IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CENTRAL ALABAMA FAIR HOUSING CENTER, et al.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NUMBER: 2:11-cv-00982-MHT-CSC
JULIE MAGEE, Revenue Commissioner for the State of Alabama, et al.,	)	
Defendants.	)	

STATE DEFENDANT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (DOC. 13)

State Defendant, Commissioner Julie Magee, sued in her official capacity as Revenue Commissioner for the State of Alabama, submits this supplemental brief in opposition to Plaintiffs' Motion for Preliminary Injunction (Doc.13). Plaintiffs are not substantially likely to prevail on their preemption claim, because Section 30, as applied in this instance, is not a regulation of immigration and does not stand as an obstacle to the purposes of Congress. Rather, Section 30 operates comfortably in the room left by Congress for states to pass laws discouraging illegal immigration and to deny public services to persons not lawfully present in the country, including by denying licenses to persons determined by the federal government to be unlawfully present in the United States.

Introduction

In a recent conference with the Court, the State Defendant pointed out that the Court's temporary restraining order, which prohibited the State Defendant and others from denying persons a registration decal for a manufactured home on the basis of immigration status, did not enjoin enforcement of criminal provisions in Section 30. Section 30 makes it a Class C felony for an illegal alien to transact certain business with the State or to attempt to do so, or for others to do so on the illegal alien's behalf. The original basis for the Court's temporary restraining order was that state and local officials were not set up to go through the federal government to confirm immigration status of applicants, and (in the Court's view) there was a conflict with federal law where state officials were themselves attempting to determine an alien's immigration status.

It is true that many state and local officials are not now registered in the SAVE program; that Commissioner Magee has notified local officials that until they have been granted access to the SAVE program or can verify an alien's immigration status through some other verification method with the U.S. Department of Homeland Security pursuant to 8 U.S.C. § 1373(c), they should not require anyone to demonstrate their U.S. citizenship or lawful presence in the United States; and that the Alabama Attorney General has instructed state and local officials that until they can go through the federal government to verify status, state

and local officials may not enforce the citizenship and immigration status checking provisions of Section 30.[1] However, law enforcement officials are presently able to verify immigration status through the federal government, through the Law Enforcement Support Center ("LESC"), and thus the original rationale for the temporary restraining order does not apply to law enforcement officials. *See* http://www.ice.gov/lesc/, (last visited December 5, 2011) (LESC "provides assistance on immigration alien queries … and answers the dedicated law enforcement phone lines.").

Of course, the Defendant does not think that the Court should grant a preliminary injunction. The question now is whether, if the Court disagrees and enjoins enforcement of Section 30 as it applies to manufactured home registration, the Court should also enjoin the provisions of Section 30 that make it a crime to transact business with the State. The question must be answered in two parts. First, if a preliminary injunction is entered on the same grounds as the Court's temporary restraining order, the answer is "no" – the rationale for the Court's temporary restraining order does not apply to the criminal provisions, because the people who enforce those provisions (law enforcement officials) are able to verify an alien's immigration status with the federal government by using the LESC system.

[1] *See* Doc. 79, State Defendant's Supplemental Evidence in Opposition to Plaintiffs' Motion for Preliminary Injunction.

Second, if, however, the Court grants a preliminary injunction on other grounds, then there is no distinction between the criminal provisions and other portions of Section 30. Either all is preempted, or none. For example, in the Court's recent order denying Defendant's motion to dissolve the temporary restraining order, doc. 74, the Court seemed to assert that Section 30 was preempted not only because state and local officials were not yet registered with SAVE, but because States have no room to address matters of immigration in the manner of Section 30 as applied in this instance. If the Court is correct, then the Court's rationale applies equally to the citizenship and immigration status checking provisions and the criminal provisions.

That said, the Court's rationale is not consistent with Supreme Court precedent regarding preemption. As addressed in the remainder of this brief, Section 30 is not preempted either on grounds that it is a regulation of immigration, on the basis of an alleged conflict, or on the basis of "field" preemption. Section 30 involves an area where States are wholly free to exercise their traditional functions.

