



Court Action on Immigration

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In 2010, the State of Arizona enacted Senate Bill (SB) 1070, the Support Our Law Enforcement and Safe Neighborhoods Act, in an effort to curtail undocumented immigrants' presence in the state, and, more generally, "[t]o address pressing issues related to the large number of aliens within its borders who do not have a lawful right to be in this country."¹ A number of other state legislatures followed suit, including Georgia, which enacted its own legislation with the same aims as Arizona SB 1070. While Georgia's House Bill (HB) 87 and Arizona's SB 1070 are not identical by any means, they contain similar provisions, some of which were ruled on by the Supreme Court in Arizona v. United States, and, for Georgia, by the 11th Circuit in Georgia Latino Alliance for Human Rights v. Georgia.² The Supreme Court's decision in Arizona solidified its take on proactive state actions, and Latino instructs Georgians on where two provisions of HB 87 stand. Both of the statutes are aimed at curbing illegal immigration by being proactive in an area where, as Georgia and Arizona believe, federal government enforcement has not been sufficient. Some examples of federal policy regarding immigrant deportation are included to illustrate recent federal action in this area.

Arizona v. United States – What the Court Ruled

On June 25, 2012, the United States Supreme Court handed down its ruling in Arizona v. United States, which determined the constitutionality of four provisions of Arizona SB 1070. Of the sections at issue, the Court struck down three of the law's provisions and upheld one provision.

UPHELD: Determining Immigration Status during Lawful Stop

Section 2(B) of SB 1070 requires police officers to check the immigration status of persons whom they detain before releasing them. It also allows police to stop and detain anyone suspected of being an undocumented immigrant.

This section was upheld by the Court, but its holding does subject the section to later challenges in lower courts. The Court found that state courts should have an opportunity to interpret and construe this provision, and there must be some showing that the section's enforcement actually conflicts with federal immigration law and its objectives.

The requirement of immigration status checks does not interfere with the federal immigration scheme. The Court stated that consultation between federal and state officials is an important

¹ Arizona v. United States, 132 S. Ct. 2492, 2494 (2012).

² Georgia Latino Alliance for Human Rights v. Deal, No. 11-13044 (11th Cir. Aug. 20, 2012).

feature of the immigration system, and Congress has encouraged the sharing of information about possible immigration violations. Therefore, the federal immigration enforcement scheme leaves room for a policy requiring state officials to contact U.S. Immigration and Customs Enforcement (ICE) as a routine matter.

This section of the statute also has three safeguards: a detainee is presumed to not be an illegal alien if he or she provides a valid Arizona driver's license or similar identification; officers may not consider race, color, or national origin except as permitted by the United States and Arizona Constitution; and the section requires implementation in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.

The Court did note that requiring state officers to delay the release of detainees for the sole reason of verifying their immigration status would raise constitutional concerns. However, the section can be read to avoid these constitutional concerns, and it is up to state courts to definitively interpret that provision. If the provision only requires officers to conduct a status check during an authorized, lawful detention or after the detainee is released, Section 2(B) will likely be held constitutional.

STRUCK DOWN: Criminalizing the Failure to Apply for or Carry a Federally Issued Alien Registration Paper

Section 3 of SB 1070 makes it a state crime for someone to be in the United States without proper authorization. This provision was struck down because it operates in an area solely controlled by federal policy – the field of alien registration. Congress left no room for states to regulate in this field, or even to enhance federal prohibitions or enact complementary state regulation, so this provision was preempted.

STRUCK DOWN: Making it Unlawful for Unauthorized Aliens to Solicit, Apply for, or Perform Work

Section 5(C) of SB 1070 makes it a state crime for undocumented immigrants to apply for a job or work in Arizona. This provision was struck down because its criminal penalty stands as an obstacle to the federal regulatory system. The text, structure, and history of the Immigration Reform and Control Act of 1986 (IRCA) led the Court to determine that Congress decided it would be inappropriate to impose criminal penalties on unauthorized employees. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose, so this provision is preempted.

