No. 11-13044-GG

United States Court of Appeals for the Eleventh Circuit

NATHAN DEAL, GOVERNOR OF THE STATE OF GEORGIA, *ET AL.*,
Defendants-Appellants,

v.

GEORGIA LATINO ALLIANCE FOR HUMAN RIGHTS, *ET AL.*,
Plaintiffs-Appellees,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, CIVIL ACTION NO. 1:11-CV-1804-TWT, HON. THOMAS W. THRASH, JR.

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Georgia Latino Alliance for Human Rights v. Deal, No.: 11-13044-GG

The undersigned counsel for *amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum") 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;

Davidson, Meghan R., Assistant Attorney General, Attorney for Defendants/Appellants Deal, Olens, Beatty and Reese;

Deal, Nathan, Defendant/Appellant;

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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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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;

Sugarman, Kenneth, Counsel for Appellees;

Task Force for the Homeless, Plaintiff/Appellee;

Thrash, The Honorable Thomas, United States District Judge,

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Werner, Daniel, Counsel for Appellees.

Pursuant to FED. R. APP. P. 26.1, *amicus curiae* Eagle Forum makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, files this *amicus* brief with all parties' consent.[1] Founded in 1981, Eagle Forum has consistently defended American sovereignty before the state and federal legislatures and courts. Eagle Forum promotes adherence to the U.S. Constitution and has repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States. Eagle Forum supports enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens. Eagle Forum also has long defended federalism, including the ability of state and local governments to protect themselves and to maintain order. For all of the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court.

STATEMENT OF THE CASE

This section outlines the relevant constitutional and statutory

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[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

provisions. Because the various plaintiffs-appellees (collectively, "Challengers") brought a facial challenge before the statute ever took effect, the litigation must focus on relevant laws: "the challenger must establish that no set of circumstances exists under which the Act would be valid," and "[t]he fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987).

Constitutional Background

Under Article III, appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). Parties cannot confer jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect" and "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.,* 523 U.S. at 94 (interior quotations omitted).

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Sovereign immunity arises also from the Constitution's structure and antedates the Eleventh Amendment, *Alden v. Maine,* 527 U.S. 706, 728-29 (1999), applying equally to suits by a states' own citizens. *Hans v. Louisiana,* 134 U.S. 1 (1890). When a state agency is the named defendant, the Eleventh Amendment bars suits for both money damages and injunctive relief unless the state has waived its immunity. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 144 (1993). Moreover, like jurisdiction, immunity may be raised at any time, even on appeal. *Edelman v. Jordan,* 415 U.S. 651, 678 (1974).

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three ways in which federal law can preempt state or local laws: express preemption, "field" preemption, and implied or conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). Courts rely on two

presumptions to assess preemption claims. First, the analysis begins with the federal statute's plain wording, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). Under that analysis, the ordinary meaning of statutory language presumptively expresses that intent. *Morales* v. *Transworld Airlines, Inc.*, 504 U.S. 374, 383 (1992). Second, under *Santa Fe Elevator* and its progeny, courts apply a presumption against preemption for federal legislation in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Statutory Background

The federal Immigration and Naturalization Act ("INA") includes various roles for state and local immigration enforcement. *See, e.g.,* 8 U.S.C. §§1252c(a) ("[n]otwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual" under certain circumstances), 1357(g)(10) (making clear that nothing requires prior federal agreements to communicate with or report the federal government regarding illegal aliens and "otherwise to cooperate

… in the identification, apprehension, detention or removal" of illegal aliens). In addition, INA prohibits all levels of government from restricting government entities' communications with the federal government on individuals' immigration status and requires the federal government to respond to such government inquiries. 8 U.S.C. §1373.

Georgia's Legislature enacted the Illegal Immigration Reform and Enforcement Act of 2011, 2011 Ga. Laws 252 ("HB87"), to control the impact of illegal immigration on Georgia. HB87's section 7 defines the crimes of knowingly transporting, harboring, and inducing illegal aliens to enter the state, O.C.G.A. §16-11-200(b), 16-11-201, 16-11-202(b). HB87's section 8 authorizes officers to seek to verify criminal suspects' immigration status when those suspects are non-discriminatorily encountered through probable cause of violations of other state or federal criminal law. *Id.* §17-5-100.

The transporting, harboring, and inducing entry into the state provisions target the individual who transports, harbors or induces the illegal alien, not the illegal alien. Each of these provisions requires (a) the commission of another criminal offense prior to being charged, and (b) the offender's specific knowledge of the alien status of the

person transported, harbored or induced. Transporting exempts various forms of transportation, including "transport[ing] an illegal alien to or from judicial or administrative proceeding" and "providing privately funded social services." *Id.* §16-11-200(b). Similarly, harboring exempts "providing privately funded social services" and "an attorney … for the purpose of representing a criminal defendant." *Id.* §16-11-201(a)(1).

