IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

United States of America, Plaintiff, vs. State of South Carolina and Nikki R. Haley, in her official capacity as the Governor of South Carolina, Defendants.	)	Civil Action No. 2:11-2958
Lowcountry Immigration Coalition, et al., Plaintiffs, vs. Nikki R. Haley, in her official capacity as the Governor of South Carolina, et al., Defendants.	)	Civil Action No. 2:11-2779

ORDER

This matter comes before the Court pursuant to a limited remand from the United States Court of Appeals for the Fourth Circuit on August 16, 2012 to allow this Court to reexamine its preliminary injunction issued on December 22, 2011 in light of the United States Supreme Court's opinion in *Arizona v. United States*, 132 S. Ct. 2492 (2012) (hereinafter "*Arizona* decision"), issued

on June 25, 2012. (Dkt. No. 98).[1] This limited remand followed this Court's "indicative ruling," issued pursuant to Federal Rule of Civil Procedure 62.1 on July 9, 2012, that the United States Supreme Court's *Arizona* decision raised "substantial issues" regarding at least a portion of this Court's earlier decision. (Dkt. No. 92). Upon the grant of the limited remand, this Court established a briefing schedule and set oral argument for November 13, 2012. (Dkt. No. 102). After a careful consideration of the relevant precedents, including the *Arizona* decision, the full record before the Court, and the written and oral arguments of all parties to these actions, the Court hereby modifies its earlier order in regard to portions of Section 6 of S.C. Act No. 69 (hereinafter "Act 69") and leaves in place the grant of preliminary injunctive relief regarding Sections 4(A), (B), (C) and (D), 5, and 6(B)(2) of Act 69, as further set forth below.

Background

The South Carolina General Assembly formally adopted a comprehensive state immigration statute, Act 69, on June 27, 2011. A number of individuals and advocacy groups (hereinafter collectively "private Plaintiffs") filed suit on October 12, 2011 challenging Act 69 in its entirety as well as specific portions of the Act and requesting preliminary and permanent injunctive relief. (C.A. No. 2:11-2779, Dkt. No. 1). Thereafter, the United States filed a separate action on October 31, 2011 challenging the validity of Sections 4, 5, 6 and 15 of Act 69 and requesting preliminary and permanent injunctive relief. (Dkt. No. 1). Because Act 69 was set to take effect on January 1, 2012, the Court set an expedited briefing schedule on November 1, 2011 and scheduled oral argument on December 19, 2011. The Court issued an order on December 22, 2011 preliminarily enjoining

[1] All citations to the case docket will be to C.A. No. 2:11-2958 unless specifically indicated otherwise.

Sections 4(A), (B), (C), and (D), 5, and 6 of Act 69. *United States v. South Carolina*, 840 F. Supp. 2d 898 (D.S.C. 2011). As referenced above, this Court now reviews this preliminary injunction in light of the *Arizona* decision.

Discussion

The above captioned parties have, somewhat predictably, taken different views on the issues before the Court in this limited remand. The state Defendants[2] assert that the Court should dissolve the preliminary injunction in its entirety despite the United States Supreme Court affirming significant portions of the Arizona district court and Ninth Circuit opinions that declared multiple and, in many instances, similar provisions of Arizona's immigration statute unconstitutional. (Dkt. Nos. 105, 110, 113). The private Plaintiffs urge the Court to maintain the previously issued preliminary injunction, including the section enjoining immigration inquiries for persons lawfully stopped or detained for other reasons, notwithstanding the fact that the *Arizona* decision reversed lower court decisions enjoining a similar provision of the Arizona statute. (Dkt. No. 106; C.A. No. 2:11-2779, Dkt. Nos. 154, 158). The United States asserts that, in light of the *Arizona* decision, this Court should dissolve that portion of the preliminary injunction relating to immigration inquiries for persons lawfully stopped or detained and, in all other respects, maintain the Court's previously granted preliminary injunctive relief. (Dkt. Nos. 107, 111). The Court will address each relevant section of Act 69 below.