I. There are three ways Plaintiffs could meet their preemption-claim burden, and they have not done so.

As Plaintiffs bring an implied preemption claim, Plaintiffs must show, under the Supreme Court's decision in *De Canas v. Bica*, 424 U.S. 351 (1976), that

(a) the state law or practice falls into the narrow category of laws deemed to be a "regulation of immigration," *id*. at 355;

(b) the state law or practice conflicts with federal laws, such that it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *id*. at 363; or

(b) Congress expressed "'the clear and manifest purpose'" of completely occupying the field and displacing all State activity, *id*. at 357.

Plaintiffs have not made this showing.

II. Section 30 is not a regulation of immigration.

A State's law is preempted if it falls into the narrow category of laws deemed to be a "regulation of immigration," because the "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica*, 424 U.S. 351, 354-55 (1976).[2] "But the [Supreme] Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration

[2] The *DeCanas* Court upheld a California statute making it unlawful for employers to knowingly employ illegal aliens. Afterward, Congress passed the Immigration Reform and Control Act (IRCA), 100 Stat. 3359, which makes it "unlawful for a person or other entity … to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien," which is an alien who is not "lawfully admitted for permanent residence" or not otherwise authorized by the U.S. Attorney General to be employed in the United States. *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1974 (2011) (internal quotation marks omitted). IRCA expressly preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." *Id.* at 1975. "Under that provision, state laws imposing civil fines for the employment of unauthorized workers like the one [the Supreme Court] upheld in *DeCanas* are now expressly preempted." *Id.* But the reasoning of *DeCanas* is still good law, as quoted recently in *Whiting*.

and thus per se pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355. "[S]tanding alone, the fact that aliens are the subject of a statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.*

This is true for laws that discriminate against aliens who are *lawfully* present in the United States. *Id.* (citing *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 415-22 (1948), and *Graham v. Richardson*, 403 U.S. 365, 372-73 (1971), which "cited a line of cases that upheld certain discriminatory state treatment of aliens *lawfully* within the United States.") (emphasis added).[3] Naturally, this truism

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[3] *See also Toll v. Moreno*, 458 U.S. 1, 3, 17 (1982) (Striking down state university's policy that barred lawfully present but nonimmigrant aliens and their dependents from acquiring in-state status as a violation of the supremacy clause.); *Cabell v. Chavez-Salido*, 454 U.S. 432, 434, 446-47 (1982) (Upholding in the face of challenge by lawfully admitted permanent resident aliens a California statute that restricted to citizens jobs of a "peace officer," including probation officers.); *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 87, 95 (1973) (In challenge brought by "a lawfully admitted resident alien who was born in and remains a citizen of Mexico," holding that national origin discrimination under Title VII of the Civil Rights of Act of 1964, "for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry" is not the same as discrimination "on the basis of citizenship or alienage," which the Act does not prohibit.); *Graham v. Richardson*, 403 U.S. 365, 371, 378 (1971) (Striking down state laws that inhibited legal aliens from obtaining welfare payments as conflicting with federal immigration policies, and noting that "[i]t has long been settled, and it is not disputed here, that the term 'person' in [the Fourteenth Amendment] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside.") *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-97, 603 (1953) (Holding that federal regulation did not authorize holding a lawful permanent resident alien without notice of charges and without opportunity to be heard, and noting that "[i]t is well established that if an alien is a lawful permanent resident of the United States and remains physically present here, he is a person within the protection of the Fifth Amendment."); *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 418-21 (1948)

applies equally (indeed, with greater force) to laws that discriminate against aliens who are *unlawfully* present in the United States. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 219 n. 19, 230 (1982) (Holding that Texas did not meet its burden of showing that denial of free public education to children who were illegal aliens furthered some substantial state interest, and noting that "[w]e reject the claim that 'illegal aliens' are a 'suspect class.' Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. … [I]t could hardly be suggested that undocumented status is a 'constitutional irrelevancy.'").

