APPEAL NO. 11-13044-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

_____

GEORGIA LATINO ALLIANCE FOR HUMAN RIGHTS, *et al.*,

Plaintiffs-Appellees,

vs.

NATHAN DEAL, *et al.*,

Defendant-Appellants.

_____

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

_____

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANTS

_____

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No. 11-13044-C, *Georgia Latino Alliance for Human Rights v. Deal*

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

Counsel certifies that the following persons have an interest in the outcome of this case:

Alterna - Plaintiff-Appellee

American Civil Liberties Union Foundation-NY - Counsel for Plaintiffs-Appellees

American Civil Liberties Union Immigrant's Rights Project - Counsel for Plaintiffs-Appellees

American Civil Liberties Union of Georgia - Counsel for Plaintiffs-Appellees

American Civil Liberties Union Racial Justice Program - Counsel for Plaintiffs-Appellees

American Immigration Lawyers Association - *Amicus Curiae*

Anello, Farrin Rose - Counsel for *Amicus Curiae* American Immigration Lawyers Association

Anti-defamation League - *Amicus Curiae*

Argentina - *Amicus Curiae*

Asian American Legal Advocacy Center - Plaintiff-Appellee

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Weber, Gerald R. - Counsel for *Amicus Curiae* Southern Center for Human Rights

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STATEMENT OF THE INTEREST OF *AMICUS CURIAE*

Judicial Watch is a public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government and fidelity to the rule of law. In furtherance of these goals, Judicial Watch regularly monitors on-going litigation, files *amicus curiae* briefs, and prosecutes lawsuits on matters it believes are of public importance.

As part of its efforts to promote fidelity to the rule of law, Judicial Watch has supported government policies and legislative enactments when it finds such policies consistent with the rule of law. Conversely, Judicial Watch has opposed such policies and enactments when it finds them to be contrary to law. In particular, Judicial Watch has undertaken extensive research on immigration laws, including the interaction of federal, state, and local laws touching on immigration issues and the doctrine of federal preemption. Judicial Watch respectfully wishes to share the results of its considerable research with the Court by filing this *amicus curiae* brief. Although primarily for purposes of assisting the Court, this *amicus curiae* brief supports the position of Defendants-Appellants Nathan Deal, *et al.* ("Appellants") in this appeal.

All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE ISSUES

The issue presented is whether the district court properly enjoined Sections 7 and 8 of the Illegal Immigration Reform and Enforcement Act of 2011 (hereafter "IIREA") from taking effect on July 1, 2011.

SUMMARY OF THE ARGUMENT

The district court erred in finding that Plaintiffs-Appellees Georgia Latino Alliance for Human Rights, *et al.* ("Plaintiffs") are likely to succeed on their claim that each enjoined provision is preempted by federal law. Preliminarily, the district court erred in not applying a presumption against preemption. The provisions at issue do not regulate immigration and are clearly with the State of Georgia's historic police power.

Section 8 of the IIREA is not preempted by 8 U.S.C. §§ 1357 or 1103. Congressional intent governs a court's determination of whether federal law preempts state law, and the Immigration and Nationality Act (hereafter "INA"), as

amended, 8 U.S.C. § 1101 *et seq.*, expressly contemplates State and local governments exercising their inherent police power to assist federal government efforts in enforcing immigration laws, even absent the conditions contained in 8 U.S.C. §§ 1357 and 1103.

Section 7 of the IIREA is not preempted by 8 U.S.C. § 1324. In the context of statutes concerning illegal aliens, the U.S. Supreme Court has made clear that Congress did not intend to "field preempt" all State regulations touching on immigration. Contrary to the district court's ruling, Section 7 is not preempted because States may complement federal immigration law where State enforcement activities do not impair federal regulatory interests. Nor is Section 7 preempted because its provisions are not identical to its federal counterpart, as different provisions do not necessarily equate with conflicting provisions.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Applicable Standards of Review

A. The Court Gives No Deference to a District Court's Legal Determinations and Reviews a District Court's Interpretation of the Underlying Legal Principles *De Novo*.

