

## Impact of *Arizona v. United States* and *Georgia Latino Alliance for Human Rights v. Governor of Georgia* on Georgia's Immigration Law<sup>1</sup>

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### I. Introduction

#### A. Summary

In *Arizona vs. United States*<sup>2</sup> Supreme Court held that the following laws were as unconstitutionally impinging upon federal preemption. The Supreme Court ruled that the following provisions of the law were unconstitutional and unenforceable:

- Immigrant Registration Laws: State laws making “willful failure to complete or carry an alien registration document...”<sup>3</sup> a state misdemeanor crime.
- Laws Prohibiting Undocumented Immigrants From Applying for, soliciting or Performing Work.<sup>4</sup>
- Laws Promoting Warrantless Arrests of Immigrants because such laws “attempt to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers.”<sup>5</sup>

Following the Supreme Court ruling in *Arizona vs. United States*, the Federal Court of Appeals for the Eleventh Circuit in *Georgia Latino Alliance for Human Rights v. Governor of Georgia*<sup>6</sup> upheld an injunction halting implementation of the following state law provisions as likely to be unconstitutional based on federal preemption.

- State law making transporting or moving undocumented immigrants a crime.
- Creating a criminal offense for inducing an undocumented immigrant to enter the state.
- State law criminalizing harboring or concealing undocumented immigrants.

#### B. Background

In July 2010, the Arizona legislature enacted the “Support Our Law Enforcement and Safe Neighborhoods Act,”<sup>7</sup> which has been characterized as the “nation’s toughest bill on illegal

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<sup>2</sup> 132 S.Ct. 2492 (2012).

<sup>3</sup> *Id* at 2501 (quoting ARIZ. REV. STAT. ANN. § 11-1509(A) (2011)).

<sup>4</sup> *Id* at 2503.

<sup>5</sup> *Id* at 2506.

<sup>6</sup> 691 F.3d 1250 (11th Cir. 2012).

<sup>7</sup> Arizona Senate Bill 1070, Support Our Law Enforcement and Safe Neighborhoods Act (2010) (hereinafter, *SB 1070*).

immigration.”<sup>8</sup> The legislation, which was introduced as Arizona Senate Bill 1070, and is commonly referred to as “SB 1070,” received national and international attention and generated considerable controversy by critics who argued that its provisions promote racial profiling. Consequently, the passage of SB 1070 prompted other states, such as Georgia, to enact similar state immigration laws and has caused other state legislatures to consider the adoption of stricter immigration statutes. In The United States Supreme Court analyzed the constitutionality of the provisions of this law in *Arizona v. United States*<sup>9</sup>, gutting a significant part of the law, which will be discussed below.<sup>10</sup>

In March 2011, the Georgia state legislature passed the Illegal Immigrant Reform and Enforcement Act of 2011, which was introduced as House Bill 87 and is commonly referred to as “HB 87.”<sup>11</sup> HB 87 generally provided that if a law enforcement officer has probable cause to believe the suspect has committed a crime, including any traffic offense, the officer is authorized to verify the suspect’s immigration status if the suspect cannot provide identification.<sup>12</sup> In addition, HB 87 also imposed criminal liability on anyone who knowingly harbors or transports undocumented immigrants while committing another crime or using fake identification to gain employment in Georgia.<sup>13</sup> Prior to the law becoming effective on July 1, 2011, some commentators witnessed the law’s desired impact in Georgia by noting that a number of undocumented persons were making efforts to leave the state before its provisions took effect.<sup>14</sup> On June 2, 2011, the American Civil Liberties Union and other civil rights groups filed a class action suit challenging the constitutionality of HB 87, particularly the provision of HB 87 that permits allows law enforcement officers to check the immigration status of criminal suspects.<sup>15</sup> On June 27, 2011, a federal judge issued a temporary injunction against the section that would require law enforcement officers to check the immigration status of those stopped by police if there is probable cause that the suspect has committed a crime and against the section that makes it illegal to transport or harbor undocumented immigrants. The State of Georgia appealed this decision.<sup>16</sup> The analysis of the Eleventh Circuit’s decision will be discussed below.<sup>17</sup>

## II. *Arizona v. United States*

On June 25, 2012, the United States Supreme Court struck down three provisions of the Arizona immigration law, SB 1070, as unconstitutional.<sup>18</sup> The Court held that Sections 3<sup>19</sup>, 5(C)<sup>20</sup>, and 6<sup>21</sup> were preempted by federal law and could not be enforced by the State of Arizona.