Plaintiffs themselves admit that Section 30 as applied in this instance "neither prohibits egress/ingress into [Alabama], nor prohibits the very presence of undocumented individuals in the United States." Doc. 14, Plaintiffs'

(California law barring issuance of commercial fishing licenses to persons ineligible for citizenship under federal law was held invalid as a violation of the precursor to 42 U.S.C. § 1981 and the Fourteenth Amendment because it barred "persons lawfully in this country" from receiving licenses.); *Truax v. Raich*, 239 U.S. 33, 39 (1915) (Striking down state law requiring employers to hire a certain percentage of native-born U.S. citizens on the basis of the 14th Amendment because the complainant, a native of Austria, had been "admitted to the United States under Federal law," and holding that "[b]eing lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws."); *Lem Moon Sing v. U.S.*, 158 U.S. 538, 547-50 (1895) (Holding that statute making the Secretary of Treasury's immigration determinations final made judicial review unavailable to a Chinese merchant who sought reentry to the United States after leaving the United States for a trip to China, and noting that "[w]hile he lawfully remains here he is entitled to the benefit" of constitutional protections "as fully … as if he were a native or naturalized citizen of the United States.").

Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, at 27. Nevertheless, they assert that, like the ordinance in *Lozano v. City of Hazleton*, 620 F.3d 170, 220-21 (3d Cir. 2010), *vacated and remanded on other grounds*, 131 S.Ct. 2958 (2011), Section 30 "ensur[es] that persons do not enter or remain in" Alabama because Section 30 "preclude[es] [the Plaintiffs'] ability to live in it." *Id.* (citing *Lozano*, 620 F.3d at 220-21).

There are several problems with Plaintiffs' argument. First, Section 30, as applied in this instance, does not prevent Plaintiffs from residing in Alabama. It only prevents the individual Plaintiffs from continuing to live in Alabama in manufactured homes they own and maintain on certain property without violating either Section 30 or Ala. Code § 40-12-255 or causing others to violate Section 30. Unlike the plaintiffs in *Lozano*, *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835 (N.D. Tex. 2010), and *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006), Plaintiffs here are not prohibited by Section 30 from living in a manufactured home they own on land they own (and thus paying ad valorem taxes on the home as realty instead of having to obtain the decal in question for the home as personalty), from buying other homes, or from renting any home.[4] *See* Ala. Code § 40-12-255(h) (a manufactured home assessed

[4] Section 13 of Act No. 2011-535 does prohibit renting to an illegal alien, but this Section is enjoined. *See* Order dated September 28, 2011, doc. 94 in *United States v. Alabama*, Case No.

for ad valorem tax under Ala. Code § 40-11-1(b)(15) is not subject to the decal registration of Section 40-12-255); § 40-11-1(b)(15) (subjects of ad valorem taxation include manufactured homes on land owned by the manufactured home owners, except manufactured homes rented or leased for business purposes, and do not include inventory).

Second, the cases of *Lozano*, *Villas at Parkside*, and *Garrett*, involved ordinances amounting to an outright ban on renting by and to illegal aliens. Section 30, as applied in this instance, does not do that. *See infra*, 14-15. Instead, Section 30 marks an effort by the State to effect Congress's will and carry out federal law by denying licenses to persons who do not have a right to be in the United States to begin with. *See id.*

Third, Section 30 defers to the federal government's determination of whether an alien has a right to engage in a business transaction with the State or one of its political subdivisions and receive the decal which licenses the manufactured home owner to lawfully maintain the home as personal property – i.e., the federal government's determination of whether the alien is lawfully present. Act No. 2011-535, § 30(c) (providing that an alien's lawful presence in the U.S. shall be demonstrated by state or local officials' verifying the same through the Systematic Alien Verification for Entitlements program or other

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2:11-cv-02746-SLB (N.D. Ala., pending). The injunction is on appeal. The State Defendant disagrees with the rationale of *Lozano*, *Villas at Parkside*, and *Garrett* in this regard.

verification with the U.S. Department of Homeland Security pursuant to 8 U.S.C. § 1373(c), which states that the federal government "shall respond" to an inquiry by a state or local government agency "seeking to verify or ascertain the citizenship or immigration status of any individual … for any purpose authorized by law, by providing the requested verification or status information.").

III. Section 30 does not stand as an obstacle to the purposes of Congress.

"'Conflict preemption' occurs when 'compliance with both federal and state regulations is a physical impossibility,' *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132,142–43 (1963), or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)." *U.S. v. State*, ___ F. Supp. 2d ___, 2011 WL 4469941, *9 (N.D. Ala. Sept. 28, 2011).