Section 8 defines an "illegal alien" as someone "verified by the federal government to be present … in violation of federal immigration law," *id.* §17-5-100(a)(2), and authorizes (but does not require) officers to seek to verify suspects' immigration status, when the officer has probable cause to suspect another criminal violation and the suspect(s) cannot provide various forms of official identification (*e.g.,* drivers licenses or state identification cards) or otherwise identify themselves. *Id.* §17-5-100(b). In determining immigration status, officers are "authorized to use any reasonable means … to determine the immigration status," including various federal resources and "electronic fingerprint readers." *Id.* §17-5-100(c). Upon verifying that the suspect is an illegal alien, officers may take any action authorized by federal or state law, although Section 8 exempts illegal aliens who contact

authorities when acting as a witness to a crime, reporting criminal activity, or seeking assistance as a victim to a crime. *Id.* §17-5-100(e)-(f).

SUMMARY OF ARGUMENT

Challengers lack standing and a ripe controversy because their injuries are speculative (Sections I.A.2, I.B), and self-inflicted and third-party injuries cannot establish standing (Sections I.A.3-I.A.5), particularly where the alleged injuries result from local law enforcement, not from the Executive-Branch state officers (collectively, "Georgia"), whom Challengers have sued (Section I.A.6). Moreover, Georgia is immune from suit, which neither 42 U.S.C. §1983 nor *Ex parte Young* can cure (Sections I.C-I.D).

On the merits, Challengers' facial challenge cannot negate HB87's as-yet unapplied, discretionary enforcement provisions (Section II.A.2) because some – indeed most – of them expressly track INA's federal standards, which INA obviously does not preempt (Sections II.B-II.D), particularly given the presumption against preemption (Section II.A.1). Finally, Challengers do not warrant injunctive relief because they lack irreparable injury, as demonstrated by their suit's hypothetical nature and the availability of adequate legal remedies (Section III).

ARGUMENT

I. FEDERAL COURTS LACK JURISDICTION OVER CHALLENGERS' CLAIMS

Because Challengers' claims do not satisfy the standing and ripeness requirements for federal-court jurisdiction and because Georgia enjoys sovereign immunity from suit in federal court, this Court and the district court lack jurisdiction over Challengers' claims. Accordingly, the preliminary injunction must be lifted and this case remanded with orders to dismiss under Rule 12(b)(1).

A. Challengers Lack Standing to Sue Georgia

Constitutional standing presents a tripartite test: cognizable injury to the plaintiffs, causation by the defendants, and redressable by a court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992). In addition, courts have erected prudential standing concerns, including that the "plaintiff's complaint [must] fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 475 (1982) (*quoting Assoc. of Data Processing Serv. Orgs. v. Camp,* 397 U.S. 150, 153 (1970)).

Because it goes to the federal courts' Article III power to hear a

case, standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). The party invoking federal jurisdiction bears the burden of proof on each step of the standing analysis, *Defenders of Wildlife,* 504 U.S. at 561, and plaintiffs must establish standing *on the merits* to support injunctive relief. *Summers v. Earth Island Institute,* 129 S.Ct. 1142, 1151 (2009). This subsection demonstrates that Challengers cannot satisfy *any one step* of the standing analysis, much less *all three* required steps.

1. Challengers' Mere Allegations Cannot Support an Injunction

The district court decided both Georgia's motion to dismiss and Challengers' motion for a preliminary injunction. Presumably because of that overlap, the district court mistakenly held that Challengers may rely on the pleadings to establish standing:

> [W]hen lack of standing is raised in a motion to dismiss, the issue is properly resolved by reference to the allegations of the complaint.

R.93 at 7 (interior quotation omitted, alteration in original). Under *Summers,* 129 S.Ct. at 1150-51, however, any affirmative relief from a federal court (as distinct from merely surviving a motion to dismiss)

requires plaintiffs to *establish* standing (as distinct from merely alleging standing). *Id.* Because Challengers have not established standing, the injunction must be vacated, even if Challengers' *allegations* of standing suffice to defeat a motion to dismiss. (Because the allegations of standing are insufficient to survive a motion to dismiss, however, this Court's remand should direct the district court to dismiss the action.)

2. Challengers Assert Speculative, Non-Imminent Injuries

A facial, pre-enforcement challenge requires a "credible threat" of enforcement against the plaintiff. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). Future run-ins with the police are simply too speculative for standing. *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983). Significantly, when each individual plaintiff lacks a sufficiently credible threat of imminent injury, an association cannot aggregate their low-probability individual claims into a collectively higher-probability claim. *Pub. Citizen v. NHTSA,* 489 F.3d 1279, 1296 (D.C. Cir. 2007). Consequently, while it is often said that there is strength in numbers, there is not standing in numbers: an identified individual must establish standing. *Summers,* 129 S.Ct. at 1150-51.

