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Opinion No. 07-69

Whether House Bill 600/Senate Bill 193 is Preempted by Federal Law

QUESTION

Is House Bill 600/Senate Bill 193 (HB600/SB193), which would criminalize the knowing transportation into Tennessee of an individual who has illegally entered the United States, preempted by federal law and therefore unenforceable?

OPINION

While it is not free from doubt, HB600/SB193 is legally defensible and would probably survive a preemption challenge.

ANALYSIS

HB600/SB193 would create the offense of transporting or causing to transport into the state an individual who the person knows or should have known has illegally entered or remained in the United States. The bill provides:

> (a) It is an offense for any person to transport or cause to be transported into the state an individual who the person knows or should have known has illegally entered or remained in the United States. For purposes of this section, the Bureau of Immigration and Customs Enforcement of the United States Department of Homeland Security determines who has illegally entered or remained in the United States.
>
> (b) The provisions of this section shall not apply to common carriers.
>
> (c) A violation of this section is a Class A misdemeanor punishable only by a fine of not less than one thousand dollars ($1,000).

> (d) Any moneys received from a violation of this section shall go to the local agency or agencies responsible for assisting or participating in the deportation proceedings of individuals illegal present in the United States.

H.B. 600 105th Gen. Assembly, 1st Reg. Sess. (Tenn. 2007).

We are asked whether the proposed criminalization of knowingly transporting or causing to be transported within Tennessee a person who has illegally entered or remained in the United States would be preempted by federal immigration laws. This question requires an examination and analysis of the relevant federal laws on the subject of immigration.

8 U.S.C. § 1324a is the federal law regarding unlawful employment of aliens. This section of the federal code makes it unlawful generally "to hire, or to recruit for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien . . . with respect to such employment . . . ." 8 U.S.C. § 1324a(a)(1)(A). This section of the federal code goes on to state explicitly that the "provisions of this section preempt 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." 8 U.S.C. § 1324a(h)(2). This explicit preemptive language indicates the clear intent of Congress that regulation of unlawful employment of unauthorized aliens shall be the exclusive domain of the federal government and that any state or local law on the subject is preempted.

However, the subject of HB600/SB193, that of transporting aliens, is addressed in a different section of the federal code, specifically 8 U.S.C. § 1324. This section of the code establishes criminal penalties for any person who, "knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law . . . ." 8 U.S.C. § 1324(a)(1)(A)(ii). A full reading of 8 U.S.C. §1324 reveals that it contains no language expressing a clear intent to preempt state or local laws on the same subject, in contrast to the language found in 8 U.S.C. § 1324a.

Where Congress includes specific preemption language in one section of a statute while excluding it from the next section of the same statute, it must be assumed that the difference between the two separate laws is intentional. We reach this conclusion on the basis of the maxim of statutory interpretation known as *inclusio unius est exclusio alterius*,[1] which provides that "where general words are used followed by a designation of particular things or subjects to be included or excluded as the case may be, the inclusion or exclusion will be presumed to be restricted to the particular thing or subject." *City of Knoxville v. Brown*, 260 S.W.2d 264, 268 (Tenn. 1953)(opinion on petition for rehearing); *see also State v. Adler*, 92 S.W.3d 397, 400 (Tenn. 2002). That is, in two consecutive statutes dealing with the regulation of immigration, where Congress has specifically included

[1]Literally, "the "expression of one thing is the exclusion of another."

language expressing its clear intent to preempt in one statute while omitting such language from the other, Congress will be deemed to have intentionally included preemptive language in 8 U.S.C. §1324a and to have intentionally excluded it from 8 U.S.C. §1324.

Moreover, there is additional language within 8 U.S.C. § 1324 that suggests that Congress may have authorized state and local law enforcement officers to make arrests under this section of the federal code. This section states that "[n]o officer or person shall have the authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, . . . *and all other officers whose duty it is to enforce criminal laws*." 8 U.S.C. § 1324(c). (Emphasis added.) Because this language specifies "all other officers" and not merely federal officers, it seems to indicate that Congress intended that local and state law enforcement officers have a role to play in the regulation of the transportation of aliens and can make arrests for violations of this section of federal law. This would support an interpretation that Congress viewed transportation of aliens differently from employment of unauthorized aliens, such that state and local governments could and should properly participate in the policing of the transportation of aliens.

The case of *DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976), provides the relevant factors for determining whether a state or local law is preempted by federal law. In *DeCanas*, the Supreme Court reviewed the constitutionality of a California state law prohibiting employers from hiring illegal aliens if such employment would have an adverse effect on lawful resident workers. The Supreme Court, while recognizing that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," found that there is no per se preemption against statutes where aliens are a subject matter of the legislation. "[S]tanding alone, the fact that aliens are a subject of a state 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.*, 424 U.S. at 355, 96 S.Ct. 933.

Instead, the Supreme Court established three ways in which a state ordinance may be preempted by federal law: 1) where the local law attempts to regulate immigration; 2) where the local law attempts to operate in an area occupied by federal law; and 3) where implementation of the local law is an obstacle or "burdens or conflicts in any manner with any federal laws or treaties." *Id*. at 354, 362-363, 96 S.Ct. 933. Applying the three factors set forth by the *DeCanas* Court to the content of HB600/SB193, it appears that only the second factor might be applicable, *i.e.*, where the local law attempts to operate in an area occupied by federal law.

In *DeCanas*, the Supreme Court found that preemption of a state employment regulation did not occur "in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Id*., 424 U.S. at 356, 96 S. Ct. 933. The Court found that Congress, through the Immigration and Naturalization Act, did not intend to affect "state regulation[s] touching on aliens in general, or the employment of illegal aliens in particular," noting in particular that respondents could not point to any specific wording or legislative intention in support of preemption. *Id.* at 358, 96 S. Ct. 933. As previously noted, Congress has added preemptive language to 8 U.S.C. § 1324a since the decision in *DeCanas*,

thus unmistakably expressing its intention that state laws criminalizing the employment of aliens should be preempted. However, 8 U.S.C. §1324, which governs the transportation of aliens, includes no preemptive language. The presumption therefore must be that Congress intended such a distinction between the two laws.

Nonetheless, some courts have been skeptical. In *Garrett v. City of Escondido*, a federal court in California questioned whether a local ordinance that sanctioned landlords who rented to illegal aliens was preempted by federal law. 465 F.Supp.2d 1043 (2006). The *Garrett* court, utilizing the analysis set forth in *DeCanas*, found that because federal statutes, namely 8 U.S.C. § 1324, specifically provide for fines and criminal penalties for the harboring of illegal aliens, the local ordinance sanctioning landlords might be preempted by federal law. *Id.* at 1056. The *Garrett* court granted plaintiffs a temporary restraining order to prohibit enforcement of the local ordinance but has yet to rule on whether a preliminary injunction will be granted. *Id.* at 1060. The *Garrett* court expressed "serious concerns in regards to the field preemption of the Ordinance by existing federal statutes." *Id.* at 1056.

Therefore, while HB600/SB193 might be challenged on the grounds or preemption, we conclude that it is defensible against such an attack.

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