The issue before this Court is whether the district court properly granted a preliminary injunction with respect to several provisions of the IIREA. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008). Since Plaintiffs were required to establish each of these elements in order to prevail on their motion for a preliminary injunction, this brief focuses solely on whether the district court properly found that Plaintiffs had established that they are likely to succeed on the merits.

Although generally the Court reviews the grant of a preliminary injunction for abuse of discretion, it gives "no deference to the district court's legal determinations" and reviews a district court's interpretation of the underlying legal principles *de novo*. *Levi Strauss & Co. v. Sunrise Int'l Trading*, 51 F.3d 982, 985 (11th Cir. 1995); *see also This That And The Other Gift And Tobacco, Inc. v. Cobb*

County, 285 F.3d 1319, 1321 (11th Cir. 2002) (conclusions of law drawn by district court en route to granting preliminary injunction reviewed *de novo*). Because preemption is a legal question, the district court's decision to grant a preliminary injunction on preemption grounds is reviewed *de novo*. *Id.*

B. This Facial Challenge Is Disfavored and Plaintiffs Bear a Heavy Burden.

Plaintiffs have never alleged that the State of Georgia or its agents have taken any action to enforce the newly enacted IIREA against them or anyone else. Plaintiffs thus raise a facial challenge to the constitutionality of the statute. Consequently, Plaintiffs confront a "heavy burden" in advancing their claims. *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118 S. Ct. 2168, 2175 (1998). The U.S. Supreme Court has declared that "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'" *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973), and citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223, 110 S. Ct. 596, 603 (1990) (noting that "facial challenges to legislation are generally disfavored")).

Facial challenges generally are disfavored because they rest on speculation, run contrary to the fundamental principle of judicial restraint, and threaten to "short circuit" the democratic process. *Washington State Grange v. Washington*

State Republican Party, 552 U.S. 442, 450-51, 128 S. Ct. 1184, 1191 (2008). When a legislative enactment is facially attacked, a court is at a disadvantage because it does not know how the law will be applied or construed by an enforcing authority. The law might be applied or construed by the enforcing authority in a way that avoids any constitutional issue. As the U.S. Supreme Court has declared, "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop." *Gonzalez v. Carhart*, 550 U.S. 124, 168, 127 S. Ct. 1610, 1639 (2007). Instead of speculating about hypotheticals, courts typically prefer to wait until the law is construed "in the context of actual disputes." *Washington State Grange*, 552 U.S. at 450, 128 S. Ct. at 1191. A court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987).

The "fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . .."" *Salerno*, 481 U.S. at 745, 107 S. Ct. at 2100. Instead, a "challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* Conversely, to defeat a facial challenge under the Supremacy Clause, a party need "merely to identify a possible" application of the state law not in conflict with

federal law. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593, 107 S. Ct. 1419, 1431 (1987). What this means for this case is that, if there exists any possible application or construction of the statute at issue that avoids a conflict with federal law, it must be applied to save the statute.[1]

C. The Provisions at Issue Must Be Presumed Constitutional.

It has been long established that "[e]very possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking-Fund Cases*, 99 U.S. 700, 718 (1879); *see also Bush v. Vera*, 517 U.S. 952, 992, 116 S. Ct. 1941, 1969 (1995) ("Statutes are presumed constitutional."); *Close v. Glenwood Cemetery*, 107 U.S. 466, 475, 2 S. Ct. 267, 274 (1883) ("Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established."); *National Mut. Insurance Co. of Dist. of Col. v. Tidewater Transfer*

[1] By seeking a preliminary injunction prior to the IIREA's effective date, Plaintiffs asked the district court to do precisely what the U.S. Supreme Court has warned against – to prematurely interpret and unnecessarily speculate on the constitutionality of the IIREA in a factual vacuum. Plaintiffs did not and cannot establish that they are likely to succeed on their claim that all applications of the challenged provisions are preempted by federal law. For this reason alone, preliminarily enjoining Sections 7 and 8 from taking effect is not warranted at this time.