As applied, there is no conflict between Section 30 and federal immigration law. Plaintiffs are correct that "[t]he touchstone for preemption is congressional intent." Doc. 14 at 26 (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992); *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941)). The Supremacy Clause gives preemptive force to *only* the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States." U.S. CONST. art. VI, cl. 2. It does not

give that preemptive force to the exercise of unilateral prosecutorial discretion by the Executive Branch.

It is incorrect to say that state laws that push too hard against the current Administration's sense of an implicit, unstated "balance" in federal immigration law are impliedly preempted. The Supreme Court rejected that sort of approach, in the immigration context in particular, earlier this year in *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1983 (2011).[5] There the Chamber of Commerce had argued that an Arizona law that stripped licenses from businesses that employed illegal aliens and required businesses to use the E-Verify system was impliedly preempted because the Immigration Reform and Control Act "reflect[ed] Congress's careful balancing of several policy considerations," and the Arizona law's alleged "harshness . . . exert[ed] an extraneous pull on the scheme established by Congress that impermissibly upsets that balance." *Id.* (internal quotation marks omitted).

[5] *Whiting* was a plurality decision but its holding is binding precedent. Chief Justice Roberts authored the opinion of the Court. The fifth vote to affirm was Justice Thomas's, who joined Parts I, II-A, and III-A of the opinion and concurred in the judgment. *See* 131 S. Ct. at 1973 n*. The rationale Chief Justice Roberts offered for upholding the Arizona law in Parts II-B and III-B—namely, his finding that the law was not impliedly preempted—was narrower than Justice Thomas's apparent rationale that "purposes and objectives" preemption doctrine should be overruled altogether. Justice Thomas did not write separately to explain why he did not join Parts II-B and III-B, but previously he has explained that he would overrule "purposes and objectives" preemption doctrine and will not join opinions that apply it. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1217 (2009) (Thomas, J., concurring in the judgment). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Cnty.*, 337 F.3d 1251, 1260 n.10 (11th Cir. 2003) (citation and internal quotation marks omitted).

The *Whiting* Court rejected this theory, explaining that every federal statute "strike[s] a balance among a variety of interests." *Id.* at 1984-85. But it is the statute itself—and not some sort of unstated "balance"—that has the preemptive effect. "Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Id.* at 1985 (citations omitted).

Congress's intent is clear: Illegal aliens may not be encouraged to reside in the United States. *See, e.g.*, 8 U.S.C. § 1324 (anti-harboring provisions). Plaintiffs have not shown that Congress has—expressly or impliedly—preempted the power of the States to refuse to license an unlawfully-present alien, consistent with Congress's intention that illegal aliens not be encouraged to reside in the United States. *See also U.S.*, 2011 WL 4469941, *60. Of course, the decals in question are more in the nature of licenses—"permission or authority" to maintain a manufactured home—than "registration requirements" such as "registering births and deaths." *Id.* at *60 (quoting *Fed. Land Bank of Wichita v. Bd. of Cnty. Comm'rs of Kiowa Cnty.*, 368 U.S. 146, 154, n. 23 (1961)). *See also id.* at *60, n. 25. In this instance, any conflict with the Executive Branch's enforcement priorities simply is not a conflict with congressional intent that gives rise preemption. Section 30 defers to the federal government's determination of who is

and is not lawfully present, and supports federal immigration law by refusing to license those who are not.

IV. Section 30 operates comfortably in the room left by Congress for States to pass laws concerning illegal aliens, including by denying licenses to illegal aliens.

Finally, there is no field preemption here. Congress has left room for the States to pass laws concerning illegal aliens. *DeCanas*, 424 U.S. at 357. "[W]e will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by [California's law prohibiting the hiring of illegal aliens] in a manner consistent with pertinent federal laws." *Id.* Indeed, field preemption would exist only upon "a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was 'the clear and manifest purpose of Congress.'" *Id.* (quoting *Paul*, 373 U.S. at 146).