STRUCK DOWN: Warrantless Arrest Where There is Probable Cause to Believe the Person has Committed a Deportable Offense

Section 6 of SB 1070 authorizes state law enforcement officials to arrest an individual, without a warrant, if the officer has probable cause to believe that the individual has committed a deportable offense. Under the federal system, an illegal immigrant can be arrested only if there is a warrant for his arrest or if he is likely to escape before police are able to obtain a warrant. This portion of the statute attempted to provide state officers with greater arrest authority than federal law provides even to federal actors. Instead, federal law specifies limited circumstances in which state officers may perform an immigration officer's duties. Because this provision gave state law enforcement officials more power to make arrests than under the federal system, it was struck down.

Georgia Latino Alliance for Human Rights v. Deal – What the Court Ruled

In July 2011, U.S. District Court Judge Thomas Thrash found two parts of HB 87 to be preempted by federal law and enjoined them: Section 7, which prohibits the harboring, inducing, and transportation of undocumented aliens; and Section 8, which allows law enforcement officers to seek to verify a person's immigration status during any investigation of a criminal suspect if the officer has probable cause to believe that the person has committed a criminal offense and the suspect is unable to provide valid identification. On August 20, 2012, the 11th Circuit considered Sections 7 and 8.

Section 8: Determining Immigration Status during Lawful Stop

Section 8 authorizes law enforcement officers to investigate the immigration status of a criminal suspect and to detain him or her if he or she does not have a lawful status in the United States, so long as probable cause exists that the individual has committed a crime. Unlike Arizona SB 1070, section 8 does not require law enforcement officers to conduct the immigration investigation, but only authorizes such an inquiry. Section 8 also contains the same three safeguards, similar to Arizona's statute – a presumption that certain documents are sufficient to pass identification muster; a prohibition against the use of race, color, or national origin in implementing the provision; and the required implementation consistent with federal laws governing immigration and civil rights. In response to an argument that this section will lead to racial profiling, the court found it unlikely that the State would openly disregard its own law by violating one of the safeguards of the statute against profiling during implementation. Thus, the 11th Circuit overturned the district court's preliminary injunction.

Section 7: Transporting, Harboring, and Inducing Illegal Aliens

Section 7 of HB 87 creates three state criminal violations: transporting or moving an illegal alien,³ concealing or harboring an illegal alien,⁴ and inducing an illegal alien to enter the state of Georgia.⁵ To violate this statute, the accused must also be engaged in some other criminal activity, and he or she must know that the person has an illegal status. The 11th Circuit upheld the District Court's preliminary injunction of this section for a number of reasons.

The Court found that this section is preempted by the Immigration and Nationality Act (INA), which "provides a comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens."⁶ Congress used language in the INA which simply permits state officials to arrest for violations of the statute, subject to federal prosecution; it did not authorize states themselves to prosecute for these crimes. Because the INA does not provide otherwise, "the role of the states is limited to arrest for violations of federal law."⁷ Even within the larger context of the federal immigration statutes, Congress "has clearly expressed more than a 'peripheral concern' with the entry, movement, and residence of aliens within the United States . . . and the breadth of these laws illustrates an overwhelmingly dominant federal interest in the field."⁸

Section 7 creates a state law penalty for violating federal law, but this is one of the reasons for the section's preemption. Even if complementary state regulation has the purpose of concurrent enforcement alongside federal enforcement, it is preempted, because, as in this case, Congress has already provided a comprehensive standard to follow with regard to the transport and

³ O.C.G.A. § 16-11-200(b).

⁴ O.C.G.A. § 16-11-201(b).

⁵ O.C.G.A. § 16-11-202(b).

⁶ *Georgia Latino Alliance for Human Rights v. Deal*, No. 11-13044, slip op. at 19 (11th Cir. Aug. 20, 2012).

⁷ *Id.* at 21.