Co., 337 U.S. 582, 604, 69 S. Ct. 1173, 1183-84 (1949) (presumption of validity prevails unless there is a "clear showing that it transgresses constitutional limitations").

D. The Burden of Establishing the Unconstitutionality of the Provisions at Issue Rests on Plaintiffs and Never Shifts.

"It is a salutary principle of judicial decision, long emphasized and followed by [the Supreme] Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it . . .." *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580, 584, 55 S. Ct. 538, 540 (1935). Even more specific to this case, the party claiming preemption bears the burden of demonstrating that federal law preempts state law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255, 104 S. Ct. 615, 625 (1984). This burden of proof never shifts.

II. The Enjoined Provisions Are Not Preempted by Federal Law.

The Supremacy Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2. The preemption doctrine arises from this clause.

"The Supreme Court has recognized three types of preemption: (1) express preemption, where a federal statute contains 'explicit preemptive language'; (2) field preemption, where the federal regulatory scheme is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it'; and (3) conflict preemption, where 'compliance with both federal and state regulations is a physical impossibility' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *This That And The Other Gift And Tobacco, Inc.*, 285 F.3d at 1322 (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604-05, 111 S. Ct. 2476, 2481-82 (1991)).

"Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Bldg. & Const. Trades Council of Metro. Dist. v. Assoc. Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224, 113 S. Ct. 1190, 1194 (1993). Accordingly, in the absence of express preemptive language, federal courts should be "reluctant to infer pre-emption." *Id*. U.S. Supreme Court precedent "establish that a high threshold must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 110, 112 S. Ct. 2374, 2389 (1992). "Congressional intent is the 'ultimate touchstone' in a

preemption case, and this intent 'governs [a court's] determination of whether federal law preempts state law.'" *This That And The Other Gift And Tobacco, Inc.*, 285 F.3d at 1322 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 2250 (1996), and *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1267 (11th Cir. 2000)).

Plaintiffs challenge Sections 7 and 8 of the IIREA. Section 7 is codified in three separate parts. The first part, O.C.G.A. § 16-11-200, prohibits a person who has committed a separate criminal offense from knowingly and intentionally transporting or moving an illegal alien for the purpose of furthering the alien's illegal presence in the State of Georgia. The second part, O.C.G.A. § 16-11-201, prohibits a person who has committed a separate criminal offense from knowingly concealing, harboring, or shielding a known illegal alien from detection within Georgia. The third part, O.C.G.A. § 16-11-202, prohibits a person who has committed a separate criminal offense from inducing, enticing, or assisting an illegal alien to enter into Georgia. Section 8, codified at O.C.G.A. § 17-5-100, authorizes a peace officer to seek to verify the immigration status of any suspect who the peace officer has probable cause to believe has committed a criminal violation. If the peace officer verifies that the suspect is an illegal alien, Section 8 authorizes the peace officer to take any action authorized by state and federal law,

including detaining the suspect, transporting the suspect to a detention facility, or notifying the U.S. Department of Homeland Security (hereafter "DHS"). *Id.*

The district court enjoined these provisions because it found that Plaintiffs had established that it is likely to succeed on their claim that each enjoined provision is preempted by federal law. In doing so, the district court found that each enjoined provision, on its face, creates an obstacle to the enforcement and implementation of federal law. The district court erred, however, as Congress' intent that states not be preempted from enacting such laws could not be any clearer. As will be shown below, the provisions at issue are in harmony with federal law and, consequently, are not preempted.