Within that is room for States to pass laws pertaining to the licensure of illegal aliens. *See, e.g.*, *Whiting*, 131 S.Ct. 1968. As with "[r]egulating in-state businesses through licensing laws," regulating individuals through licensing laws "has never been considered such an area of dominant federal concern" such that Section 30 would impermissibly upset the "balance" of federal immigration law, even if considering such a balance was permissible (and it is not). *Id.* at 1983; *see also supra*, 11-12.

As with "[t]he balancing process that culminated in IRCA" that "resulted in a ban on hiring unauthorized aliens," the balancing process that culminated in the anti-harboring provisions of 8 U.S.C. § 1324, and other federal provisions declaring that Congress intends for illegal aliens to receive no assistance in unlawfully remaining in the United States, resulted in a ban on such assistance, and Section 30 "simply seeks to enforce that ban." *Id.* at 1985. Federal provisions similar to 8 U.S.C. § 1324 in this regard include the Real ID Act, Pub. L. 109-13, § 202(c)(2)(B), which has a provision calling for States not to issue driver's licenses to illegal aliens, and 8 U.S.C. §§ 1611 and 1621, which prohibit States (and the federal government) from issuing public benefits—including housing—to illegal aliens).[6][7]

While the ordinances in *Lozano* and *Villas at Parkside* required tenants to obtain a "license" or "permit" before renting, what the ordinances were actually prohibiting was the illegal aliens' renting from private landlords. *See Lozano*, 620 F.3d at 180 ("Hazleton landlords are required to inform all prospective occupants

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[6] The Real ID Act provides that no federal agency may accept a State's driver's license for any official purpose unless the State meets the standards of the Act. Pub. L. 109-13, § 202(a)(1). One of those standards that the State must meet is to confirm the citizenship or lawful immigration status of all applicants. Pub. L. 109-13, § 202(c)(2)(B).

[7] *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244, 1255 (C.D. Cal. 1997) ("*LULAC II*") suggests that Congress has occupied the field of regulation regarding alien eligibility for public benefits. However, "*LULAC II* is neither controlling nor persuasive with respect to [8 U.S.C. §§ 1611 and 1621's] preclusive effect on state regulation of illegal alien access" to certain public benefits. *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 605, n. 19 (E.D. Va. 2004). In any event, the manufactured home decals at issue are not among the "public benefits" listed in 8 U.S.C. §§ 1611 or 1621.

of [the permit] requirement, and they are prohibited from allowing anyone over the age of eighteen to rent or occupy a rental unit, unless that person has a permit."); *Villas at Parkside*, 701 F. Supp. 2d at 856-57 (Even though the ordinance required persons to get a "license" before being able to rent, the objects of the regulation were "purely private contracts" for shelter.).[8] Section 30, as applied in this instance, does not do that. The only persons who must get the decals in question but who are prevented from doing so by Section 30 are persons who own a manufactured home but do not live in it, or who do live in it but maintain it on property that they do not own. *See* Ala. Code § 40-12-255(h) (a manufactured home assessed for ad valorem tax under Ala. Code § 40-11-1(b)(15) is not subject to the decal registration of Section 40-12-255); § 40-11-1(b)(15) (subjects of ad valorem taxation include manufactured homes on land owned by the manufactured home owners, except manufactured homes rented or leased for business purposes, and do not include not inventory). Section 30 prohibits no one from renting.

Conclusion

For these reasons, and those stated in her other oppositions and filings (docs. 33, 38, 40, 64, 79), which the State Defendant incorporates herein by reference, the State Defendant respectfully requests that the Court deny Plaintiffs' motion for preliminary injunction.

[8] *Garrett* prohibited only landlords from renting to illegal aliens. 465 F. Supp. 2d at 1047-48.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of December 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the counsel for Plaintiffs who are registered for electronic service in this case.

I FURTHER CERTIFY that on the 5th day of December 2011, I am serving by electronic mail the following co-defendant for whom no counsel has yet appeared:

Judge Jimmy Stubbs probatejudge@elmoreco.org

I FURTHER CERTIFY that on the 5th day of December 2011, I am serving by electronic email the following counsel for Plaintiffs who are not yet registered for service using the CM/ECF system:

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