

1 For these reasons, *amicus curiae* respectfully requests that the Court grant leave to file this brief.

2 June 17, 2011.

3 Respectfully Submitted,

4 G. JASON THOMPSON

5 NATHANIEL J. OLESON
6 UNITED STATES JUSTICE FOUNDATION

7 Counsel for Amicus
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BRIEF OF AMICUS CURIAE

1 **IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS¹**

2
3 **LEGAL DISCUSSION**

4 **PREEMPTION DOCTRINE**

5 Plaintiffs initially filed suit against Defendants on the grounds that any state legislation passed
6 concerning illegal immigration is preempted by Federal law and would likely cause unnecessary and long
7 detentions of those illegal immigrants apprehended by local law enforcement. If the duty to enforce any
8 law even remotely connected to immigration is exclusively the jurisdiction of the Federal government, as
9 Plaintiffs suggest, then Georgia should be permitted to bring an action to compel the appropriate Federal
10 agencies to enforce the immigration laws. However, as the United States Supreme Court discussed in the
11 case of *New Jersey v. United States*, "no precedent suggests that inaction by Congress or the Executive
12 Branch constitutes the kind of coercion that violates the Tenth Amendment. As defendants succinctly
13 state in their brief, 'the Tenth Amendment provides a shield against the federal exercise of powers
14 reserved to the states, not a sword to compel federal action.' " (*New Jersey v. United States*, 91 F.3d 463
15 (1996)). Plaintiffs point out that the Georgia legislature disagreed with the immigration policy of the
16 Obama administration and passed the underlying immigration law because of this disagreement.
17 Plaintiffs did not argue that the underlying Georgia law was contrary to Federal immigration law, only
18 contrary to the current policy of enforcement. If the current policy of the Federal immigration
19 enforcement agencies is to disregard many established Federal immigration laws, why should Georgia be
20 prevented from taking steps to enforce similar laws given that the Federal government refuses to do so?
21 Plaintiffs are unable to demonstrate why disagreement with a current Federal policy precludes a State
22 from acting contrary to that policy in areas where the State has a right and the authority to legislate.

23
24
25 ¹ 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.

1 The general rule with regard to the preemption doctrine is that no act of Congress is presumed to
2 preempt State law unless Congress has made such an intention "clear and manifest:"

3 "[B]ecause the States are independent sovereigns in our federal system, we have long presumed
4 that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*,
5 518 U.S., at 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240. In areas of traditional state regulation, we
6 assume that a federal statute has not supplanted state law unless Congress has made such an
7 intention "clear and manifest." *New York State Conference of Blue Cross & Blue Shield Plans v.*
8 *Travelers Ins. Co.*, 514 U.S. 645, 655, 131 L. Ed. 2d 695, 115 S. Ct. 1671 (1995) (quoting *Rice v.*
9 *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)); see also
10 *Medtronic, Inc. v. Lohr*, 518 U.S., at 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240. "
11 *Bates v. Dow Agrosiences L.L.C.*, 544 U.S. 431.

12 Plaintiffs' have alleged, with regard to the enforcement of immigration laws, that Congress has
13 intended for Federal immigration laws to preempt State laws and that any attempt by Georgia, or any
14 other State, to find a means to deal with the growing and continuing problem of illegal immigration
15 would be interference with the Federal government's plan of enforcement. However, the Federal
16 agencies responsible for enforcement of Federal immigration laws have neglected to so enforce the law in
17 Georgia, which has caused the State of Georgia to attempt to control the after effects of this non-
18 enforcement of immigration laws at great expense to the State and its taxpayers.

19 SOVERIGN STATE POLICE POWERS

20 No State can compel the Federal government to act where the Federal government, through law
21 or current policy of a particular President, has not acted in a particular manner or to deal with a particular
22 problem. (*New Jersey v. United States*, 91 F.3d 463 (1996)). In a similar manner, the Federal
23 government cannot compel a State to follow the dictates or instructions of the Federal government or to
24 involuntarily act as an agent of the Federal government. (*Printz v. United States*, 521 U.S. 898, 912
25 (1996)). However, when the Federal government has failed to act, or has refused to act in any particular

1 area, the Federal government cannot claim to have preempted the field against State action in that
2 particular area unless Congress expressly intended to do so:

3 “There is no federal pre-emption in vacuo, without a constitutional text or a federal statute to
4 assert it. Where a comprehensive federal scheme intentionally leaves a portion of the regulated
5 field without controls, then the pre-emptive inference can be drawn -- not from federal inaction
6 alone, but from inaction joined with action.”

7 *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988).