- Section 3 created a new state misdemeanor: the “willful failure to complete or carry an alien registration document...”<sup>22</sup>

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<sup>8</sup> Randal C. Archibald, *Arizona Enacts Stringent Law on Immigration*, N.Y. Times, Apr. 24, 2010, at A1, available at <http://www.nytimes.com/2010/04/24/us/politics/24immig.html?r=2>.

<sup>9</sup> *Supra* note 1.

<sup>10</sup> *Infra* Section II.

<sup>11</sup> Georgia House Bill 87, *Illegal Immigrant Reform and Enforcement Act of 2011* (2011).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See, e.g.*, Jeremy Redmon & Mario Guevara, *Many Immigrants Leaving Georgia Behind*, Atlanta Journal-Constitution, June 8, 2011, available at <http://www.ajc.com/news/dekalb/many-immigrants-leaving-georgia-967054.html>.

<sup>15</sup> *See* Stephen Caesar, *Georgia Immigration Law Taken To Court*, L.A. Times, June 2, 2011, available at <http://articles.latimes.com/2011/jun/02/nation/la-na-georgia-immigration-20110603>.

<sup>16</sup> *See* Kim Severson, *Parts of Georgia Immigration Law Blocked*, New York Times, June 27, 2011, available at <http://www.nytimes.com/2011/06/28/us/28georgia.html>; *See also Georgia Latino Alliance for Human Rights, Supra* note 2.

<sup>17</sup> *Infra* Section III.

<sup>18</sup> *Supra* note 1.

<sup>19</sup> *Arizona*, 132 S.Ct. at 2503.

<sup>20</sup> *Id.* at 2502-03 (reasoning that the federal government has occupied this field by enacting law that requires aliens to carry proof of registration and, therefore, preempts state law by occupying this field. Field preemption prevents states from entering any area reserved for and occupied by the federal government).

<sup>21</sup> *Id.* at 2507.

- In holding that Section 3 was preempted by the federal government’s occupation of the field of immigration, the Court reasoned that “‘with respect to the subject of alien registration, Congress intended to preclude States from ‘complement[ing] the federal law, or enforc[ing] additional or auxiliary regulations.’”<sup>23</sup>
- Section 5(C) created a state misdemeanor that does not exist anywhere in federal law: prohibiting “an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or an independent contractor” in Arizona.<sup>24</sup>
  - The Court held that this section was also preempted because it interfered with the objectives of Congress in enacting the Immigration Reform and Control Act of 1986, which did not call for criminal penalties on aliens who sought or engaged in unauthorized employment.<sup>25</sup>
- Finally, Section 6, which provides that a state officer, “‘without a warrant may arrest a person if the officer has probable cause to believe... [the person] has committed any public offense that makes [him] removable from the United States.’”<sup>26</sup>
  - The Court held that this section was also preempted because it directly contradicted the federal system of immigration enforcement because it “‘attempt[ed] to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers.’”<sup>27</sup>

The Supreme Court upheld one controversial section of SB 1070: Section 2(B), which requires state officers to make a “‘reasonable attempt... to determine the immigration status’ of any person they stop, detain, or arrest on some other legitimate basis if ‘reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.’”<sup>28</sup>

- The Court, in upholding the so-called “show me your papers” provision, considered the fact that there were three limits built into the law:
  - 1. Any person that is detained is presumed not to be alien unlawfully present in the United States if he or she provides law enforcement with a valid Arizona driver’s license;
  - 2. Officers are not permitted to consider race, color, or national origin and
  - 3. The provision has to be implemented in a manner that is consistent with federal law that regulates immigration.<sup>29</sup>
- The Court also considered the mandatory immigration status verification and held that it was valid because it requires state officers to contact Immigration and Customs Enforcement (ICE), which federal law has left room for.
- The other area of concern was the undue delayed detention while a detainee’s immigration status was verified.

