.C. L. REV. 197, 212-13 & n.37 (2009) ("[T]he *Plyler* majority's tergiversation has led the Court to interpret the decision as a once-in-a-lifetime confluence of a quasi-suspect class determined by a trait for which the class's members are not responsible and a quasi-fundamental right. . . . [that has been] so narrowly interpreted as to be effectively irrelevant.") (citing *Kadrmas*, 487 U.S. at 459; *Brian B. v. Pa. Dep't of Educ.*, 230 F.3d 582, 586 (3d Cir. 2000)).

¹⁵⁹ ALA. CODE §§ 31-13-27(g) to -27(h). In one respect, section 28 did impose additional requirements on students who failed to present a birth certificate indicating that they were born in the United States or were the child of a lawfully present parent. See *id.* § 31-13-27(a). Section 28 provided that the parents of these students "shall" provide, under penalty of perjury, additional identifying documentation or a declaration of the lawful presence of their child. *Id.* The only mandated consequence of a failure to comply with these requirements, however, was that the student would be presumed to be unlawfully present for purposes of reporting aggregate data to the Board of Education. *Id.*

¹⁶⁰ ALA. CODE § 31-13-27. Although section 28 did not require such reporting, it did leave open the possibility of disclosure to federal authorities contingent on the Alabama attorney general's grant of a waiver of confidentiality. *Id.* § 31-13-27(e). The need to obtain a waiver on a case-by-case basis from such a high level official made disclosure following any particular enrollment procedure highly unlikely, but the mere possibility may have contributed to section 28's overall deterrent effect. See *id.*

Finally, challenges to state laws premised on *Plyler* may provide the Supreme Court its first opportunity to reconsider a controversial 5–4 decision that some consider a vulnerable outlier in traditional equal protection jurisprudence.¹⁶¹ Many commentators consider the Supreme Court under Chief Justice John Roberts to be the most conservative in decades,¹⁶² leading some to doubt *Plyler*'s continued viability should the Court revisit its holding.¹⁶³ Advocates for undocumented children may well prefer to pursue an equally effective remedy under Title VI's disparate impact regulations rather than risking *Plyler*'s reversal.¹⁶⁴

C. Viability of a Title VI Disparate Impact Claim Challenging Section 28

The most analytically and strategically sound challenge to a state immigration law such as section 28 rests not in the Constitution, but in the federal government's enforcement of the DOE's Title VI regula-

¹⁶¹ See, e.g., *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting) (“[T]he Court . . . rejects any suggestion that illegal aliens are a suspect class or that education is a fundamental right [one of which would typically be required for heightened scrutiny]. . . . [yet it] patches together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis.”); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 714 n.208 (2000) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-23, at 1553 (2d ed. 1988) (noting that commentators “will quite properly wish that the [*Plyler*] Court’s head had proven equal to its heart and that a sturdier analytic foundation had been provided for the result reached”)); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 54 n.296 (1984) (noting that *Plyler* is a “doctrinal anomaly” that departs from the Court’s precedents and conventional equal protection analysis by failing to apply rational basis review).

¹⁶² See, e.g., Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 948 (2008) (asserting that the Roberts Court is the most conservative Court since the mid-1930s); Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, at A1 (noting that five of the ten most conservative Justices since 1937 are currently on the Court); see also Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 39 & n.48 (noting that Chief Justice John Roberts and Justice Samuel Alito both publicly expressed their belief that *Plyler* was wrongly decided prior to joining the Court).

¹⁶³ See, e.g., Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 86 (2010) (“Whether the current Court would [affirm *Plyler*] today is unclear; the evolution of immigration law and policy since 1982, as well as intervening economic developments and changes in the Court itself, all matter here.”); MARSHALL FITZ ET AL., *CTR. FOR AM. PROGRESS, TRIUMPHS AND CHALLENGES ON THE 30TH ANNIVERSARY OF PLYLER V. DOE 2* (2012), available at <http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/plyler.pdf> (“[T]he conservative justices on today’s Supreme Court already appear relatively unconstrained by precedent . . . leaving the fate of *Plyler* up in the air.”). But cf. T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis*, 16 GEO. IMMIGR. L.J. 365, 367 (2002) (“*Plyler v. Doe* [is] a case that stands for fundamental justice more than constitutional logic—one that is unlikely to be overturned but also unlikely to chart a major change in constitutional law.”).