A. The District Court Erred in Not Applying a Presumption Against Preemption.

One of the cornerstones of the U.S. Supreme Court's decisions on preemption is that

> in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 129 S. Ct. 1187, 1194-95 (2009) (quoting *Medtronic, Inc.*, 518 U.S. at 485, 116 S. Ct. at 2250) (citation and alteration omitted); *see also United States v. Locke*, 529 U.S. 89, 108, 120 S. Ct. 1135, 1147 (2000) (When Congress

legislates "in a field which the States have traditionally occupied . . . [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.) (citation omitted); *Gade*, 505 U.S. at 111-12, 112 S. Ct. at 2390 (Kennedy, J., concurring) (stating preemption must not be found "absent a clear statement of intent by Congress") (citations omitted). Courts rely on "the presumption because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'" *Wyeth*, 129 S. Ct. at 1195 n.3 (quoting *Medtronic, Inc.*, 518 U.S. at 485, 116 S. Ct. at 2250); *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977) ("This assumption provides assurance that the federal-state balance, will not be disturbed unintentionally by Congress or unnecessarily by the courts.") (citation and internal quotation marks omitted).

In this case, the district court found that the presumption against preemption should not be applied to either Section 7 or 8 because these provisions regulate immigration, not fields that the States have traditionally occupied. *Georgia Latino Alliance for Human Rights v. Deal*, No. 1:11-CV-1804, 2011 U.S. Dist. LEXIS 69600, at *30, 46-47 (N.D. Ga. June 27, 2011). The district court is wrong for two reasons.

The provisions at issue do not regulate immigration. The U.S. Supreme Court has declared that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration . . .." *De Canas v. Bica*, 424 U.S. 351, 355, 96 S. Ct. 933, 936 (1976). In fact, "even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve." *Id.* at 355-56, 96 S. Ct. at 936. A legislative enactment is a regulation of immigration *only* if it makes "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355, 96 S. Ct. at 936. "In other words, it is the creation of standards for determining who is and is not in this country legally that constitutes a regulation of immigration in these circumstances, not whether a state's determination in this regard results in the actual removal or inadmissibility of any particular alien, for the standards themselves are 'a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain.'" *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 602-03 (E.D. Va. 2004) (quoting *De Canas*, 424 U.S. at 355, 96 S. Ct. at 936).

The California statute at issue in *De Canas* prohibited employers from knowingly employing an alien who is "not entitled to lawful residence in the United States." *De Canas*, 424 U.S. at 352 n.1, 96 S. Ct. at 935. The U.S. Supreme Court found that the statute, although plainly concerning illegal aliens, did not regulate immigration as it had adopted federal immigration standards regarding who was "entitled to lawful residence in the United States." *Id.* at 355-56, 96 S. Ct. at 936-37. The fact that the statute might have an "indirect impact on immigration" made no difference to the High Court. *Id.*

In this case, Sections 7 and 8, although touching on immigration status, do not in any way make or require a state official to make "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas*, 424 U.S. at 355, 96 S. Ct. at 936. In this regard, the determination of who is an "illegal alien" is expressly left up to the federal government, as the provisions adopt federal immigration standards regarding who is entitled to lawful residence in the United States. Specifically, Section 7 defines "illegal alien" as "a person who is verified *by the federal government* to be present in the United States in violation of federal immigration law." *See* O.C.G.A. §§ 16-11-200(a)(1), 16-11-201(2), 16-11-202(a) (emphasis added). Likewise, Section 8 defines "illegal alien" as "a person who is verified *by*

the federal government to be present in the United States in violation of federal immigration law." *See* O.C.G.A. § 17-5-100(a)(2) (emphasis added).