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<sup>22</sup> *Id* at 2501 (quoting ARIZ. REV. STAT. ANN. § 11-1509(A) (2011)).

<sup>23</sup> *Id* at 2503 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66-7).

<sup>24</sup> *Id* (quoting ARIZ. REV. STAT. ANN. 13-2928(C) (2011)).

<sup>25</sup> *Id* at 2503 (“Although § 5(C) attempts to achieve one of the same goals as federal law- the deterrence of unlawful employment- it involves a conflict in the method of enforcement.”)

<sup>26</sup> *Id* at 2504 (quoting ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2011)).

<sup>27</sup> *Id.* at 2506.

<sup>28</sup> *Arizona*, 132 S.Ct. at 2507 (quoting Ariz. Rev. Stat. Ann. § 11-1051(B) (2012)).

<sup>29</sup> *Id* at 2507-08.

- This Court reasoned that the section can be interpreted to state that the immigration verification does not have to be completed during the stop or detention if it is not reasonable to do so.<sup>30</sup>
- Regarding the issue of preemption, the Court reasoned that, as the current provision is written, it “*likely* would survive preemption- at least absent some showing that it has other consequences that are adverse to federal law and its objectives.”<sup>31</sup>
  - The Court also stated that there was no need to address whether this provision was preempted.
    - This was due, in large part, to the fact that the provision had not yet gone into effect at the time the case was before the Court and that it would be prudent to wait and see how the state courts would interpret the provision.

The holding regarding Section 2(B) left room for the provision to be challenged at a later date in the state courts.

### III. *Georgia Latino Alliance for Human Rights v. Governor of Georgia*

Georgia, following in Arizona’s footsteps, enacted a similarly restrictive immigration law, called the “Illegal Immigration Reform and Enforcement Act of 2011,” (HB 87). The law was challenged by various civil liberties groups and other nonprofit organizations in the United States District Court for the Northern District of Georgia, which resulted in two sections of the Act to be preliminarily enjoined on the grounds that they were both preempted by the Immigration and Nationality Act (INA). State officers appealed to the United States Court of Appeals for the Eleventh Circuit<sup>32</sup>, which delivered a split decision.

- The first section that was enjoined was Section 7, which codified three separate crimes in relation to interactions with an “illegal alien,” defined by the Act as “a person who is verified by the federal government to be present in the United States in violation of federal immigration law.”<sup>33</sup>
- The first provision created the crime of “transporting or moving an illegal alien” which applies to “[a] person who, while committing another criminal offense, knowingly and intentionally transports or moves an illegal alien in a motor vehicle for the purpose of furthering the illegal presence of the alien in the United States.”<sup>34</sup> Persons providing “privately funded social services” were excepted from this criminal provision.<sup>35</sup>
- The second criminal provision created the offense of “concealing or harboring an illegal alien,” which applied to “[a] person who is acting in violation of another criminal offense and who knowingly conceals, harbors, or shields an illegal alien from detection in any place in [Georgia], including any building or means of transportation, when such person knows that the person being concealed, harbored, or shielded is an illegal alien.”<sup>36</sup>
- Finally, the third criminal provision considered by the Circuit Court was one that created the offense of “inducing an illegal alien to enter into [Georgia],” which applied to “[a] person who is acting in violation of another criminal offense and who knowingly induces,

<sup>30</sup> *Id* at 2509 (citing Reply Brief for Petitioners 12, n. 4).