3. Challengers Cannot Assert Third-Parties' Injuries

Plaintiffs cannot assert the rights of absent third parties unless the plaintiff itself has constitutional standing, the plaintiff and the absent third parties have a "close" relationship, and a sufficient "hindrance" keeps the absent third party from protecting its own interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio,* 499 U.S. 400, 411 (1991)). Here, all plaintiffs lack standing, so Challengers fail the first prong of the *Powers* test. With respect to the immigration attorney who sometimes drives his illegal-alien clients, the Supreme Court foreclosed basing third-party standing on the "*hypothetical* attorney-client relationship posited here." *Tesmer,* 543 U.S. at 131 (emphasis in original). Under the circumstances, Challengers who are not illegal aliens cannot assert the INA rights (if any) of illegal aliens.

4. Challengers Cannot Base Standing on Self-Inflicted Injuries

A plaintiff cannot establish standing through self-inflicted injuries or payments. *Pevsner v. Eastern Air Lines, Inc.,* 493 F.2d 916, 917-18 (5th Cir. 1974); *Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976). Unless Challengers have a legally protected right to avoid the payments

or expenses in question, Challengers' voluntary payments or expenditures cannot establish standing.

5. The Challenger Associations' General Interest in Immigration Cannot Manufacture Standing

Relying on *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378-79 (1982), and its Circuit progeny in voting-related cases, the district court found the Challenger associations to have standing based on HB87's "caus[ing them] to 'divert resources from [their] regular activities.'" R.93 at 12 (*quoting Common Cause/Georgia v. Billups,* 554 F.3d 1340, 1350 (11th Cir. 2009)). The district court overstates the scope of standing found in *Havens*.

As this Circuit recognized, the "precise issue in *Havens* was whether the organizational plaintiff had statutory standing to sue under section 812 of the Fair Housing Act." *Florida State Conference of N.A.A.C.P. v. Browning,* 522 F.3d 1153, 1165 n.14 (11th Cir. 2008). That statute created a right – applicable to individuals *and associations* – to truthful, non-discriminatory information about housing:

> Section 804(d) states that it is unlawful for an individual or firm covered by the Act "[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental

> when such dwelling is in fact so available," a prohibition made enforceable through the creation of an explicit cause of action in § 812(a) of the Act. Congress has thus conferred on all "persons" a legal right to truthful information about available housing.

Havens, 455 U.S. at 373 (emphasis in original, citations omitted). Moreover, because the *Havens* statute "extend[ed] to the full limits of Art. III, the inquiry into statutory standing collapsed into the question of whether the injuries alleged met the Article III minimum of injury in fact." *Browning,* 522 F.3d at 1165 (*citing Havens,* 455 U.S. at 372) (interior quotations omitted). Challengers lack several critical elements of *Havens.*

First, the *Havens* organization had a statutory right (backed by a statutory cause of action) to the truthful information that the defendants denied to it. Because Congress can create rights, the denial of those rights can confer standing. *Warth,* 422 U.S. at 514 ("Congress may create a statutory right.... the alleged deprivation of which can confer standing"). The Challenger associations have no claim to any rights whatsoever under INA.

Second, and related to the first issue, the injury that the Challenger associations claim must align with the other components of

their standing, *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1232 (D.C. Cir. 1996), notably here the allegedly cognizable right. In *Havens,* the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information, in violation of the statute). Unlike in *Havens,* nothing in INA even *remotely* relates to the Challenger associations' spending.[2]

Third, the *Havens* statute statutorily eliminated prudential standing. Here, the Challenger associations have no claim whatsoever that INA eliminates prudential standing doctrines, and it is fanciful to suggest that INA puts the Challenger associations and their private spending in INA's zone of interests or enables these organizations to enforce the INA rights (if any) of third parties. *Coyne v. American Tobacco Co.,* 183 F.3d 488, 494 (6th Cir.1999) ("in statutory cases, the plaintiff's claim must fall within the 'zone of interests' regulated by the statute in question"); *Tesmer,* 543 U.S. at 128-31 (discussed in Section I.A.3, *supra*).

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[2] In federal court, sovereign immunity precludes money damages, which *Ex parte Young* cannot remedy. To satisfy redressability, Challengers must establish continuing payments to show redress from *prospective* payments.

At bottom, the Challenger associations' diverted resources are simply self-inflicted injuries, which cannot manufacture a case or controversy. *See* Section I.A.4, *supra.* If mere spending could manufacture standing, any private advocacy or welfare organization could establish standing against any government action, which clearly is not the law. *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972) (organizations lack standing to defend "abstract social interests"); *Nat'l Taxpayers Union, Inc. v. U.S.,* 68 F.3d 1428, 1433-34 (D.C. Cir. 1995) (same). *Havens* did not eviscerate Article III.