¹⁶⁴ See *infra* notes 165–250 and accompanying text.

tions prohibiting disparate impact discrimination.¹⁶⁵ A straightforward application of the Title VI disparate impact burden-shifting framework to the facts surrounding section 28's implementation in Alabama's public schools illustrates this point.¹⁶⁶ First, the federal government would most likely succeed in proving that section 28 had a disproportionately adverse impact on the educational opportunities of Hispanic students in comparison to those of non-Hispanic students.¹⁶⁷ Next, Alabama would likely be unable to demonstrate a substantial educational necessity for section 28.¹⁶⁸ Finally, even if the state succeeded in demonstrating such a necessity, the United States would likely be able to show that the asserted necessity is a pretext based on the availability of less discriminatory methods to achieve Alabama's purposes.¹⁶⁹

1. Section 28's Unduly Adverse Impact on Hispanic Students

In order to prove a *prima facie* case of disparate impact under Title VI, the federal government would need to present a statistical comparison of section 28's effect on access to education for a protected class, such as Hispanic students, with its effect on other groups of students.¹⁷⁰ This data need not show that section 28 adversely affected every Hispanic student, and the federal government would likely not require that some minimum percentage of students were harmed before concluding that the disparate impact regulations were violated.¹⁷¹ The DOJ's Civil Rights Division determined that there was a significant statewide spike in absence and withdrawal rates for Hispanic students following section 28's implementation, corroborating reports of even more pronounced effects in certain schools and districts.¹⁷² In addi-

¹⁶⁵ See 34 C.F.R. § 100.3(b)(2) (2012); *infra* notes 170–250 and accompanying text.

¹⁶⁶ See *supra* notes 118–124 and accompanying text (describing the burden-shifting framework).

¹⁶⁷ See *infra* notes 170–197 and accompanying text.

¹⁶⁸ See *infra* notes 198–236 and accompanying text.

¹⁶⁹ See *infra* notes 237–250 and accompanying text.

¹⁷⁰ See, e.g., *Villanueva v. Carere*, 85 F.3d 481, 487 (10th Cir. 1996); *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1418, 1420 (11th Cir. 1993); *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1421 (11th Cir. 1985), *abrogated by Lee v. Etowah Cnty. Bd. of Educ.*, 963 F.2d 1416 (11th Cir. 1992); *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 982–83 (9th Cir. 1984); *Campaign for Fiscal Equity, Inc. v. New York*, 655 N.E.2d 661, 670 (N.Y. 1995).

¹⁷¹ See, e.g., *Powell v. Ridge*, 189 F.3d 387, 396 (3d Cir. 1999) (“We have never held . . . that as a matter of law the practice complained of must affect a certain minimum percentage of the minority group to justify a finding that the discrimination is because of [a ground protected by Title VI].”).

¹⁷² See *supra* notes 51–54, 59–60 and accompanying text.

tion, because Hispanic children change schools more frequently, on average, than non-Hispanic children, Hispanic students and their families would have been subject to the section 28 verification procedures at a higher rate than non-Hispanics had the provision remained in effect.¹⁷³ This increased parental contact with school enrollment authorities would most likely exacerbate the *in terrorem* effect that Alabama's attendance and enrollment data reveals.¹⁷⁴

The closest factual analogy to the circumstances surrounding section 28 may be found in a Title VI disparate impact case also originating in the Alabama public schools.¹⁷⁵ In 1993, in *Elston v. Talladega County Board of Education*, the U.S. Court of Appeals for the Eleventh Circuit addressed a pattern of white public school students transferring from a predominantly black high school, where they were zoned to attend, to a predominantly white high school outside their residential catchment area.¹⁷⁶ The *Elston* court held that this pattern of student "zone-jumping" increased the racial identifiability of the predominantly black high school, resulting in a disparate impact on the black students who attended that school.¹⁷⁷ According to the court, the high school's black students experienced a disproportionately adverse impact when, over the course of a school year, fifty-four white students and only five black students transferred out of the high school's attendance zone.¹⁷⁸ The corresponding increase in the school's racial identifiability, regardless of the fact that racial balances had not changed in the school system as a whole, gave rise to a presumption of disparate impact.¹⁷⁹

The statistical evidence in *Elston* showing the rate of student departures from schools over a specified period of time is directly analogous to the evidence available to the federal government concerning the

¹⁷³ See ALA. CODE § 31-13-27 (2011) ("Every public elementary and secondary school in this state, at the time of enrollment in kindergarten or any grade in such school, shall determine whether the student enrolling . . . was born outside the . . . United States or is the child of an alien not lawfully present in the United States.") (emphasis added); Robert Evans, *Reframing the Achievement Gap*, 86 PHI DELTA KAPPAN 582, 586 (2005) ("Between first and third grades, 27% of black and 25% of Hispanic students change school three or more times, while just 13% of white students change schools as often. In many urban classrooms, the turnover rate of students approaches 50% per year."); *Public Data Reports*, *supra* note 24.

¹⁷⁴ See Evans, *supra* note 173, at 585; see also *Cent. Ala. Fair Hous. Ctr.*, 835 F. Supp. 2d at 1188 (describing section 28's threatening nature as an "*in terrorem* mechanism").