<sup>31</sup> *Id.* (emphasis added)

<sup>32</sup> *Supra* note 2.

<sup>33</sup> *Georgia* at 1256 (quoting O.C.G.A. § 16-11-200(a)(1), 201 (a)(2), and 202(a)).

<sup>34</sup> *Id* at 1256 (quoting O.C.G.A. § 16-11-200(b)).

<sup>35</sup> *Id* (citing O.G.C.A. § 16-11-200(d)(5)).

<sup>36</sup> *Id* (quoting O.G.C.A. § 16-11-201(b)).

entices, or assists an illegal alien to enter into [Georgia], when such person knows that the person being induced, enticed, or assisted to enter into [Georgia] is an illegal alien.”<sup>37</sup>

- The second section that was enjoined was Section 8, which permitted “Georgia law enforcement officers to investigate the immigration status of an individual if the officer has probable cause to believe the individual has committed another crime and the individual cannot provide one of the pieces of identification listed in the statute.”<sup>38</sup>
  - If the officer verifies that the person is unlawfully present in the United States, the officer may take actions that are authorized by state and federal law, which includes “detaining the person, transporting the person to a detention facility, or notifying the Department of Homeland Security (DHS).”<sup>39</sup> Similar to the Arizona law, this provision prohibited the consideration of race, color, and national origin.
  - Notably, the provision also prohibited the immigration status investigation of persons who witness or report criminal activity, “where the reason for investigation is based on information arising from that contact.”<sup>40</sup>

It should be noted that the Circuit Court analyzed these two sections based on whether there was a substantial likelihood of success on a preemption claim, in order to determine whether the preliminary injunction granted by the District Court was appropriate.

#### **A. Section 7**

The Circuit Court applied the same preemption standard used by the Supreme Court in *Arizona* in order to determine whether Sections 7 and 8 were preempted federal law.

- In analyzing Section 7, the Circuit Court looked to relevant federal law, which, in this case, was the INA. The INA provides a “comprehensive framework to penalize the transportation, concealment, and inducement of unlawfully present aliens.”<sup>41</sup>
- In addition to the various provisions of the INA criminalizing the aforementioned actions,<sup>42</sup> the INA also included specific provision which indicated that “[r]ather than authorizing states to prosecute for these crimes, Congress chose to allow state officials to arrest for § 1324 crimes, subject to federal prosecution in federal court.”<sup>43</sup> The Circuit Court inferred, from the limiting language in the INA, that Congress intended to limit the role of states to arrests for violations of federal law.

The Circuit Court went on to draw an analogy to the Supreme Court’s reason in *Arizona* regarding Section 3’s state penalty for a federal crime (failure to complete and carry alien registration).

- The Circuit Court agreed with the reasoning that states are preempted when they attempt to enter a field that has been occupied by the federal government, particularly when the federal government has enacted comprehensive federal law regulating that field.
- Here, the Circuit Court reasoned, the INA “comprehensively addresses criminal penalties for these actions undertaken within the borders of the United States, and a state’s attempt

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<sup>37</sup> *Id* (quoting O.G.C.A. § 16-11-202(b)).

<sup>38</sup> *Id* (citing O.G.C.A. § 17-5-100(b)).

<sup>39</sup> *Id* (citing O.G.C.A. § 17-5-100(e)).

<sup>40</sup> *Id* (citing O.G.C.A. § 17-5-100(f)).

<sup>41</sup> *Id* at 1263.

<sup>42</sup> 8 U.S.C. § 1324(a)(1)(A)(ii)-(iv); § 1324(a)(1)(A)(v); § 1324(c).