In addition to asserting injuries in their own right, membership associations can establish standing (on the merits) for at least one *identified* member, provided that the interest protected is germane to the organization and nothing requires the member's participation as a party. *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977); *Summers,* 129 S.Ct. at 1150-52. The Challenger associations cannot meet the member-based test for the reasons outlined for individuals.

6. The Georgia Defendants Have Not Caused and Cannot Redress Challengers' Injuries

Beyond cognizable injury, standing's "irreducible constitutional

minimum" also requires that plaintiffs' injuries be traceable to the defendants' conduct and that it be likely, rather than merely speculative, that a favorable decision will redress the plaintiff's injury. *Lujan,* 504 U.S. at 560. In addition to their not having suffered cognizable injury, Challengers also fail traceability and redressability because they have sued Georgia defendants who are not the source of the complained-of injuries.

The Georgia defendants' inability to enforce any relevant provision of HB87 is fatal to Challengers' standing. As the Fifth Circuit noted *en banc,* "[t]he requirements of *Lujan* are entirely consistent with the longstanding rule that a plaintiff may not sue a state official who is without any power to enforce the complained-of statute." *Okpalobi v. Foster,* 244 F.3d 405, 426 (5th Cir. 2001) (*en banc*); *cf Bennett v Spear,* 520 U.S. 154, 169 (1997) (redressability fails if independent non-parties cause harm). Enjoining state officials does nothing to redress enforcement-based injuries when "there would still be a multitude of other prospective litigants who could potentially sue [plaintiff] under the act." *Nova Health Sys. v. Gandy,* 416 F.3d 1149, 1159 (10th Cir. 2005). The injunction does not prohibit the injuries that Challengers allege.

7. The Injunction Is Overbroad if It Applies where Challengers Lack Standing

Plaintiffs must establish standing for each claim raised and form of relief requested: "standing is not dispensed in gross." *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996). Even assuming *arguendo* that any of Challengers has a justiciable case or controversy, the scope of the injunctive relief cannot exceed the scope of that case or controversy. Put another way, federal courts lack jurisdiction to enjoin facets of HB87 that do not injure Challengers. While *amicus* Eagle Forum concurs with Georgia that Challengers do not assert *any* justiciable claims, this Court must tailor the injunctive remedy *only* to whatever justiciable claims its finds.

B. Challengers Lack a Ripe Claim

In addition to lacking standing, Challengers also bring unripe claims. Ripeness doctrine seeks "[t]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 148 (1967), *abrogated on other grounds, Califano v. Sanders,* 430 U.S. 99, 105 (1977). Like standing, "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for

refusing to exercise jurisdiction," and "[e]ven when a ripeness question in a particular case is prudential, [courts] may raise it on [their] own motion." *Reno v. Catholic Social Servs., Inc.,* 509 U.S. 43, 57 n.18 (1993); *In re Jacks,* 642 F.3d 1323, 1332 (11th Cir. 2011) (same). Moreover, as with standing, lack of ripeness is a jurisdictional defect, *Jacks,* 642 F.3d at 1332, which courts evaluate *sua sponte,* even if the parties concede it. *Catholic Social Servs.,* 509 U.S. at 57 n.18. As the Supreme Court explained in dismissing a claim for lack of ripeness, "if any of the respondents are ever prosecuted and face trial, or if they are illegally sentenced, there are available state and federal procedures which could provide relief from the wrongful conduct alleged." *O'Shea v. Littleton,* 414 U.S. 488, 502 (U.S. 1974). *Littleton* applies to Challengers' claims here.

For constitutional ripeness, "[a] claim is not ripe when it is based on speculative possibilities." *Jacks,* 642 F.3d at 1332. As outlined for standing in Sections I.A.1-I.A.2, *supra,* Challengers' claims are constitutionally unripe.

For prudential ripeness, courts consider "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of

withholding court consideration." *Cheffer v. Reno,* 55 F.3d 1517, 1524 (11th Cir.1995) (*citing Abbott Labs,* 387 U.S. at 149).[3] While Challengers' alleged hardships are inadequate for the same reasons outlined in Sections I.A.3-I.A.5, *supra,* for standing, Georgia's *potential* application of HB87 in violation of INA is classic example of an unripe "uncertain event[,] which may not happen at all." *Skull Valley Band of Goshute Indians v. Nielson,* 376 F.3d 1223, 1237 (10th Cir. 2004); *City of Fall River, Mass. v. F.E.R.C.,* 507 F.3d 1, 6 (1st Cir. 2007); *cf. Gopher Oil Co. v. Bunker,* 84 F.3d 1047, 1050 (8th Cir. 1996) ("[t]he mere possibility of being named a defendant … does not constitute the actual controversy [that] is required" for ripeness). Given that Challengers must negate every possible application of HB87 to prevail, *Salerno,* 481 U.S. at 745, and that HB87 gives law enforcement discretion on whether and how to enforce HB87's provisions, O.C.G.A. §17-5-100(b)-