¹⁷⁵ See *Elston*, 997 F.2d at 1418, 1420.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1420.

effects of section 28.¹⁸⁰ Even in the unlikely event that a statewide tripling in absenteeism and the withdrawal of 13.4% of the state's Hispanic students¹⁸¹ were not found to constitute a disproportionately adverse effect, a gap in attendance or enrollment rates between Hispanics and non-Hispanics in *any* school or district sufficient to alter its national origin identifiability would give rise to a presumption of disparate impact under the Title VI regulations.¹⁸²

Notably, the *Elston* court came to its conclusion despite the fact that the white students transferred of their own volition, without any express or implied motivation from the School Board.¹⁸³ In the case of section 28, Alabama would likely argue that, as in *Elston*, the Hispanic students were completely free to withdraw or not, and that the state and its public schools were powerless to influence these individual decisions.¹⁸⁴ But unlike the situation in *Elston*, which involved no major alterations of government policy that might have affected the rate of zone-jumping during the period in question, section 28 marked a clear spike in Hispanic students' rate of absences and withdrawals.¹⁸⁵ Many Alabama educators predicted this effect prior to section 28's implementation, and it was subsequently observed and measured in the fall of 2011.¹⁸⁶

In the end, however, the *Elston* plaintiffs' disparate impact claim failed because they were unable to demonstrate a causal link between the Board's policies and the voluntary actions of the white students.¹⁸⁷ Alabama's aggregate attendance and withdrawal data for Hispanic and

¹⁸⁰ See *id.* at 1418, 1420. With regard to section 28, the statistical comparison would involve the absence and withdrawal rates of Hispanic and non-Hispanic students in individual schools throughout the two-week period that section 28 was in effect. See *supra* notes 51–54, 59–60 and accompanying text.

¹⁸¹ See *supra* notes 59–60 and accompanying text.

¹⁸² See *Elston*, 997 F.2d at 1420 (“[A]n increase in the racial identifiability of the Training School would be enough to constitute a disparate impact under the Title VI regulations, regardless of whether overall racial balances have changed in either the Talladega County or the Talladega City school systems.”).

¹⁸³ See *id.* at 1418, 1420.

¹⁸⁴ See *id.* Indeed, Alabama would likely argue that it did everything in its power to compel the students' enrollment in school through vigorous enforcement of its compulsory attendance law. See ALA. CODE § 16-28-12 (2011).

¹⁸⁵ See *Elston*, 997 F.2d at 1418, 1420; *supra* notes 51–54, 59–60 and accompanying text.

¹⁸⁶ See *supra* notes 50–54, 59–60 and accompanying text.

¹⁸⁷ See *Elston*, 997 F.2d at 1420–22 (“If zone-jumping and the increase in racial identifiability it produced would have occurred no matter what the Board did, the Board . . . could not be said to have caused the identified disparate impact.”).

non-Hispanic students before and after section 28's implementation, however, clearly shows the causal link that was absent in *Elston*.¹⁸⁸

Courts have also found a disparate impact under Title VI in public educational contexts outside of attendance and enrollment.¹⁸⁹ In 1984, in *Larry P. ex rel. Lucille P. v. Riles*, the U.S. Court of Appeals for the Ninth Circuit held that California public schools' use of non-validated intelligence tests to place children in classrooms for the educable mentally retarded ("EMR") had an impermissible disparate impact on black children.¹⁹⁰ The EMR placements—a benefit for children who truly needed these services due to an accurately diagnosed disability—resulted in stigmatization and lost educational opportunities for many black children who were incorrectly placed.¹⁹¹ If administered without sufficient consideration for the population served, nominally beneficial school policies—such as the EMR placements in *Larry P.* or English as a Second Language ("ESL") placements in the case of section 28—may harm the students they were intended to assist.¹⁹² Because section 28's ESL eligibility determinations were made in conjunction with an immigration status verification procedure that was likely to intimidate and deter Hispanic students from coming to school, the referenced remedial services almost assuredly would not reach the full spectrum of school-age children in Alabama who have particular linguistic needs.¹⁹³

Both *Elston* and *Larry P.* provide a model for how disparate impact may be proven in the educational context, but many other cases illustrate the common stumbling blocks in making out a prima facie case.¹⁹⁴ Most obviously, if a public school takes action that is not shown to have a substantially disparate effect on a protected class of students, there will be no finding of disparate impact.¹⁹⁵ Similarly, if a plaintiff employs

¹⁸⁸ See *id.*; *supra* notes 59–60 and accompanying text.

¹⁸⁹ See, e.g., *Larry P.*, 793 F.2d at 982–83; *GI Forum, Image De Tejas v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 681 (W.D. Tex. 2000).

¹⁹⁰ *Larry P.*, 793 F.2d at 982–83. Statistical reports demonstrated that, on average, black children scored ten percentage points lower on the intelligence tests and accounted for 27% of the state's EMR population in one school year, despite constituting only 9% of the total school population. *Id.* at 973, 982–83. Because the tests were not validated to ensure that all black children scoring below a certain threshold were mentally retarded, a substantial number of black children were misplaced in EMR classrooms. *Id.* at 980–81.

¹⁹¹ See *id.* at 983.

¹⁹² See ALA. CODE § 31-13-27(a)(1) (2011); *Larry P.*, 793 F.2d at 983.

¹⁹³ See ALA. CODE § 31-13-27(a)(1); *supra* notes 51–54, 59–60 and accompanying text.