⁸ *Id.*

movement of aliens. Additionally, Section 7's enticement provision is a new crime that is not found in federal law, which creates an additional regulation that conflicts with federal law.

For uniformity purposes, states' ad hoc enforcement of different immigration laws is not favorable or workable. Fifty separate attempts to regulate in this area of such a comprehensive federal concern would create a patchwork of regulations in an area of law that Congress intended to be cohesive. For these reasons, the 11th Circuit upheld the preliminary injunction of Section 7, meaning it will not go into effect. However, Georgia Attorney General Sam Olens petitioned the 11th Circuit to revisit its decision regarding Section 7 on September 12, 2012. Until the court acts on this rehearing request from the State, both Sections 7 and 8 will remain on hold.⁹

Current Federal Policy Moving Forward

While states have been working to crack down on illegal immigration, the federal government is implementing immigration policies reflecting its priorities regarding deportation.

In the summer of 2011, the Obama Administration announced significant changes to deportation practices, placing deportation of dangerous felons ahead of low-risk individuals.¹⁰ This policy reflects "an effort to better focus the immigration enforcement system on the removal of criminal aliens, the promotion of public safety and border security, and the integrity of the immigration system."¹¹ The most important positive factors in determining whether resources should be diverted to different individuals include:

- Veterans and members of the U.S. armed forces;
- Long-time lawful permanent residents;
- Minors and elderly individuals;
- Individuals present in the United States since childhood;
- Pregnant or nursing women;
- Victims of domestic violence, trafficking, or other serious crimes;
- Individuals who suffer from a serious mental or physical disability; and
- Individuals with serious health conditions.

The following groups will have more resources allocated toward their deportation:

- Individuals who pose a clear risk to national security;
- Serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- Known gang members or other individuals who pose a clear danger to public safety; and
- Individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

On June 15, 2012, the Obama Administration announced that certain young people who were brought to the United States as young children, do not present a risk to national security or public safety, and meet other criteria will be considered for relief from removal from the country or from entering into removal proceedings.¹² This policy reflects an enforcement of immigration laws with individual case considerations and discretion. Those individuals who demonstrate

⁹ <http://www.ajc.com/news/news/local-govt-politics/georgia-asks-appeals-court-for-rehearing-on-immigr/nR89j/>

¹⁰ <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>

¹¹ <http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf>

¹² <http://www.ice.gov/news/releases/1206/120615washingtondc.htm>

that they meet the following criteria will be eligible to receive deferred action for a two-year period, subject to renewal, and will be eligible to apply for work authorization:

- Came to the United States under the age of sixteen;
- Have continuously resided in the United States since June 15, 2007;
- Are currently in school, have graduated from high school, have obtained a general education development certificate, or are honorably discharged veterans of the Coast Guard or Armed Forces of the United States;
- Have not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and
- Are not above the age of 30.

As of September 11, 2012, more than 72,000 applications for this program had been received.¹³

Georgia's Immigration Law at Work

Of the number of sections in HB 87 with the purpose of curtailing illegal immigration in Georgia, only one section was found to be preempted, and it is currently being appealed by the state. Some of the valid sections include:

- Immigration compliance in contract for public works: all bids for work with a public employer must include a signed, notarized affidavit that the contractor has registered with and is using E-Verify.
- Secure and verifiable documents: requires all agencies and political subdivisions to accept only secure and verifiable documents for official purposes.
- Information on immigration status: requires a foreign national's immigration status to be verified if he or she is confined and being held for the alleged commission of a felony.
- Verification of eligibility for public benefits: requires applicants for public benefits to present a secure and verifiable document.
- E-Verify requirements: private employers with 10 or more employees are required to use E-Verify, the federal work authorization program.
- False identification offense: creates the offense of aggravated identity fraud, which is the willful and fraudulent use of counterfeit or fictitious identifying information for the purpose of gaining employment.

¹³ <http://www.nytimes.com/2012/09/12/us/program-offering-immigrants-relieve-is-off-to-quick-start.html?src=recg>