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[3] Citing *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 733 (1998), this Court has divided the fitness prong into two sub-prongs: (a) "whether judicial intervention would inappropriately interfere with further administrative action;" and (b) "whether the courts would benefit from further factual development of the issues presented." *Pittman v. Cole,* 267 F.3d 1269, 1278 (11th Cir. 2001); *cf. U.S. v. Rivera,* 613 F.3d 1046, 1050 (11th Cir. 2010) (restating the traditional *Abbott Labs* two-prong test).

(c), Challengers' facial challenge is unripe, at least for conflict preemption, because no-one knows whether or how HB87 enforcement will unfold. *See* Section II.C, *infra.* Simply put, Challengers cannot possibly show the type and level of "frustration" required for conflict preemption without a record of actual INA-HB87 conflict.

C. Federal Courts Cannot Invalidate State Laws Based on Hypothetical Situations

Jurisdiction is also lacking here because federal courts cannot invalidate state laws in hypothetical situations like those presented here. Challengers here impermissibly seek to declare a state law unconstitutional based on hypothetical arguments, notwithstanding that the Supreme Court has rejected such a role for federal courts in enjoining state laws in the abstract.

In reversing an injunction against enforcement of a state law to the extent it was not preempted by federal law, the Supreme Court held that the district court "disregarded the limits on the exercise of its injunctive power." *Morales,* 504 U.S. at 382 (Scalia, J.). The Court explained:

> In suits such as this one, which the plaintiff intends as a "first strike" to prevent a State from initiating a suit of its own, the prospect of state

> suit must be imminent, for it is the prospect of that suit which supplies the necessary irreparable injury. *Ex parte Young* thus speaks of enjoining state officers "*who threaten and are about to commence proceedings,*" and we have recognized in a related context that a conjectural injury cannot warrant equitable relief. Any other rule (assuming it would meet Article III case-or-controversy requirements) would require federal courts to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable. This problem is vividly enough illustrated by the blunderbuss injunction in the present case, which declares pre-empted "any" state suit involving "any aspect" of the airlines' rates, routes, and services. As petitioner has threatened to enforce only the obligations described in the guidelines regarding fare advertising, the injunction must be vacated insofar as it restrains the operation of state laws with respect to other matters.

Morales, 504 U.S. at 382-83 (citations omitted, emphasis in *Morales*). As Justice Scalia indicates in the quoted text, the limitation springs from Article III's requirement for a case and controversy, from equity's requirement for imminent injury as an irreparable harm, and (for state defendants like Georgia) from the limited *Ex parte Young* exception to sovereign immunity. *See* Section I.A.2, *supra;* Sections I.D.2, III, *infra.*

D. The Eleventh Amendment Bars Challengers' Suit

At the outset, it is clear that neither the INA nor the Supremacy

Clause provide their own cause of action against Georgia, much less abrogate Georgia's sovereign immunity. Given that Georgia may assert its immunity both on appeal and as the district court case proceeds, Challengers' likelihood of prevailing depends on their bypassing Georgia's immunity from suit.

In general, plaintiffs seeking to enforce federal law without a statutory right of action can consider two alternate paths, 42 U.S.C. §1983 and the *Ex parte Young* exception to sovereign immunity:

> [T]wo [post-Civil War] statutes, together, after 1908, with the decision in *Ex parte Young,* established the modern framework for federal protection of constitutional rights from state interference.

Perez v. Ledesma, 401 U.S. 82, 106-07 (1971). First, the Civil Rights Act of 1871, 17 Stat. 13, provided what now are 42 U.S.C. §1983 and 28 U.S.C. §1343(3) to protect civil rights. *Id.* Second, the Judiciary Act of 1875, 18 Stat. 470, provided federal-question jurisdiction under what now is 28 U.S.C. §1331, which *Ex parte Young* can extend to state actors who violate federal law. *Id.* Here, however, Challengers lack the federal right needed to sue under §1983 and lack the ongoing violation of federal law needed to sue under *Ex parte Young*.

1. Challengers Cannot Sue under §1983

By its terms, "§1983 permits the enforcement of '*rights,* not the broader or vaguer 'benefits' or 'interests.'" *City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 119-20 (2005) (*quoting Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002) (emphasis in *Gonzaga*)). As such, "[i]n order to seek redress through §1983, ... a plaintiff must assert the violation of a federal *right,* not merely a violation of federal *law*." *Blessing v. Freestone,* 520 U.S. 337, 340 (1997) (emphasis in original). To establish the *presumption* of an enforceable right, §1983 plaintiffs must meet a three-part test: (1) Congress must have intended the provision in question to benefit the plaintiff; (2) the alleged right is not so "vague and amorphous" that enforcing it would "strain judicial competence;" and (3) the rights-creating provision is stated in mandatory, rather than precatory, terms. *Blessing,* 520 U.S. at 340-41. Challengers cannot establish any of these tests.