¹⁹⁴ See, e.g., *Villanueva*, 85 F.3d at 487; *Ga. State Conference of Branches of NAACP*, 775 F.2d at 1421–22.

¹⁹⁵ See, e.g., *Villanueva*, 85 F.3d at 487. For example, in 1996, in *Villanueva v. Carere*, the U.S. Court of Appeals for the Tenth Circuit held that parents of Hispanic students who had attended schools closed by the local school board had failed to provide statistical evidence

statistical evidence but analyzes the effect of a certain practice on incomparable groups, disparate impact will not be found.¹⁹⁶ With respect to section 28, the federal government could easily avoid these mistakes by presenting Alabama's own attendance and enrollment data, which is already disaggregated by students' Hispanic or non-Hispanic status.¹⁹⁷

2. No Legitimate Educational Necessity Justifies Section 28

Once a disparate impact on a protected class is statistically demonstrated, the burden shifts to the recipient of federal funding to prove that there is a manifest relationship between a legitimate "educational necessity" and the discriminatory program.¹⁹⁸ In other words, the recipient must prove "that the challenged course of action is demonstrably necessary to meeting an important educational goal."¹⁹⁹ Despite their traditional deference to state and local officials on matters of educational policy,²⁰⁰ courts will not accept a proffered goal as indicative of a legitimate educational necessity without at least some judicial scrutiny.²⁰¹ In determining whether there is a manifest relationship between a discriminatory practice and a legitimate educational necessity, courts

that these closures resulted in an adverse effect on Hispanic students as compared to other student groups. *Id.* The parents' "broadly pleaded" disparate impact claim, based solely on anecdotal evidence regarding the amenities and relative crowding of different school buildings, failed to demonstrate a substantial adverse impact on Hispanic students. *See id.*

¹⁹⁶ *See, e.g., Ga. State Conference of Branches of NAACP*, 775 F.2d at 1421–22. For example, in 1985, in *Georgia State Conference of Branches of NAACP v. Georgia*, the U.S. Court of Appeals for the Eleventh Circuit held that black schoolchildren who had allegedly been assigned to EMR classes based on practices that violated state procedural regulations had not suffered a disparate impact. *Id.* Although the plaintiffs employed a significant amount of statistical evidence—in contrast to *Villanueva*—they erred in comparing the intelligence scores of black schoolchildren with those of the entire student body, instead of with similarly situated white schoolchildren. *See Villanueva*, 85 F.3d at 487; *Ga. State Conference of Branches of NAACP*, 775 F.2d at 1421–22.

¹⁹⁷ *See Public Data Reports*, *supra* note 24; *supra* notes 59–60 and accompanying text.

¹⁹⁸ *See, e.g., Cureton v. Nat'l Collegiate Athletic Ass'n (Cureton II)*, 198 F.3d 107, 112 (3d Cir. 1999).

¹⁹⁹ *Elston*, 997 F.2d at 1412.

²⁰⁰ *See, e.g., Villanueva*, 85 F.3d at 487 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)).

²⁰¹ *See Cureton v. Nat'l Collegiate Athletic Ass'n (Cureton I)*, 37 F. Supp. 2d 687, 703–06 (E.D. Pa. 1999), *rev'd on other grounds*, 198 F.3d 107 (3d Cir. 1999). Nevertheless, when there is evidence that a facially legitimate educational necessity and an illegitimate ulterior motive both prompted a challenged policy, courts will disregard the illegitimate purpose in finding a manifest relationship between the practice and the legitimate goal. *See, e.g., Groves v. Ala. State Bd. of Educ.*, 776 F. Supp. 1518, 1531–32 (M.D. Ala. 1991); *see also Cureton I*, 37 F. Supp. 2d at 704 (finding a manifest relationship when both a public relations benefit and a demonstrated educational need motivated a discriminatory practice).

look to historical evidence that sheds light on the motivation for the policy.²⁰²

Alabama asserted that section 28 served at least four legitimate state interests.²⁰³ First, the empirical evidence it would produce could help the state defend litigation involving the costs of illegal immigration.²⁰⁴ Second, it would inform the public about the impact of illegal immigration on the state economy.²⁰⁵ Third, it would maximize educational opportunity by determining students' eligibility for ESL services.²⁰⁶ Fourth, it would help the state budget for public education by highlighting districts that may lack a sufficient tax base.²⁰⁷ Alabama claimed virtually unrestrained autonomy in determining the best manner to further these interests because it was legislating in an area of traditional state primacy—public education.²⁰⁸

Although there is no bright line rule to determine when a state's asserted interest constitutes a legitimate educational necessity, such a finding tends to require a practice that may be reasonably forecast to advance the educational interests of all students.²⁰⁹ For example, in the 1999 case, *Cureton v. National Collegiate Athletic Ass'n*, the U.S. District Court for the Eastern District of Pennsylvania held that the National Collegiate Athletic Association's (NCAA) first proffered goal of raising student-athlete graduation rates demonstrated a legitimate educational necessity, but its second asserted goal of closing the gap in graduation rates between black and white student-athletes did not.²¹⁰ The former

²⁰² See, e.g., *Cureton I*, 37 F. Supp. 2d at 703–04 (examining transcripts of NCAA convention proceedings to determine the motivation for a discriminatory practice); *Groves*, 776 F. Supp. at 1519–21 (examining transcripts of school board committee proceedings to determine the motivation for a discriminatory practice).