In addition, Section 7 does not "regulate" immigration at all. Rather, it utilizes the State of Georgia's ordinary police powers to create a new criminal offense for any person -- regardless of his or her citizenship or immigration status -- who commits the various elements of the offense with the requisite criminal intent. Specifically, it prohibits any person -- again regardless of his or her citizenship or immigration status -- who, in the course of committing another crime, entices an illegal alien to enter Georgia, harbors an illegal alien in Georgia, or transports an illegal alien in Georgia. One obvious example of an underlying criminal offense to which Section 7 is likely to apply, if it were allowed to go into effect, is the State's anti-human trafficking law, O.C.G.A. § 16-5-46. In this regard, an individual who commits the offense of trafficking a person for labor or sexual servitude (O.C.G.A. § 16-5-46(b) and (c)) could also be found to have committed one of the three offenses created by Section 7 if the victim of his or her offense is an illegal alien who is being enticed to enter Georgia or is being harbored or transported in Georgia. Other examples of underlying predicate offences to which Section 7 is likely to apply, if it is allowed to go into effect, include violations of prostitution and drug trafficking laws. The obvious purpose

of Section 7 is not to criminalize illegal aliens or immigration status, but to target persons, regardless of the citizenship or immigration status, who conspire with, enlist, or victimize illegal aliens in carrying out another criminal offense. Section 7 is the type of enactment that is quintessentially within any state's traditional police power.

In this regard, the district court erred in not applying the presumption against preemption because it too narrowly defined Georgia's traditional police power and the fields it has historically occupied. It has long been maintained by the U.S. Supreme Court that the police power of any State is "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." *License Cases*, 46 U.S. (5 How.) 504, 582 (1847). "It may be said in a general way that the police power extends to all the great public needs." *Noble State Bank v. Haskell*, 219 U.S. 104, 111, 31 S. Ct. 186, 188 (1911) (citation omitted). "It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Id.* The U.S. Supreme Court has stated that the police power exists for the "public safety, public health, morality, peace and quiet, and law and order." *Berman v. Parker*, 348 U.S. 26, 32, 75 S. Ct. 98, 102 (1954).

Section 8 is not a "regulation of immigration" either. Section 8 authorizes a peace officer, during the course of a criminal investigation, to seek to verify whether a suspect is an illegal alien, if the officer has probable cause to believe that the suspect has committed a crime. *See* O.C.G.A. § 17-5-100(b). If the officer receives verification from the federal government that the suspect is an illegal alien, Section 8 also authorizes the officer to detain, transport, or contact DHS if such detention, transportation, or contact is authorized by both state *and* federal law. *See* O.C.G.A. § 17-5-100(e). The provision would seem to promote good police work, not give rise to violations of the federal constitution.

It has long been recognized that state and local peace officers have inherent power to investigate, if not make arrests for, violations of federal law, including immigration law. *See*, *e.g.*, *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295-96 (10th Cir. 1999) (finding state and local peace officers have long possessed inherent police powers to arrest for violations of federal law, including immigration law); *cf. Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465 (2005) (finding peace officer did not err under traditional police power when he inquired into individual's immigration status); *Estrada v. Rhode Island*, 594 F.3d 56 (1st Cir. 2010) (finding peace officer did not err under traditional police power when he inquired into individuals' immigration status, contacted immigration, and

transported illegal aliens to ICE office); *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987) (finding peace officers did not err under traditional police power when detained illegal alien stowaways on incoming barge); *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001) (finding peace officer did not err under traditional police power when he inquired into individual's immigration status); *United States v. Hernandez*, 418 F.3d 1206, 1209 n.3 (11th Cir. 2005) (noting within traditional police power for peace officer to ask questions – even questions not strictly related to reason for law enforcement intervention). Rather than regulating immigration, Section 8 merely codifies the inherent, well-established powers of state and local police officers.