Most significantly, Congress could not have intended the INA to shield Challengers – and especially the associations, U.S. citizens, and legal aliens – from HB87 enforcement for two reasons. First, INA allows state and local enforcement. 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-

(c). Second, INA regulates federal agencies and state and local governments, without conferring rights to individuals: "Statutes that focus on the person regulated rather than the individuals protected create *no implication* of an intent to confer rights on a particular class of persons." *Alexander v. Sandoval,* 532 U.S. 275, 289 (2001) (interior quotations omitted, emphasis added); *accord Gonzaga,* 536 U.S. at 286 (applying the *Sandoval* reasoning to §1983 actions). Under *Sandoval* and *Gonzaga,* group-based *benefits* and *systemic* requirements do not create *rights.*

Further, the numerous savings clauses within INA that preserve Georgia's authority for state and local enforcement rebut the claim that INA is mandatory in the way that the *Blessing* test uses the term. *See, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c). Given that INA *allows* some state and local enforcement, Challengers cannot argue that Georgia – by enacting an as-yet unenforced statute – has breached a *mandatory* federal rule sufficiently to trigger review under §1983.

2. Challengers Cannot Sue under *Ex parte Young*

Under the Eleventh Amendment, Georgia enjoys immunity from Challengers' claims. U.S. CONST. amend. XI. In *Ex parte Young,* 209

U.S. 123, 157 (1908), the Supreme Court held that the Eleventh Amendment's bar does not extend to suits to enjoin state officials' enforcement of an allegedly unconstitutional statute, provided that "such officer [has] some connection with the enforcement of the act." *Id.* *Ex parte Young* is a limited exception to sovereign immunity, and that exception applies only to *ongoing violations* of federal law.

For example, *Ex parte Young* was unavailable in *Green v. Mansour,* 474 U.S. 64 (1985), where, after "Respondent … brought state policy into compliance," the plaintiffs sought "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Mansour,* 474 U.S. at 66-67. Similarly, as Justice Scalia explained in *Morales,* prospective injuries cannot be hypothetical and instead must involve "state officers '*who threaten and are about to commence proceedings.*'" *Morales,* 504 U.S. at 382-83 (*quoting Ex parte Young,* 209 U.S. at 156) (emphasis in *Morales*). While many of Challengers' fears are unfounded to the point of frivolity, given HB87's exemptions, none of Challengers' fears rise beyond hypothetical, given HB87's enforcement discretion.

II. CHALLENGERS CANNOT PREVAIL ON THE MERITS

After establishing the relevant rules of statutory construction, *amicus* Eagle Forum demonstrates that Challengers cannot prevail on their preemption claims under any theory of federal preemption.

A. The Rules of Statutory Construction Favor Georgia

Assuming *arguendo* that federal courts have jurisdiction over Challengers' claims and that Challengers have a cause of action against Georgia, this Court must consider two canons of statutory interpretation before it decides the merits. First, the Court must address the presumption against preemption for fields traditionally occupied by the states, requiring a "clear and manifest" congressional intent for preemption. Second, this Court must consider the *Salerno* requirement that pre-enforcement facial challenges negate the statute's application in all circumstances. Both canons favor Georgia and therefore support reversal.

1. The Presumption against Preemption Applies

Courts apply a presumption against preemption for fields traditionally occupied by state and local government. *Santa Fe Elevator,* 331 U.S. at 230. When this "presumption against preemption" applies, courts will not assume preemption "unless that was the *clear and*

manifest purpose of Congress." *Id.* (emphasis added). Even if a court finds that Congress expressly preempted *some* state action, the presumption against preemption applies to determining the *scope* of that preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good,* 129 S.Ct. 538, 540 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). Courts "rely on the presumption because respect for the States as independent sovereigns in our federal system leads [them] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine,* 129 S. Ct. 1187, 1195 n.3 (2009) (internal quotations omitted). For that reason, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* If states occupied the field historically, the presumption plainly applies.

Here, INA and HB87 intersect in several areas of traditional local concern under the police power, including public safety, negative impacts on employment, and the state fisc. *DeCanas v. Bica,* 424 U.S. 351, 354-55 (1976); R.93 at 33 (discussing criminal activity by illegal

aliens). The authority to combat illegality is central to the states' traditional police power: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself." *Jacobson v. Massachusetts,* 197 U.S. 11, 27 (1905); *Slaughter-House Cases*, 16 Wall. 36, 62 (1873) (holding that the states have traditionally enjoyed great latitude under their police powers to legislate as "to the protection of the lives, limbs, health, comfort, and quiet of all persons") (interior quotations omitted). Challengers' view would take from Georgia the "right to protect itself" against the unlawful taking up of residency and all of the resulting ills. The lawlessness that follows is predictable and, if a community's "right to protect itself" is recognized, entirely preventable.