²⁰³ See Corrected Response Brief for Appellees and Principal Brief for Cross-Appellants Alabama and Governor Bentley at 54–55, *Alabama III*, 691 F.3d 1269 (Nos. 11-14532-CC, 11-14674-CC) [hereinafter Alabama Response Brief]; Alabama and Governor Bentley's Response to United States' Motion for Preliminary Injunction at 45, *Hispanic Interest Coal. of Ala. v. Bentley (HICA I)*, Nos. 2:11-cv-02746-SLB, 5:11-cv-02484-SLB, 5:11-cv-02736-SLB (N.D. Ala. Aug. 15, 2011) [hereinafter Response to Motion for Preliminary Injunction].

²⁰⁴ Alabama Response Brief, *supra* note 203, at 54.

²⁰⁵ *Id.* at 55.

²⁰⁶ Response to Motion for Preliminary Injunction, *supra* note 203, at 45.

²⁰⁷ Alabama Response Brief, *supra* note 203, at 54.

²⁰⁸ See *id.* at 26, 51.

²⁰⁹ See, e.g., *Elston*, 997 F.2d at 1412; *GI Forum v. Tex. Educ. Agency*, No. CIVASA-97-CA-1278EP, 1999 WL 33290624, at *11 (W.D. Tex. July 27, 1999) (order granting in part and denying in part defendant's motion for summary judgment); *Cureton I*, 37 F. Supp. 2d at 703–06.

²¹⁰ *Cureton I*, 37 F. Supp. 2d at 703–06.

goal was directly in line with the primary mission of the institutions of higher education that the NCAA represented—educating and graduating as many students meeting the minimum academic standards as possible.²¹¹ The latter goal—explicitly seeking to balance outcomes among racial groups—was illegitimate as an express goal of an educational institution receiving federal funding.²¹²

Although courts have not had the opportunity to provide guidance on what might constitute a legitimate educational necessity under Title VI in the context of school enrollment procedures utilizing immigration classifications, the Supreme Court has considered state interests in this context with respect to an equal protection claim.²¹³ In *Plyler*, the Supreme Court held that the three state interests that Texas proffered as legitimate bases for its law permitting officials to deny or charge students for an education in public schools were not substantial.²¹⁴ These interests included “protect[ion] . . . from an influx of illegal immigrants”, “provi[sion of a] high-quality public education[to students lawfully present]”, and rationing educational expenditures for students more likely “to put their education to productive social or political use within the State.”²¹⁵

²¹¹ *Id.* at 703–04.

²¹² *Id.* at 704–05. Courts have found a legitimate educational necessity under Title VI in a variety of educational contexts. *See, e.g., Elston*, 997 F.2d at 1413 (building a new school at a location disproportionately impacting black students when the plaintiff’s preferred site was not available for development); *Ga. State Conference of Branches of NAACP*, 775 F.2d at 1418–19 (grouping students by ability based on relevant, pedagogically sound criteria); *Lucero v. Detroit Pub. Sch.*, 160 F. Supp. 2d 767, 797 (E.D. Mich. 2001) (locating a new school building under facts similar to those in *Elston*); *GI Forum*, 87 F. Supp. 2d at 681 (using a standardized, curriculum-based test as a high school graduation requirement); *Young ex rel. Young v. Montgomery Cnty. Bd. of Educ.*, 922 F. Supp. 544, 551 (M.D. Ala. 1996) (imposing a one-year ban on interscholastic athletic competition following a student’s transfer to a new district in order to prevent illicit recruiting and to revitalize the district’s schools). *But cf. Larry P.*, 793 F.2d at 983 (holding that use of a diagnostic test resulting in the improper placement of a disproportionate number of black students in classes for the “educable mentally retarded” served no legitimate educational necessity because assignment of students lacking cognitive disabilities to these classes could not possibly serve their educational needs).

²¹³ *See Plyler*, 457 U.S. at 227–30. Given the historical ties between Title VI and the Equal Protection Clause, it is instructive to examine asserted state interests in equal protection case law to shed light on the potential for a legitimate educational necessity under Title VI. *See supra* notes 87–109 and accompanying text. The classification at issue in the Title VI context is national origin (Hispanic children) rather than alienage (unlawfully present children); thus, analogizing to *Plyler* here does not open the door to the same infirmities that a direct equal protection challenge premised on that case presents. *See supra* notes 145–164 and accompanying text.

²¹⁴ 457 U.S. at 227–30.