In sum, rather than regulating immigration, the State of Georgia has merely invoked its well-established police power and codified the inherent, well-established investigatory powers of state and local police officers. Moreover, in doing so it relied entirely on federal immigration standards and the federal government's determination of whether a person is lawfully present in the United States. Clearly, the district court erred in finding that Plaintiffs were likely to succeed in challenging sections 7 and 8, as the provisions are not regulations of immigration as defined by the Supreme Court in *De Canas*. *See also Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011) (State law

sanctioning businesses that employ illegal aliens based on federal immigration standards does not regulate immigration); *Gray v. City of Valley Park*, No. 4:07-CV-00881, 2008 U.S. Dist. LEXIS 7238, at *24-25 (E.D. Mo. Jan. 31, 2008) (State law sanctioning businesses that harbor or employ illegal aliens based on federal immigration standards does not regulate immigration), *aff'd*, 567 F.3d 976 (8th Cir. 2009); *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 770 (C.D. Cal. 1995) (hereafter "LULAC") (Proposition denying state benefits to illegal aliens based on federal immigration standards did not regulate immigration); *Merten*, 305 F. Supp. 2d at 603 (school policies denying admission to illegal aliens based on federal immigration standards do not regulate immigration).[2]

B. Section 7 Is Not Preempted by 8 U.S.C. § 1324.

The district court held that Section 7 is preempted by 8 U.S.C. § 1324 because the federal provision prohibits the transporting, harboring and enticing of illegal aliens in the United States. *Georgia Latino Alliance for Human Rights*, 2011 U.S. Dist. LEXIS 69600, at *28-32. According to the district court, States

[2] The fact that the provisions at issue might have "some indirect impact on immigration" does not make them a regulation of immigration either. *De Canas*, 424 U.S. at 355-56, 96 S. Ct. at 936-37; *see also LULAC*, 908 F. Supp. at 770 (finding that although benefits denial provision might "indirectly or incidentally affect immigration by causing such persons to leave the state or deterring them from entering California," provision was not a regulation of immigration under *De Canas*).

cannot complement federal immigration law, and, even if they could, Section 7 is implicitly conflict preempted because its provisions are not identical to its federal counterpart. *Id.* Under either theory, the district court has clearly misconstrued the applicable legal principles.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S. Ct. 2395, 2399 (1991). Under our federal system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Id.* (citation omitted). Hence, while the States have surrendered certain powers to the Federal Government, they retain "residuary and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 918-19, 117 S. Ct. 2365, 2376 (1997) (quoting THE FEDERALIST NO. 39, at 245 (J. Madison) (C. Rossiter ed. 1961)).

Under our system of dual sovereignty, States have the authority to act -- including in areas touching on immigration -- when States prohibit activity that is already prohibited under federal law. In this case, the fact that the INA and Section 7 include provisions about transporting, harboring, and enticing illegal aliens does not create a conflict. Not only are the provisions different -- Section 7 expressly requires that the transporting, harboring, or enticing be undertaken in the

course of committing another state offense -- but "establishing that federal law overlaps state law is, by itself, insufficient to establish that federal law preempts state law." *Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 228 (3rd Cir. 2001). Indeed, the "creation of a federal [prohibition] does not necessarily eradicate existing state law [prohibitions] or require that the federal [prohibition] be exclusive." *Id.* at 227 (citing *Medtronic, Inc.*, 518 U.S. at 495-501, 116 S. Ct. at 2255-58 (holding that § 360(k) of the Medical Device Amendments of 1976 does not preempt overlapping state tort law).

In the instant matter, the State of Georgia carefully crafted Section 7 to promote the "public safety, public health, morality, peace and quiet, and law and order" (*see Berman*, 348 U.S. at 32, 75 S.Ct. at 102) by utilizing traditional police powers to create new criminal offenses applicable to anyone, regardless of their citizenship or immigration status. Moreover, to the extent that the offenses touch on immigration status, the State of Georgia was careful to ensure that the relevant person's immigration status is determined and verified by federal officials, not state officials. *See* O.C.G.A. §§ 16-11-200(a)(1), 16-11-201(2), 16-11-202(a). Section 7 is not preempted by 8 U.S.C. § 1324, and the district court erred in finding otherwise.