[2] The term "state Defendants" refers collectively to the named defendants in the two above captioned actions.

Court, in declaring the Arizona statute preempted, noted that "[p]ermitting the State to impose its own penalties for the federal offenses here would create conflict with the careful framework Congress adopted." *Id.* at 2502.

In addition, in two post-*Arizona* decisions the Eleventh Circuit enjoined similar transporting and sheltering provisions found in the Alabama and Georgia statutes. *See Ga. Latino Alliance for Human Rights v. Georgia*, 691 F.3d 1250, 1263-67 (11th Cir. 2012) (hereinafter "*GLAHR*"); *United States v. Alabama*, 691 F.3d 1269, 1285-88 (11th Cir. 2012). The Eleventh Circuit in *GLAHR* found that the federal criminal provisions relating to harboring and transporting unlawfully present persons were "comprehensive" and that the "breadth of these laws illustrates an overwhelming dominant federal interest in the field." 691 F.3d at 1264. The *GLAHR* court further found that Georgia's harboring and sheltering statute "threaten[ed] the uniform application" of federal immigration law and challenged "federal supremacy in the realm of immigration." *Id.* at 1265-66. Based on that reasoning, the Eleventh Circuit found the Georgia statutory provision preempted by federal law, *id.* at 1267, as well as the Alabama provision in the companion case, *United States v. Alabama*, 691 F.3d at 1290.

Further, the Arizona district court recently

was field and conflict preempted. (Dkt. No. 105-1 at 8).

This Court, having carefully considered the arguments of all parties and the recent case law

a civil matter, any effort by a State to criminalize that activity creates a "conflict in the method of enforcement" that stands as "an obstacle to the regulatory system Congress chose" and is, therefore, "preempted by federal law." *See Arizona v. United States*, 132 S. Ct. at 2505 (concluding that a State effort to criminalize seeking or engaging in unauthorized employment is preempted by a federal statute that instead imposes civil penalties on employees).

Sections 4(A) and (C) represent just such an effort to criminalize an activity that is, under federal law, deemed a civil violation. The provisions place criminal sanctions on the sheltering and transporting of one's self—activities that are, practically speaking, unavoidable. In effect, Sections 4(A) and (C) criminalize removable aliens' presence in the State, and do so despite the Supreme Court's affirmation in *Arizona* that, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States." *Id.*

for purposes of offering proof of one's lawful presence in the United States. This Court previously enjoined these provisions because, given that "the national government has adopted a pervasive and comprehensive scheme that leaves no place for state regulation in this area," it is clear that "alien registration is a field under the exclusive control of the federal government." *United States v. South Carolina*, 840 F. Supp. 2d at 917-18.

In the *Arizona* case, the Supreme Court confronted a new state misdemeanor statute that prohibited "willful failure to complete or carry an alien registration document . . . in violation of 8 United States Code section 1304(e) or 1306(a)." Ariz. Rev. Stat. Rev. Stat. Rev. d5 § 11-1509(AD. AffirmUnit

to find that the area of alien registration is field preempted from state regulation and leaves undisturbed its preliminary injunction regarding Sections 5 and 6(B)(2) of Act 69.

D. Sections 6(A), (B)(1), (C)(1)-(3), and (D)

Section 6(A) of Act 69 mandates that a state or local law enforcement officer who lawfully stops a person for a criminal offense and has a "reasonable suspicion" that "the person is unlawfully present in the United States" must make a "reasonable effort" to determine that person's immigration status. Section 6(B)(1) allows the use of certain official picture identifications to create a presumption of a person's lawful presence. If the person under suspicion does not possess one of the designated forms of identification, the officer must make a "reasonable effort, when practicable, to verify the person's lawful presence." S.C. Act 69, § 6(C)(1). This can include inquiries to federal immigration officials or a newly created state immigration enforcement unit. *Id.* The statute goes on to provide that any stop or detention may not be longer than "a reasonable amount of time as allowed by law" and must be consistent with federal immigration law and the United States Constitution. *Id.* §§ 6(C)(2), (D).