²¹⁵ *Id.*

In holding that the first interest was illegitimate, the Court noted that the dominant incentive for aliens to cross illegally into the country was employment, and few, if any, aliens were drawn by a free education.²¹⁶ With respect to the second interest, the Court noted that, even assuming that exclusion of a class of students would improve the overall quality of public education, “the State must support its selection of *this* group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are basically indistinguishable from legally resident alien children.”²¹⁷ Finally, the Court noted that the third interest was purely speculative, as the state had no assurance that any student, alien or not, would employ the fruits of his or her education within the state in the future.²¹⁸ Texas’s law violated the Equal Protection Clause because not one of its proffered interests was deemed substantial.²¹⁹

In the case of section 28, Alabama’s first and second interests—gathering evidentiary support to defend litigation and enlightening the public about illegal immigration’s effects—both would fail to state a legitimate educational necessity because their aims are far too attenuated from the focus on classroom education that courts require.²²⁰ Alabama’s efforts to gather and disseminate data regarding the economic impact of unlawfully present students in public schools appears to be based on its understanding that Texas’s failure to successfully defend its state law in *Plyler* was largely due to its prior failure to collect the necessary supporting data.²²¹ The problem with Alabama’s choice of policy, however, lies in the policy’s deterrent effect.²²²

An adjudicator considering Alabama’s first and second purported interests would, necessarily, have already found that section 28 had a disproportionately adverse impact on the enrollment and attendance of Hispanic students.²²³ Such a finding would strongly suggest that the true number of unlawfully present children in Alabama had failed to

²¹⁶ *Id.* at 228 & n.24.

²¹⁷ *Id.* at 229 (internal quotation marks omitted).

²¹⁸ *Id.* at 230.

²¹⁹ *Id.* at 228–30.

²²⁰ See, e.g., *Larry P.*, 793 F.2d at 983; *Cureton I.*, 37 F. Supp. 2d at 703.

²²¹ See *Guarino*, *supra* note 54; cf. *Plyler*, 457 U.S. at 228–29 (“There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State’s economy. . . . [or] that exclusion of undocumented children is likely to improve the overall quality of education in the State.”).

²²² See *supra* notes 170–197 and accompanying text (discussing the disproportionate adverse impact of section 28 on Alabama’s Hispanic students).

²²³ See *supra* notes 118–124 and accompanying text (outlining the Title VI disparate impact burden-shifting framework).

appear at school to undergo enrollment procedures and participate in the mandated data collection.²²⁴ Thus, the state's attempt to obtain an accurate measure of the number of unlawfully present school-age children to support a theory that these students collectively impose a burden on the state's provision of public education would fail.²²⁵ Adding to this imprecision is section 28's presumption of unlawful presence for any student failing to provide documentation proving, to the satisfaction of a school official, that the student was lawfully present.²²⁶ The imposition of a disproportionately adverse impact on Hispanic students in a purported effort to collect highly imprecise data to share with the general public and to use as evidence in future litigation could not possibly support any legitimate educational necessity that a reasonable fact finder would credit.²²⁷

Alabama's third asserted interest clearly identifies a legitimate educational necessity—maximizing educational opportunities by determining which students require ESL services.²²⁸ Nonetheless, a manifest relationship between the verification of students' immigration status and the legitimate educational need to determine which students have limited English proficiency is lacking.²²⁹ Longstanding, permissible actions taken in public schools around the country, including inquiries into the primary language used in the student's home and administration of language assessments at the time of enrollment, do exhibit such a manifest relationship.²³⁰ Furthermore, they better serve the educational necessity because fewer students are likely to be deterred from accessing the very services that the state seeks to provide.²³¹

Alabama's fourth and final purported interest fails to satisfy a legitimate educational necessity because the relationship between resi-

²²⁴ See *supra* notes 170–197 and accompanying text.

²²⁵ See *supra* notes 170–197 and accompanying text.

²²⁶ See ALA. CODE § 31-13-27 (2011); Alabama Response Brief, *supra* note 203, at 52–53 (recognizing that “Section 28 is . . . unlikely to yield particularly precise data” because it results in “children [being] presumed unlawfully present aliens who are neither aliens nor unlawfully present”).

²²⁷ Cf., e.g., *Larry P.*, 793 F.2d at 983; *Cureton I.*, 37 F. Supp. 2d at 703–06.

²²⁸ See *Lau v. Nichols*, 414 U.S. 563, 568 (1974), *abrogated on other grounds by Guardians*, 463 U.S. 582 (1983); *United States v. Alabama (Alabama I)*, 813 F. Supp. 2d 1282, 1347 n.22 (N.D. Ala. 2011) (noting that this information is already collected and reported under federal law pursuant to 20 U.S.C. § 6968 (2006)).

²²⁹ See *Alabama I*, 813 F. Supp. 2d at 1347 n.22 (noting that qualification for ESL services is not synonymous with a student's national origin).

²³⁰ See, e.g., CAL. EDUC. CODE §§ 52164–52164.5 (West 2006) (mandating these practices in public schools); FLA. ADMIN. CODE ANN. r. 6A-6.0902 (2011) (same); TEX. EDUC. CODE ANN. § 29.056 (West 2006) (same).