<sup>43</sup> *Georgia* at 1264 (citing 8 U.S.C. § 1324(c) and § 1329).

to intrude into this area is prohibited because Congress has adopted a calibrated framework within the INA to address this issue.”<sup>44</sup>

The Circuit Court went on to reason that Section 7 was preempted because it acted as an “obstacle to the execution of the federal statutory scheme and challenges federal supremacy in the realm of immigration.”<sup>45</sup>

- The Circuit Court also explained that enforcement of Section 7 by state law enforcement and state prosecutors threatened the uniform application of the INA because the enactment of a law parallel to the INA takes control of enforcing the INA away from the federal government.<sup>46</sup>
- Further, the Circuit Court reasoned that the inconsistencies between Section 7 and the INA create a conflict that calls for the state law to be preempted by the federal law.
  - For instance, the Circuit Court pointed out that Section 7 created a crime that does not exist in the federal scheme: federal law prohibits a person from inducing or enticing a person to “come to, enter, or reside *in the United States*”<sup>47</sup> where Section 7 makes it a crime to induce or encourage unlawfully present persons to cross state lines, which is not a federal crime.
  - The Circuit also stated that the “complementary” provision of harboring and transporting aliens that are unlawfully present in the United States as impermissible because it conflicted with Congress’ goal when it established a comprehensive framework that regulates the movements of aliens in the United States.<sup>48</sup>

This preemption analysis led to the Circuit Court’s holding that Plaintiffs met their burden to show a likelihood of success on a preemption claim to invalidate Section 7.

## **B. Section 8**

The second section that the Circuit Court considered was Section 8, which permitted immigration status investigations to be conducted by state law enforcement officers, where there is probable cause that the individual has committed a crime and cannot produce adequate identification.

- Again, the Circuit Court looked to the Supreme Court’s analysis of a similar provision in *Arizona* (section 2(B)). The Circuit Court agreed with the holding of the Supreme Court that, at this stage of litigation, a preemption analysis is inappropriate because it has not yet been enforced and also rejected a pre-enforcement challenge.
- Similar in nature to Section 2(B) of the *Arizona* law, Section 8 included consultation between federal and state officials to verify immigration status.
  - The Circuit Court agreed with the Supreme Court’s analysis and held that this does not infringe upon the federal government’s dominance in this field because “Congress has set up a system to provide assistance to state officers and has mandated that ICE response to state inquiries concerning the immigration status of individuals,” especially when immigration violations are involved.<sup>49</sup>

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<sup>44</sup> *Georgia* at 1264 (citing *Arizona*, 132 S.Ct. at 2502-03).

<sup>45</sup> *Id* at 1265.

<sup>46</sup> *Id* at 1266.

<sup>47</sup> *Id* (quoting 8 U.S.C. § 1324(a)(1)(A)(iv) (emphasis in original)).

<sup>48</sup> *Id* at 1266.

<sup>49</sup> *Georgia* at 1267 (citing *Arizona* 132 S.Ct. at 2508).

- In rejecting the pre-enforcement challenge the Circuit Court noted that Section 8, unlike Section 2(B), did not *require* an immigration status investigation; it only *authorized* such an investigation. This, in addition to the “three built-in limitations,”<sup>50</sup> would not make it likely that Plaintiffs would succeed on a preemption claim regarding Section 8 at this stage.

Therefore, the Circuit Court came to the same conclusion as the Supreme Court: the provision is not subject to a valid pre-enforcement challenge and, after it is enforced, state courts can determine the preemption claim.

#### **IV. Which Provisions are Still in Place?**

As a result of the Eleventh Circuit’s decision, Section 7 remains enjoined, whereas Section 8 did not survive the pre-enforcement challenge. The preliminary injunction on Section 8 was reversed and the case was remanded back to the District Court for further proceedings. Again, the Circuit Court only looked to the two sections that were enjoined by the District Court and not the Act in its entirety. What this means is that those provisions are enforceable until they are challenged in a state court and the court rules otherwise.

The Supreme Court and the Eleventh Circuit have provided a framework for analyzing state immigration laws in terms of preemption, but refused to determine the constitutionality of provisions that have not yet taken effect. It remains to be seen what the federal courts will do with these provisions once they are enforced and, undoubtedly, challenged.

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<sup>50</sup> *Supra* note 25.