2. Facial Challenges Cannot Succeed against State Laws that Have Not Taken Effect and Make the Allegedly Unconstitutional Conduct Optional

Under *Salerno,* 481 U.S. at 745, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." "The fact that [a statute] might operate unconstitutionally under some conceivable set of circumstances

is insufficient to render it wholly invalid." *Id.; accord Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 n.5 (1982). For statutes like HB87 with enforcement discretion on whether and how to enforce their provisions, the "most difficult challenge" becomes *even more* difficult.

As the Supreme Court recently emphasized, facial invalidation is counter to the judicial preference not to "nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood,* 546 U.S. 320, 329 (2006). Facial challenges also interfere with the norm of statutory construction that enables avoidance of constitutional questions based on how narrowly a law is applied. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973); *cf. New York v. Ferber,* 458 U.S. 747, 767 (1982) ("a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court").

Under well-known standards of statutory construction, courts may construe statutes to avoid unconstitutionality by adopting sensible constructions that avoid absurd or unlawful consequences. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 574 n.8 (1942); *State v. Fielden,* 280

Ga. 444, 448, 629 S.E.2d 252, 257 (2006). Unfortunately for Challengers, their chosen forum lacks the authority to adopt such narrowing constructions of *state* law: "Federal courts do not sit as a super state legislature, [and] may not impose [their] own narrowing construction ... if the state courts have not already done so." *United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.,* 857 F.2d 422, 431 (8th Cir. 1988) (interior quotations omitted, alterations in original); *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972). If Challengers wanted to resolve their legal concerns about HB87's scope, they chose the wrong forum for their facial challenge.[4]

B. INA Does Not Expressly Preempt HB87

Nothing in INA expressly preempts state and local enforcement. Quite the contrary, INA preserves state and local authority in several savings clauses. *See, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c). To prevail, Challengers require conflict or field preemption.

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[4] Under the doctrine of concurrent jurisdiction, §1983 suits are available in state courts, *Haywood v. Drown,* 129 S.Ct. 2108, 2114 (2009), as are *Ex parte Young* suits. *Martinez v. California,* 444 U.S. 277, 284 (1980); *Musgrove v. Georgia Railroad & Banking Co.,* 204 Ga. 139, 157, 49 S.E.2d 26, 36 (1948).

C. INA Does Not Conflict Preempt HB87

Conflict preemption includes both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because nothing prevents compliance with both federal law and HB87, Challengers necessarily invoke conflict preemption's "prevent-or-frustrate" prong.

Amicus Eagle Forum respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth,* 129 S.Ct. at 1205 (characterizing this prong as "'purposes and objectives' pre-emption") (Breyer, J., concurring). Instead, federalism's central tenet permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety:

> [F]ederalism was the unique contribution of the Framers to political science and political theory.

> Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). "The Framers adopted this constitutionally mandated balance of power to reduce the risk of tyranny and abuse from either front, because a federalist structure of joint sovereigns preserves to the people numerous advantages." *Wyeth,* 129 S.Ct. at 1205 (interior quotations and citations omitted) (Breyer, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role.

Notwithstanding federal primacy in *regulating immigration,* mere overlap with immigration does not necessarily displace state actions in areas of state concern. *DeCanas,* 424 U.S.at 354-55 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). With respect to "prevent-or-frustration" preemption, Challengers cannot conflate federal administrative inaction with *congressional* intent. Even if Congress in the INA had not saved state and local enforcement authority, the Executive's non-enforcement could not preempt state and local enforcement. Moreover, because HB87

tracks the federal guidelines, it cannot frustrate congressional purpose in the INA because the Supremacy Clause does not require *identical* standards. It is enough for state law to "*closely* track[] [federal law] in all *material* respects." *Chamber of Commerce of U.S. v. Whiting,* 131 S.Ct. 1968, 1981 (2011) (emphasis added). In areas of dual federal-state concern and *a fortiori* in ones of traditional state and local concern, Challengers' arguments do not rise to the level of preemption.

D. INA Does Not Field Preempt HB87

Given its numerous clauses that save state and local authority over immigration-related enforcement, *see, e.g.,* 8 U.S.C. §§1252c(a), 1357(g)(10), 1373(a)-(c), INA cannot *field preempt* state and local involvement. Challengers would be not merely wrong but "*quite wrong* to view [the] decision [not to regulate] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 65 (2002) (emphasis added). While "an authoritative federal determination that the area is best left *un*regulated … would have as much pre-emptive force as a decision *to* regulate," *id.* at 66 (emphasis in original), *Geier,* 529 U.S. at 881, INA does not do so.