²³¹ See *supra* notes 170–197 and accompanying text.

dents' unlawful presence and a school district's tax base is highly speculative, and the means employed are unnecessary.²³² Section 28 gathered no information regarding parents' tax burden.²³³ Even if it had, it would have been unlikely to produce evidence that parents who are not lawfully present contribute less to state revenues, on average, than similarly situated parents who are lawfully present.²³⁴ Alabama's public schools are funded mainly through state property taxes, not income taxes, meaning that all residents within a school district—both lawfully and unlawfully present—contribute to public school funding, either directly through taxes paid pursuant to real estate ownership or indirectly through rent payments.²³⁵ Furthermore, the Alabama state treasury maintains precise information regarding each school district's tax base, obviating the need to make personal inquiries of parents.²³⁶

3. Any Educational Necessity Proffered for Section 28 is Pretextual

If a recipient of federal funding is able to successfully rebut a demonstrated disparate impact on a group that Title VI protects by showing a manifest relationship between the discriminatory practice and a legitimate educational necessity, the federal government may still prevail by showing that this proffered necessity is a pretext for invidious discrimination, or alternatively by showing that other less discriminatory but comparably effective methods are available.²³⁷ Courts require

²³² See ALA. CODE § 31-13-27 (2011); Alabama Response Brief, *supra* note 203, at 54.

²³³ See ALA. CODE § 31-13-27; Alabama Response Brief, *supra* note 203, at 54.

²³⁴ See Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1, 5–7 (2006) (noting that undocumented immigrants pay billions of dollars in taxes but take advantage of relatively few public benefits, resulting in higher effective tax rates than similarly situated, lawfully present residents); Stephen M. Nesmith, Jr., *New Immigration Law Will Be Costly on Taxpayers*, TUSCALOOSA NEWS.COM (June 12, 2011), <http://www.tuscaloosanews.com/article/20110612/NEWS/110619915?p=1&tc=pg> (reporting that undocumented immigrants in Alabama paid over \$130 million in taxes in 2010—including \$5,825,919 in property taxes—in contrast to their estimated \$112 million burden on the state's economy).

²³⁵ See *Cent. Ala. Fair Hous. Ctr.*, 835 F. Supp. 2d at 1197 n.22 (citing Opinion of the Justices, 624 So. 2d 107, 114 (Ala. 1993)).

²³⁶ See ALA. STATE TREASURY, SCHEDULE OF REVENUES BY PRINCIPAL SOURCES AND DISTRIBUTIONS OF REVENUES, FY 2010, (2010), available at <http://www.treasury.state.al.us/Content/Documents/FY2010AnnualReport.pdf> (detailing various sources of revenue, including a “General Property Tax” alongside distributions to programs like the Alabama Public School Fund).

²³⁷ See, e.g., *Elston*, 997 F.2d at 1407; *Lucero*, 160 F. Supp. 2d at 796; *supra* notes 118–124 and accompanying text.

exceedingly persuasive evidence at this stage of the burden-shifting framework, often resulting in victory for the recipient.²³⁸

Although there is little history of successful proof of pretext or comparably effective alternative practices in Title VI disparate impact cases in the educational context, the unique circumstances surrounding section 28 indicate that a successful case could be made.²³⁹ Before passage of the Act, key state legislators frequently made public statements conflating “illegal immigrant” and “Hispanic,” both on and off the statehouse floor.²⁴⁰ Some comments barely hid the representatives’ animus toward Hispanics residing in their communities, raising the inference that “illegal immigrant” was being used as code for “Hispanic.”²⁴¹ One court found that section 28’s marked deviation from the legislature’s historical prioritization of Alabama’s children further supported this evidence of pretext.²⁴²

In addition to the evidence of pretext, Alabama’s asserted state interests that are at least tangentially related to a legitimate educational necessity could be served equally well through policies likely to have far

²³⁸ See, e.g., *Elston*, 997 F.2d at 1413 (holding that there was no comparably effective alternative to siting a new school building at a location disproportionately impacting black students when the plaintiff’s preferred school location was unavailable for development); *Ga. State Conference of Branches of NAACP*, 775 F.2d at 1420–21 (holding that there was no comparably effective alternative to student ability grouping having a disproportionately adverse impact on black students when random assignment of students to classes and intra-class grouping was shown to not be as pedagogically effective); *Lucero*, 160 F. Supp. 2d at 797 (making the same determination as the *Elston* court on facts similar to that case); *Young*, 922 F. Supp. at 551 (holding that there was no comparably effective alternative to a one-year ban on interscholastic athletic competition resulting in a disproportionately adverse impact on black students when the district’s preexisting grievance and investigation procedures had failed to satisfy its legitimate educational needs).

²³⁹ See *infra* notes 240–250 and accompanying text.