The Supreme Court addressed a similar provision in the Arizona statute, Section 2(B), and expressed concerns regarding the possible detention or holding of persons simply to verify their immigration status. The Supreme Court noted that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." *Arizona v. United States*, 132 S. Ct. at 2509. Further, the Supreme Court observed that "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." *Id.* The Supreme Court went on to hold, however, that if the Arizona statute "only requires state officers to conduct a status check during the course of an authorized,

lawful detention or after a detainee has been released, the provision likely would survive preemption—at least absent some showing that it has other consequences that are adverse to federal law and its objectives." *Id.*

Thus, though it recognized significant limitations on the authority of the State to detain a person suspected of being unlawfully present in the United States, the Supreme Court found that it was possible that the Arizona statute might be interpreted by the state courts "to avoid these concerns." *Id.* The Court explained that, where "[t]here is a basic uncertainty about what the law means and how it will be enforced," it would be "inappropriate to assume [the provision] will be construed in a way that creates a conflict with federal law." *Id.* at 2510. As a result, the Supreme Court held that enjoining the Arizona statute on the basis of a facial challenge was not proper, though the Court made a point not to "foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect." *Id.*

This Court earlier enjoined the immigration inquiry provisions of Section 6, holding at the time that such inquiries potentially burdened and disrupted "finite and limited federal immigration enforcement resources" and interfered with federal control over matters potentially affecting the foreign affairs of the United States. *United States v. South Carolina*, 840 F. Supp. 2d at 924. Courts reviewing the constitutionality of the Arizona and Georgia immigration statutes reached similar conclusions. *See United States v. Arizona*, 703 F. Supp. 2d 980, 993-98 (D. Ariz. 2010), *aff'd*, 641 F.3d 339, 348-54 (9th Cir. 2011); *GLAHR*, 793 F. Supp. 2d at 1330-33. *But see United States v. Alabama*, 813 F. Supp. 2d 1282, 1318-29 (N.D. Ala. 2011).

The Supreme Court in the *Arizona* decision concluded otherwise. In doing so, the Court

federal government was explicitly authorized under federal law and "[i]ndeed, [Congress] has encouraged the sharing of information about possible immigration violations." *Arizona v. United States*, 132 S. Ct. at 2508. Thus, the Supreme Court concluded that the "federal scheme . . . leaves room for a policy requiring state officials to contact ICE as a routine matter." *Id.*

The private Plaintiffs argue that Sections 6(A) and 6(C)(1) will inevitably lead to the detention of persons solely to verify their immigration status. They make this argument on the premise that the time necessary to conduct an immigration status inquiry will routinely exceed the time reasonably necessary to complete the law enforcement work associated with the original purpose of a stop or detention. (Dkt. No. 106 at 15-18). The *Arizona* decision leaves little doubt that, should such detentions occur, they would raise constitutional concerns. 132 S. Ct. at 2509; *see also Arizona v. Johnson*, 555 U.S. 323, 333 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop."); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.").

The state Defendants argue, as did the defendants in *Arizona*, that the immigration inquiry statute can be interpreted to avoid such unconstitutional detentions. For example, the *Arizona* decision noted that, simply because the state statute mandated the initiation of an immigration inquiry, it did not require that the inquiry be completed while the person under suspicion is being stopped or detained. 132 S. Ct. at 2509. Further, Section 6(C)(2) provides that a person may be detained "only for a reasonable amount of time as allowed by law" and that, if the person's

immigration status cannot be determined in such time, "the officer may not further . . . detain . . . the person solely on the person's lawful presence in the United States." Additionally, Section 6(D) provides that Section 6 must be construed consistently with federal immigration law and the United States Constitution.

