NO. 11-13044-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGIA LATINO ALLIANCE FOR HUMAN RIGHTS, et al.,
Plaintiffs/Appellees,

v.

NATHAN DEAL, Governor of the State of Georgia, et al.,
Defendants/Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
1:11-CV-1804-TWT

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The Supreme Court's June 25, 2012 decision in *Arizona v. United States*, No. 11-182 (slip opinion available at www.supremecourt.gov/opinions/11pdf/11-182b5e1.pdf) directly impacts both currently-enjoined sections of Georgia HB 87. *Arizona* strengthens Plaintiffs' claims against HB 87 § 7 in multiple ways. Similarly, the Court's analysis of Arizona's warrantless arrest and status-check provisions (SB 1070 §§ 6 and 2(B)) sets clear limits on state authority that support Plaintiffs' claims against HB 87 § 8. *Arizona* thus confirms that the existing preliminary injunction against implementation of §§ 7 and 8 should be affirmed, although the Court may now wish to certify questions relating to § 8's interpretation to the Georgia Supreme Court in light of the *Arizona* decision.

I. Section 7

In *Arizona*, the Supreme Court struck down both state immigration crimes at issue: SB 1070 § 3, which made it a state crime to violate the criminal provisions of the federal alien registration law, and § 5(C), which made it a state crime to work (or seek work) without federal work authorization. Slip op. 1-2. HB 87 § 7 would similarly create new state crimes based on alleged violations of federal immigration law—specifically 8 U.S.C. § 1324, the federal harboring statute. *Arizona* confirms that, like the state crimes in SB 1070, HB 87 § 7 is preempted:

(1) In *Arizona*, the Supreme Court reaffirmed that state immigration laws can be field-preempted, and struck down SB 1070 § 3 because federal law occupies the

alien registration field. Slip op. 10-11. Similarly, 8 U.S.C. § 1324 occupies the alien harboring field, which is an integral part of Congress's comprehensive immigration law. Red Br. 37-39; *GLAHR v. Deal*, 793 F. Supp. 2d 1317, 1336 (N.D. Ga. 2011) ("HB87 imposes additional criminal laws on top of a comprehensive federal scheme"); *United States v. South Carolina*, 2011 WL 6973241, at *13 (D.S.C. Dec. 22, 2011) (8 U.S.C. § 1324 is part of federal scheme "so pervasive that it left no room in this area for the state to supplement it.").

(2) The Court explained that a state law allowing states to prosecute and punish alleged immigration violations fundamentally conflicts with Congress's reservation of "broad discretion" over immigration enforcement to federal officials. Slip op. 11 (SB 1070 § 3 "conflict[s]" with federal law by giving Arizona "the power to bring criminal charges against individuals for violating a federal law even . . . where . . . prosecution would frustrate federal policies"); *see also id.* 17-18. Georgia's own statements confirm that HB 87 § 7 conflicts with federal discretion in the same way. *See* Red Br. 29-30; *GLAHR*, 793 F. Supp. 2d at 1335.

(3) *Arizona* underscores that even a small inconsistency between federal and state laws relating to immigration justifies preemption. Slip op. 11 (SB 1070 § 3 conflicts because it creates "an inconsistency between [state] and federal law with respect to penalties" by ruling out probation and pardon). HB 87 § 7 conflicts even more strongly than the Arizona criminal provisions: as well as potentially imposing

different penalties, it prohibits a different, broader range of *conduct* than the federal harboring law. Red Br. 28-29; *GLAHR*, 793 F. Supp. 2d at 1334-35.

(4) The Court recognized that federal law authorizes state involvement in immigration enforcement only in specific, limited circumstances, including through 8 U.S.C. § 1324(c), which provides "[a]uthority to *arrest*" for violations of the federal harboring statute. Slip op. 17 (emphasis added). The Court made clear that states may not exceed those specific authorizations. *Id.* 19. In § 7, Georgia goes well beyond what Congress authorized with respect to harboring—arrest for the *federal* crime—by creating its own state-law criminal scheme. Red Br. 30.

(5) The Court confirmed that state laws of this type implicate foreign relations, further supporting preemption. Slip op. 3-5, 18 ("Decisions of this nature touch on foreign relations and must be made with one voice."); *see* Red Br. 40; Br. *Amicus Curiae* of the United Mexican States; *GLAHR*, 793 F. Supp. 2d at 1334.

(6) Finally, the Court flatly rejected the argument that a "provision [that] has the same aim as federal law and adopts its substantive standards" must survive preemption, calling it "unpersuasive on its own terms." Slip op. 10-11; *accord id.* 15 ("Although § 5(C) attempts to achieve one of the same goals as federal law . . . it involves a conflict in the method of enforcement."). That "mirroring" argument is the heart of Georgia's appeal.

II. Section 8

In *Arizona*, the Supreme Court struck down SB 1070 § 6, which authorized the arrest of certain undocumented immigrants by state and local police, but declined to enjoin § 2(B), which mandates status checks in certain circumstances. The controlling legal principle is the same: "Detaining individuals solely to verify their immigration status would raise constitutional concerns. . . . And it would disrupt the federal framework to put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision." Slip op. 22; *accord id.* 15-19. Arizona's Section 2(B) survives, for now, only because the *Arizona* record left § 2(B)'s effect unclear. *Id.* 23-24.

The statute and record before *this* Court establish a likelihood that under HB 87 § 8, police will extend detentions solely for immigration purposes, for two main reasons. First, the statute authorizes status determinations, but does not limit their duration, and the State appears to acknowledge that the process of determining status itself can delay release. *See, e.g.*, Blue Br. 58 (describing Plaintiffs' interest as that of "individuals who commit criminal acts and might be *detained to determine status*" (emphasis added)); *accord GLAHR*, 793 F. Supp. 2d at 1326 ("Section 8 will convert many routine encounters with law enforcement into lengthy and intrusive immigration status investigations.").

Second, unlike SB 1070 § 2(B) but like the invalidated § 6, HB 87 § 8(e) explicitly authorizes arrests on immigration grounds. It instructs officers that if

they "receive[] verification that [a] suspect is an illegal alien," they may "take any action authorized by state and federal law, *including, but not limited to, detaining such suspected illegal alien* . . ." O.C.G.A. § 17-5-100(e) (emphasis added); *cf.* slip op. 19 (state officers generally "may not make warrantless arrests of aliens based on possible removability"). While the State claims that § 8(e) "provides the officer with no additional authority" to detain individuals, Gray Br. 16, that contradicts the statute's plain language. *See GLAHR*, 793 F. Supp. 2d at 1331 ("Section 8 . . . authorizes local law enforcement officers to investigate a suspect's illegal immigration status and, if the officer determines the suspect has violated federal immigration law, detain and arrest the suspect without a warrant.") It also renders the section surplusage.[1]

Thus, this Court can and should affirm the preliminary injunction against § 8 based on its plain language. Plaintiffs acknowledge, however, that *Arizona* noted the state courts had not yet provided a "definitive interpretation" of whether SB 1070 § 2(B) allows stops or detentions to be prolonged. Slip op. 24. Accordingly, this Court may wish to certify relevant questions to the Georgia Supreme Court (suggested questions attached as Exhibit A), *see* Ga. R. Sup. Ct. 46, while the existing preliminary injunction maintains the status quo pending a response.

[1] Indeed, if § 8(e) does not provide any additional detention authority, and the remainder of § 8 authorizes only already-lawful discretionary inquiries that do not extend detentions, then § 8 does nothing and Defendants suffer no harm from the injunction.

Dated: July 6, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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