²⁴⁰ See *Cent. Ala. Fair Hous. Ctr.*, 835 F. Supp. 2d at 1192 (“After a reporter inquired about Hammon’s oft-repeated comment that ‘Alabama has the second-fastest-growing illegal immigrant population in the nation’ . . . Hammon sent the journalist a news article that indicates Alabama’s *Hispanic* population had the second-largest percentage growth between 2000 and 2010[. In contrast, the article] says nothing about unauthorized immigration whatsoever.”); *infra* note 241 (providing additional examples of such statements).

²⁴¹ See *Cent. Ala. Fair Hous. Ctr.*, 835 F. Supp. 2d at 1192–93 (noting that one representative cited various counties’ Hispanic populations in a speech supporting H.B. 56 and stated that “[t]he [Hispanics] that I have a problem with are the ones that come here and create all kinds of social and economic problems”); *id.* at 1193–94 (noting that legislators made comments during the debate on H.B. 56 that reflected negative stereotypes of Mexicans and drew distinctions based on race and national origin rather than immigration status).

²⁴² See *id.* at 1188–90 (citing various state constitutional and statutory provisions prioritizing the education, social welfare, and general well-being of all children and seeking to support, rather than punish, children whose parents exhibit characteristics putting the child’s development at risk).

less of a disproportionate impact on Hispanic students.²⁴³ The widely accepted “residual method” of estimating unlawfully present immigrant populations would effectively serve the state’s purported interest in collecting data to “help the State defend litigation . . . in which the costs imposed by illegal immigration are an issue” and to “enlighten the public about illegal immigration’s impacts.”²⁴⁴ Government and private organizations, such as the Department of Homeland Security and the Pew Hispanic Center, have long relied on the residual method to obtain the most accurate estimate of the size of unlawfully present populations.²⁴⁵ Given the deterrent effect of section 28’s enrollment procedures and the inherent imprecision in its use, the residual method would likely be at least as accurate without requiring face-to-face interrogation by local officials.²⁴⁶

As discussed earlier, more effective and less discriminatory options also exist to serve Alabama’s other purported interests.²⁴⁷ With respect to determination of eligibility for ESL services, Alabama could rely on the widely accepted practice of questioning parents regarding the primary language of the home and administering children a language assessment at the time of enrollment, without inquiring into immigration status.²⁴⁸ With respect to identifying school districts with an insufficient property tax base, the state need only request the existing data from the Alabama State Treasury.²⁴⁹ Neither of these alternatives would be likely to have any deterrent effect on enrollment or attendance of Hispanic students, and the resulting data would in all likelihood be more accurate.²⁵⁰

²⁴³ See *infra* notes 244–250 and accompanying text.

²⁴⁴ Alabama Response Brief, *supra* note 203, at 54–55; see PASSEL & COHN, *supra* note 22, at 4. The “residual method” estimates the population of unauthorized immigrants by subtracting the lawfully present foreign-born population from the total foreign-born population based on data from the U.S. Bureau of Labor Statistics’ and the U.S. Census Bureau’s monthly Current Population Survey. PASSEL & COHN, *supra* note 22, at 4.

²⁴⁵ See PASSEL & COHN, *supra* note 22, at 4; U.S. DEP’T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2011, at 1 (2012), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2011.pdf.

²⁴⁶ See ALA. CODE § 31-13-27 (2011); PASSEL & COHN, *supra* note 22, at 4.

²⁴⁷ See Alabama Response Brief, *supra* note 203, at 54 (noting Alabama’s asserted interest in identifying school districts with an insufficient tax base); Response to Motion for Preliminary Injunction, *supra* note 203, at 45 (describing Alabama’s asserted interest in determining and reporting eligibility for ESL services).

²⁴⁸ See *supra* notes 230–231 and accompanying text.

²⁴⁹ See ALA. STATE TREASURY, *supra* note 236.

²⁵⁰ See *id.*; *supra* notes 230–231 and accompanying text.

CONCLUSION

Despite consistent guidance from federal agencies regarding the illegality of public school officials' inquiries into students' immigration status, bills requiring such verification have been introduced in state legislatures with increasing frequency in recent years. Even in its brief enforcement period, section 28 of the Beason-Hammon Alabama Taxpayer and Citizen Protection Act clearly illustrates the negative impact such a law has on Hispanic students and their families. Constitutional challenges to this type of carefully crafted, facially neutral regulation face significant analytical and strategic obstacles. Although a federal appeals court invalidated section 28 on equal protection grounds, the obstacles facing constitutional claims remain, providing no guarantee that a more tailored provision would meet a similar fate in the future.

Title VI's disparate impact regulations, on the other hand, embody the policy foundations and aspirations of equal protection jurisprudence while permitting an effects-based inquiry in the absence of proof of state legislators' invidious intent. Although private enforcement of the disparate impact regulations has been severely limited, the federal government has a clear interest in aggressive application of the regulations in this unique context—to ensure that federal tax dollars do not perpetuate discriminatory practices visited upon a class of vulnerable children who deserve equal access to a quality education in all of our nation's public schools.

PAUL EASTON