**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

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**CASE NO. 11-13044-C**

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**NATHAN DEAL, Governor of the State of Georgia, et al.,**

**Defendants/Appellants,**

**v.**

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

**Plaintiffs/Appellees.**

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**On Appeal From the United States District Court For the Northern District of Georgia**

**1:11CV-1804-TWT**

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# SUPPLEMENTAL BRIEF OF APPELLANTS

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**Senior Assistant Attorney General**

**Georgia Latino Alliance for Human Rights v. Deal**

**DOCKET NO.: 11-13044-C**

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

The undersigned attorney for Appellants hereby certifies, pursuant to 11th Cir. R. 26.1-1, that the following have an interest in the outcome of this case:

Alterna, Plaintiff/Appellee;

Asian American Legal Advocacy Center, Plaintiff/Appellee;

Bauer, Mary, Counsel for Appellees;

Beatty, Mike, Defendant/Appellant;

Blazer, Jonathon, Counsel for Appellees;

Bridges, Paul, Plaintiff/Appellee;

Broder, Tanya, Counsel for Appellees;

Brooke, Samuel, Counsel for Appellees;

Coalition of Latino Leaders, Plaintiff/Appellee;

Coalition for the People's Agenda, Plaintiff/Appellee;

Conley, Danielle, Counsel for Appellees;

Deal, Nathan, Defendant/Appellant;

Desormeau, Katherine, Counsel for Appellees;

Doe, Jane #1, Plaintiff/Appellee;

Doe, Jane#2, Plaintiff/Appellee;

Doe, John #1, Plaintiff/Appellee;

Doe, John #2, Plaintiff/Appellee;

DREAM Activist.org; Plaintiff/Appellee;

Edwards, Paul, Plaintiff/Appellee;

Federal, Robert Keegan, Counsel for Appellees;

Georgia Latino Alliance for Human Rights, Plaintiff/Appellee;

Gruner, Sharon, Plaintiff/Appellee;

Howe, Everitt, Plaintiff/Appellee;

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Service Employees International Union, Plaintiff/Appellee;

Shahshahani, Azadeh, Counsel for Appellees;

Singh, Jaypaul, Plaintiff/Appellee;

Southern Regional Joint Board of Workers' United, Plaintiff/Appellee;

Spears, George Brian, Counsel for Appellees;

Speight, Benjamin, Plaintiff/Appellee;

Stewart, Falecia, Defendant/Appellant;

Sugarman, Kenneth, Counsel for Appellees;

Task Force for the Homeless, Plaintiff/Appellee;

Thrash, The Honorable Thomas, United States District Judge, Northern District of Georgia, Atlanta Division;

Tumlin, Karen C., Counsel for Appellees;

Turner, Andrew, Counsel for Appellees;

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Wang, Cecillia, Counsel for Appellees;

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Respectfully submitted,

/s/ Devon Orland
Devon Orland Bar No. 554301
Senior Assistant Attorney General

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with FRAP 32(a)(5) and FRAP 32(a)(6) and has been prepared in Times New Roman 14-point font.

/s/ Devon Orland
Devon Orland
Senior Assistant Attorney General

The Supreme Court upheld a provision of Arizona law indistinguishable in any material way from § 8 of HB 87 in *Arizona v. United States*, 567 U.S. ___; slip op. 11-182 (2012); the Court also held that federal law preempted three provisions that do not resemble either provision of HB 87 at issue here. Based upon the Court's analysis, § 7 of HB 87 is not preempted because it mirrors federal law and objectives – unlike the invalidated §§ 5 and 6 of Arizona's law – and does not encroach on a field exclusively occupied by the federal government, unlike the invalidated § 3 of Arizona's law. Similarly, § 8 is not preempted because it replicates Arizona's § 2B, which the Court upheld.

First, it is necessary, to point out a glaring distinction between *Arizona* and this case. In *Arizona*, the United States asserted its prerogatives under the Supremacy Clause in suing Arizona, while private parties bring this case. No language from *Arizona* supports the existence of a private right to sue for preemption nor does the Court find that 42 U.S.C. § 1983 would provide a vehicle for such a challenge. Consequently, Georgia reiterates that a suit challenging a statute premised on preemption can be brought only by the United States, and 42 U.S.C. § 1983 does not provide a vehicle for a private right of action.[1]

[1] The Supreme Court's analysis also highlights a clear error in the District Court's analysis of Georgia's statute. The District Court premised its analysis on the conclusion that Georgia was not entitled to the presumption against preemption. (R. 93, p. 21, 35). This was error. The Court clearly notes that the analysis of the Arizona statute began with this

Turning to the Arizona law, § 3 creates a state crime for failure to comply with federal registration requirements. The Court held that the registration of aliens remains the exclusive province of the Federal government, thus preempting additional state regulation. Notably, the Court did not find that mirrored objectives necessarily created a conflict. Rather, it found that by imposing additional penalties to a field where Congress intended exclusivity, Arizona conflicted with Congress' comprehensive plan. *Id.* slip op. at 10-11. [2] As neither § 7 nor § 8 add additional penalties for an alien's failure to register, the analysis applied to Arizona's § 3 has no applicability. The criminal sanction attached to § 7 bears no reference to the alienage of the wrongdoer nor has Congress evidenced any intent to exclusively enforce matters related to others who aide illegal aliens. Further, § 8 does not add additional penalties for failing to comply with federal registration requirements. As such, and the invalidity of § 3 and the Court's analysis do not support a finding of preemption for either § 7 or § 8 of Georgia's law.