8 Plaintiffs have alleged that any action that Georgia takes to deal with problems resulting from illegal
9 immigrant activities in the State would be an interference with the immigration policy of the Federal
10 government. Since this Federal policy seems to be to ignore the problem of illegal immigration, rather
11 than taking steps to enforce existing law, then the argument of the Plaintiffs should be read as where
12 there is inaction on the part of the Federal government the States may not act. Laws are meaningless if
13 the government agencies responsible for the enforcement of those laws refuse to do so. The Tenth
14 Amendment states, “The powers not delegated to the United States by the Constitution, nor prohibited by
15 it to the States, are reserved to the States respectively, or to the people.” (United States Constitution,
16 Tenth Amendment). As discussed above, unless Congress makes a “clear and manifest” intention to fully
17 regulate an area of law, States are not prevented from doing so. Contrary to Plaintiffs unsupported
18 allegation that there is long-settled law giving the Federal government an exclusive role in regulating
19 immigration, recent Supreme Court decisions would suggest that the contrary is true (*see Chamber of*
20 *Commerce v. Whiting*, 09-115 (2011)), and, since the Federal government seems intent on pursuing a
21 policy of non-enforcement of immigration laws, Georgia is left with no option but to address the problem
22 directly. The immigration status law passed by the State of Georgia, which is the basis of the underlying
23 complaint, should be found by the Court to be a valid State action under the Tenth Amendment, because
24 Congress has not prohibited the State from so acting and because the State of Georgia has a compelling
25 interest in protecting the health, safety, and welfare of all those who are lawfully within its borders.

1 **DIFFICULTY IN MAKING DETERMINATIONS OF LEGAL STATUS BASED ON FEDERAL**
2 **LAW DOES NOT PREVENT STATES FROM PASSING LAWS REGARDING ILLEGAL**
3 **IMMIGRATION**

4 The plaintiffs frequently refer to the difficulty of making determinations of immigration status,
5 extending to the Federal agencies that are supposed to be experts making such determinations. The mere
6 fact that Congress has written laws that are immensely complicated, even for those whose responsibility it
7 is to enforce said laws, should not require that Georgia refrain from attempting to do anything about the
8 problem of illegal immigration in the State. Likewise, it is not the problem of the State of Georgia that
9 the Federal immigration database requires an average of 80 minutes to conduct a search. If the Federal
10 government needs to upgrade their databases, it should do so, but whether the Federal government does so
11 should not prevent Georgia from attempting to take control over the problems that illegal immigration
12 cause to the State of Georgia, and its citizens, as that is something that the police powers of the State
13 allow the State to deal with.

14 In addition, Plaintiffs, allege throughout their complaint, that ordinary law enforcement officials
15 in Georgia lack the training and expertise to make determinations with regard to a person's immigration
16 status, specifically pointing to the fact that the Federal government only authorizes certain approved law
17 enforcement agencies in Georgia to work with the Federal government in this regard. However, the
18 voluntary partnership that some Georgia counties have entered into with the Federal government does not
19 preclude Georgia from independently taking action to address problems that exist within the State's
20 borders.

21 Finally, Plaintiffs cited several cases where injunctions were issued to stay the immigration laws
22 of several States pending resolution of the cases. However, Plaintiffs failed to cite the recent Supreme
23 Court of the United States decision in *Chamber of Commerce v. Whiting*, 09-115 (2011), where the
24 Supreme Court upheld an Arizona law that punished businesses that hire illegal immigrants. At the very
25 least, this case shows that there is no settled case law that exclusively reserves to the Federal government

1 any law relating to immigration, as alleged by Plaintiffs. *Whiting*, instead, demonstrates that the U. S.
2 Supreme Court recognizes that the various States of the United States have the right to legislate issues
3 related to illegal immigration within their state borders without running afoul of Federal law. All states,
4 Georgia included, have the right, as recognized by the Tenth Amendment, to exercise its police powers
5 over the health, safety and welfare of the citizens of the State, unless Congress has expressly intended to
6 preempt such State laws. Apart from Plaintiffs' mere allegation of this "intent" of Congress, the State of
7 Georgia has the right, and the authority, to defend its citizens from unlawful activity, even in the arena of
8 illegal immigration.

9 **CONCLUSION**

10 For these reasons, *Amicus* respectfully requests that the Court grant leave to file this brief in
11 support of Defendants' motion to dismiss.

12
13 Respectfully Submitted,

14 
G. Jason Thompson

15 G. Jason Thompson (GA SBN 709789)
16 THE THOMPSON LAW FIRM, PC
200 East Crogan Street
Suite 101
17 Lawrenceville, GA 30046
Tel: (678) 442-6464
18 email: thompsonlawfirm@hotmail.com

19 Attorney for *Amicus* Rightmarch.com, Joshua
20 Clark, and Brett Harrell

NATHANIEL J. OLESON* (CA SBN 276695)
UNITED STATES JUSTICE FOUNDATION
932 "D" Street, Suite 3
Ramona, California 92065
Tel: (760) 788-6624
Fax: (760) 788-6414
email: usjf@usjf.net
email: njoleson@gmail.com

Attorneys for *Amicus* Rightmarch.com, Joshua
Clark, and Brett Harrell

21 *Application for admission pro hac vice forthcoming
22
23
24
25