Applying the holding of the *Arizona*

E. Section 6(C)(4)

Section 6(C)(4) of Act 69 provides that, if a state or local law enforcement officer determines that a person is unlawfully present in the United States, the officer "shall determine in cooperation with" state and federal immigration officials whether the officer will retain custody relating to the criminal offense which led to the initial stop or detention or whether state or federal immigration agencies "shall assume custody of the person." The subsection goes on to provide that the "officer may securely transport the person to a federal facility in this State or to any other point of transfer into federal custody that is outside of the officer's jurisdiction," provided that the officer must obtain judicial authorization if the transporting of the person to federal custody is outside of South Carolina.

In granting a preliminary injunction enjoining enforcement of this subsection, this Court interpreted the statutory language as authorizing state and local law enforcement officials to deliver persons determined to be unlawfully present in the United States to any federal facility without federal authorization. *United States v. South Carolina*, 840 F. Supp. 2d at 923. Following the clear and unequivocal language of the *Arizona* decision that the State "holding aliens in custody for possible unlawful presence without federal direction and supervision" would "disrupt the federal framework," *Arizona v. United States*, 132 S. Ct. at 2509, the state Defendants now assert that Section 6(C)(4) "is not interpreted by [the state Defendants] or the Department of Public Safety to permit the detention of individuals based on immigration status pending and during transfer unless authorized by federal officials." (Dkt. No. 113 at 3-4).[5]

[5] The state Defendants have filed an affidavit executed by the commander of the newly created Immigration Enforcement Unit at the South Carolina Department of Public Safety to provide factual support for this statement. (Dkt. No. 115).

This Court is mindful of the Supreme Court's admonition in the *Arizona* decision that it should exercise restraint in granting preliminary injunctive relief as a result of a facial challenge where there is "basic uncertainty about what the law means and how it will be enforced." *Arizona v. United States*, 132 S. Ct. at 2510. Further, the *Arizona* Court noted that the State had placed certain "limits" on its law, including providing that the law would be "implemented in a manner consistent with federal law regarding immigration, protecting civil rights of all persons and respecting the privileges and immunities of United States citizens." *Id.* at 2508.

South Carolina included nearly identical limiting language in its immigration statute at Section 4lt of a D)-25I a r8.8e privilewhole peon 4l.33.33on ons a4nted433" linimlch waw privilenew 8.8(une

note that the Court previously declined to address the Section 7 issues because the granting of the preliminary injunction regarding Sections 4, 5, and 6 largely eliminated the risk of being adversely affected by Section 7. The private Plaintiffs contend that, should the Court dissolve any portion of the previously issued injunction, it should revisit the issue of whether an injunction is appropriate regarding Section 7 of the Act. The state Defendants assert that consideration of an injunction regarding Section 7 goes beyond the scope of the limited remand granted by the Fourth Circuit. (Dkt. No. 113 at 11).

While the Court is not persuaded that consideration of Section 7(E) is beyond the scope of the limited remand, the Court concludes that the private Plaintiffs have significant standing problems associated with a challenge to this particular provision. For a party to satisfy the threshold question of standing, the party must demonstrate that it is under threat of suffering an injury in fact that is "concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Though a plaintiff who seeks preventive relief while challenging a statute need not await actual injury to have standing, that plaintiff must nonetheless face a realistic danger of sustaining a direct injury through the application of that statute. *See Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Although some of the private Plaintiffs may be unlawfully present in the United States, none has pleaded a realistic danger of sustaining injury through the application of Section 7(E). Section 7(E) potentially impacts persons who have been arrested, tried, convicted, incarcerated and are then expecting release following the completion of their sentence.[6] The threat of injury resulting from

[6] In this way, standing to challenge Section 7(E) differs from cases in which plaintiffs facing a threat of prosecution have standing to challenge a criminal statute. *See, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383 (1988); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

the application of Section 7(E) only faces individuals who, it can be expected, will at some point be released from incarceration. None of the private Plaintiffs claims to have been arrested, let alone to be currently incarcerated. As a result, the Court finds that the potential injury to any of the private Plaintiffs is too remote, contingent, and speculative at this time to satisfy Article III standing requirements regarding Section 7(E).

Conclusion