Arizona's § 5 makes it a crime for an unauthorized alien to seek or engage in work. The Supreme Court found this provision invalid because Congress made the

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presumption. *Id.* slip op. at 8. The District Court's failure to apply this principle, requires reexamination of the core analysis presented in the District Court's decision.

[2] The Supreme Court further clarified that its decision in *Hines v. Davidowitz*, 312 U.S. 52 (1941) applied only to matters involving registration of aliens. *Arizona*, slip op. at 9. The District Court's significant reliance on *Hines* was misplaced as the Georgia statutes do not relate to the registration of aliens.

deliberate decision not to criminalize this activity. The Court concluded that since Arizona's law contradicted this deliberative decision that the law was in conflict with federal law and therefore preempted. *Id.* slip op. at 13. The Court noted that while § 5 of Arizona's law attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it adopted an approach rejected by Congress, and therefore interfered with the "careful balance" struck by Congress. *Id.* slip op. at 15. Neither § 7 nor § 8 present a similar conflict on this record, as there is nothing in the record suggesting that Congress considered and rejected similar provisions.

§ 7 mirrors 8 U.S.C. § 1324 in purpose and enforcement. The Court emphasized that the conflict with respect to § 5 arose because of the variance in focus on the enforcement mechanism, not on the mirrored purpose. §§ 7 and 8 U.S.C. § 1324 both focus the consequence on the individual who facilitates the unlawful activity by harboring, enticing or transporting an illegal alien and both impose criminal penalties on the same wrongdoer without regard to the citizenship of the wrongdoer. As such, there is no conflict in either the purpose or the implementation of the two provisions. Similarly, § 8 allows law enforcement to conduct status checks after establishing probable cause that another crime has been committed. As § 8 attaches no additional penalty but rather allows for local law

enforcement to confirm authorized presence, the invalidation of Arizona's § 5 is of no consequence.

Arizona's § 6 authorizes the arrest, without a warrant, where an officer believes he has probable cause to believe that a person committed a removable offense. The Supreme Court determined that the federal enforcement scheme defines when and under what circumstances an individual may be detained on the basis of possible removability and attempts to give state officers greater authority to arrest aliens based upon removability than Congress has given to federal officers. As a result § 6 allows the state to achieve its own immigration policy. *Id.* slip op. at 16-17. Again, this reasoning holds no applicability to either § 7 or § 8 of Georgia's law. § 7 does not address the wrongdoer's immigration status at all and neither statute attempts to provide greater authority to enforce federal immigration law than that possessed by federal law enforcement. Rather, § 7 provides state penalties for those individuals who commit crimes while also knowingly transporting, harboring or enticing illegal aliens and § 8 codifies that law enforcement can take reasonable steps to verify status where there is probable cause to believe a crime has been committed. As neither provision defines immigration policy by providing greater authority over federal law to local law enforcement the reasoning applied to invalidating Arizona's § 6 does not apply. The Court also noted that where Congressional enforcement priorities do not

contradict the statute on its face, there is no preemption. *Id.* slip op. at 21. As § 7 does not contradict any such priority it withstands this facial preemption challenge.

§ 8, while more tempered than Arizona's § 2B, bears close similarity in all material respects. As an initial matter, the Supreme Court cited the civil rights protections present in § 2B which are similarly present in § 8. § 8 provides for only reasonable detention, and soundly prohibits consideration of race, color or national origin except as authorized by state or federal law. O.C.G.A. § 17-6-100 (b), (c). The Court further noted the applicability of *Meuhler v. Mena*, 544 U.S. 93 (2005) in finding that local law enforcement may lawfully inquire into alienage during the course of a lawful detention. *Arizona,* slip op. at 22. In reiterating this holding, the Court held that a state officer's ability to conduct a status check during a lawful detention survives preemption, absent some showing that it has other consequences that are adverse to federal law. As there are no such collateral consequences in § 8, it cannot be facially preempted. *Id.* slip op. at 23. Moreover, as Challengers' claims focus on the application, instead of the facial validity of the law, their claims are premature. *Id.* Like the challenge to § 2B, the potential for conflict cannot serve as a basis for a facial challenge. Accordingly, "[a]t this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume [the statute] will be construed in a way that creates a conflict with federal law." Slip op. at 24.

Respectfully submitted this 6th day of July, 2012.

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## CERTIFICATE OF SERVICE

I do hereby certify that I have this date served the within and foregoing **SUPPLEMENTAL BRIEF OF APPELLANTS** prior to filing same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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