To foreclose state and local regulation, courts require that Congress make an affirmative statement against regulation, not that Congress merely refrain from regulating. For example, *Geier* involved "an affirmative policy judgment that safety would best be promoted if manufacturers installed *alternative* protection systems in their fleets rather than one particular system in every car." *Sprietsma,* 537 U.S. at 67 (interior quotations omitted, emphasis in original); *Rowe v. N.H. Motor Trans. Ass'n,* 128 S.Ct. 989, 993, 996 (2008) (Airline Deregulation Act intended "to leave such decisions, where federally unregulated, to the competitive marketplace" to enable "maximum reliance on competitive market forces"). In place of an ostensibly door-shutting congressional determination, however, INA includes door-opening savings clauses. If INA does not conflict preempt HB87, INA plainly does not field preempt it, either.[5]

III. EQUITABLE FACTORS WEIGH IN GEORGIA'S FAVOR

Amicus Eagle Forum supports Georgia's arguments on balancing the equities between Challengers' alleged injuries and those to Georgia

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[5] "[T]he categories of preemption are not 'rigidly distinct,' [and] 'field pre-emption may be understood as a species of conflict pre-emption.'" *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373 (2000) (*quoting English v. Gen'l Elec. Co.,* 496 U.S. 72, 79, n.5 (1990)).

and her citizens. One additional equitable considerations counsels for denying preliminary and permanent equitable relief here.

Injunctive relief requires irreparable harm and inadequacy of legal remedies. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506-07 (1959). Although the traditional four-part test that Georgia cites undoubtedly applies, Georgia Br. at 30-31, that test omits the prerequisite for inadequate legal remedies,[6] which applies equally to preliminary injunctions: "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies." *Amoco Production Co. v. Village of Gambell, AK,* 480 U.S. 531, 542-43 (1987) (*citing Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313 (1982)).

Of course, a damages remedy suffices for any actual harm, *Lyons,* 461 U.S. at 109, but more significantly an as-applied suit (rather than this hypothetical one) is not only available but also *required. Morales,* 504 U.S. at 382-83 (quoted in Section I.C, *supra*); *cf. Gonzales v. Carhart,* 550 U.S. 124, 168 (2007) ("[a]s-applied challenges are the basic building blocks of constitutional adjudication"). Had Challengers sued

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[6] Circuit precedent from the Fifth Circuit would require proving the inadequacy of legal remedies to establish irreparable injury. *Lewis v. S.S. Baune,* 534 F.2d 1115, 1124 (5th Cir. 1976).

in state court, they would have had judges empowered to narrow HB87 via statutory interpretation, *Fielden,* 280 Ga. at 448, 629 S.E.2d at 257, to the extent that they stated a valid claim. Because Challengers have demonstrated neither irreparable harm nor inadequate legal remedies, they are not entitled to equitable relief.

CONCLUSION

Although it reviews preliminary injunctions deferentially on factual and equitable issues, this Court reviews legal issues *de novo.* Georgia Br. at 14. Moreover, even preliminary injunctions require jurisdiction, *Lyons,* 461 U.S. at 103, which appellate courts review not only *de novo* but also *sua sponte. Steel Co.,* 523 U.S. at 94. Finally, the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici. Turner v. Rogers,* 131 S.Ct. 2507, 2519-20 (2011); *see also id.* at 2521 (Thomas, J., dissenting). Even where Georgia has not yet made arguments that supporting *amici* make, Georgia may do so in the subsequent merits proceedings and at any time, even on appeal, for

jurisdictional and immunity issues.

Because Challengers lack standing and federal courts lack jurisdiction over the sovereign State of Georgia and because Challengers cannot prevail on the merits, this Court *sua sponte* should vacate the preliminary injunction for this litigation's pendency and then reverse and remand with instructions to dismiss this action.

Dated: August 22, 2011

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CERTIFICATE OF COMPLIANCE

Georgia Latino Alliance for Human Rights v. Deal, No.: 11-13044-GG

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 6,944 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Century Schoolbook 14-point font.

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I do hereby certify that I have this date served the foregoing *Amicus Curiae* Brief of Eagle Forum Education & Legal Defense Fund prior to the filing of same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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I further certify that I have this date sent via electronic mail a courtesy copy of the foregoing brief in portable document format to each of the foregoing counsel who filed an appearance in this Court. Finally, I further certify that I have this date sent an original and six copies of the foregoing brief to the Clerk of the Court via *Federal Express,* next-day delivery, for filing in this matter.

Executed at McLean, Virginia, this 22nd day of August, 2011.

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