C. Section 8 Is Not Preempted by 8 U.S.C. §§ 1357 or 1103.

The district court held that Section 8 is implicitly conflict preempted by 8 U.S.C. §§ 1357 and 1103 because allegedly these federal statutes specifically enumerate the only conditions under which state officers can aid in immigration enforcement. The district court stated that "Congress has provided that local officers may enforce civil immigration offenses *only where* the Attorney General has entered into a written agreement with a state, 8 U.S.C. § 1357(g)(1), or where the Attorney General has expressly authorized local officers in the event of a mass influx of aliens. 8 U.S.C. § 1103(a)(10)." *Georgia Latino Alliance for Human Rights*, 2011 U.S. Dist. LEXIS 69600, at *24 (emphasis added). The district court's implied conflict preemption argument is based solely on the maxim of statutory construction *expressio unius exclusio alterius* (the expression of one thing is the exclusion of another). In other words, when Congress granted arrest power to State and local peace officers in certain circumstances, it impliedly precluded the exercise of that power in all other circumstances.

This might be a reasonable interpretation of Congress's intent if it were not for the existence of several other statutory provisions contained in the INA that clearly indicate that Congress did not intend to so limit or abrogate the States' inherent police power to enforce federal immigration law. For instance, 8 U.S.C. § 1357(g)(10) expressly provides that *no written agreement* is required for State or

local peace officers "to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States," or "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." *See Vasquez-Alvarez*, 176 F.3d at 1300 (finding 8 U.S.C. § 1357(g)(10) as "a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws" utilizing their inherent police power). This savings clause is dispositive.

In addition, in 8 U.S.C. § 1373, Congress mandated that *notwithstanding any other provision of federal law*, no person or Federal, State, or local government entity or agency may prohibit, or in any way restrict, a State or local government entity or official from sending to, or receiving from, DHS information regarding the citizenship or immigration status, lawful or unlawful, of any individual. The same provision also prohibits any restriction on State or local government entities or officials in maintaining or exchanging such information with other Federal, State, or local government entity. In addition, the provision obligates DHS to respond to inquiries by a State and local government agency seeking to verify or

ascertain the citizenship or immigration status of any individual by providing such information.

In 8 U.S.C. § 1644, Congress mandated that *notwithstanding any other provision of federal law*, no State or local government entity may be prohibited, or in any way restricted, from sending to, or receiving from, DHS information regarding the citizenship or immigration status, lawful or unlawful, of any individual. In 8 U.S.C. § 1324(c), Congress provided that:

> Authority to arrest. No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, *and all other officers whose duty it is to enforce criminal laws*.

(Emphasis added).

Clearly, Congress's intent is plain and unmistakable. The INA expressly contemplates State and local governments exercising their inherent police power to assist federal government efforts in enforcing immigration laws, even absent the conditions contained in 8 U.S.C. §§ 1357 and 1103. "Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Whiting*, 131 S. Ct. at 1981; *cf. Lynch*, 810 F.2d at 1367 ("No statute precludes other federal, State, or local law enforcement agencies from

taking other action to enforce this nation's immigration laws."); *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) ("[I]t would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the States may allow."). Section 8 is not preempted by 8 U.S.C. §§ 1357 or 1103, and the district court erred in finding otherwise.

CONCLUSION

Because Sections 7 and 8 of the IIREA are not preempted by federal law, the district court's grant of a preliminary injunction should be reversed and vacated.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing *Brief of Amicus Curiae Judicial Watch, Inc. in Support of Appellants* complies with the type-volume limitations in Fed.R.App.P. 32(a)(7)(B). The brief was written in 14 point-Times New Roman font and contains 5,613 words, as counted by Microsoft Word 2011.

/s/ Paul J. Orfanedes

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August 2011, I filed the foregoing **BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANTS** with the Court via the CM/ECF system and by overnight mail via Federal Express (the original and six copies of) and served the foregoing **BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANTS** on the following counsel of record via the CM/ECF system and first-class U.S. mail:

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