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Opinion No. 11-42

Constitutionality of Proposed "Lawful Immigration Enforcement Act"

QUESTIONS

1. Whether the provisions of SB0770/HB1578 and SB0780/HB1380 (collectively, the "Bill") violate the separation of powers doctrine.

2. Whether the provisions of the Bill violate the protections against unreasonable searches and seizures set forth in the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Tennessee Constitution.

3. Whether the provisions of the Bill are preempted by federal immigration law.

OPINIONS

1. To the extent that Sections 3 and 4 of the Bill attempt to vest the executive authority of constitutionally elected officers in coordinate branches of government, those provisions would likely be found unconstitutional under the separation of powers doctrine.

2. To the extent that Section 8 of the Bill requires or authorizes a law enforcement officer to prolong the detention of a suspect based on mere suspicion of "unlawful presence" in the United States, such detention could amount to an unlawful seizure in violation of the federal and state constitutions.

3. Section 8 of the Bill is, in light of recent federal court decisions, subject to serious challenge on grounds of federal conflict preemption. These recent decisions, however, were not unanimous, are not binding on courts in Tennessee and are subject to further appeal.

ANALYSIS

The proposed "Lawful Immigration Enforcement Act" is set forth in identical bills, SB0770/HB1578 and SB0780/HB1380, presently pending before the General Assembly. Among other things, the Bill would prohibit state and local officials from limiting the enforcement of federal immigration laws to "less than the full extent permitted by federal law." (Section 3(b).) Eligible voters who believe that officials have failed in this duty may file suit in an appropriate chancery court. (Section 4(a).) The chancellors are empowered to compel

enforcement of the immigration laws, issue contempt orders, and impose civil penalties of $500 to $5,000. (Section 4(c).)

Section 8 of the Bill requires law enforcement officers to request verification of a person's immigration status from federal authorities when the officers develop reasonable suspicion that the person "is unlawfully present in the United States" during the course of an otherwise lawful stop or detention for violation of state or local law. Where officers verify that a person's presence is unlawful, they "may" securely transport the alien to a federal facility. (Section 8.) The Bill contains a severability provision and provides that it is to be construed in a manner consistent with federal laws regulating immigration. (Sections 14, 16.)

These provisions are susceptible to challenge on several state and federal constitutional grounds.

I. Sections 3 and 4 of the Bill Would Likely Be Found To Violate the Constitutional Principle of Separation of Powers.

Tenn. Code Ann. § 7-68-103 presently restrains local governmental entities and officials (which are defined in the preceding section) from taking actions that would interfere with their ability to comply "with applicable federal law pertaining to persons who reside within the state illegally." Tenn. Code Ann. § 7-68-103(a) & (b). The Bill proposes amendments to these provisions. Although this portion of the Code is nominally devoted to local government functions, the Bill would include certain state officials and agencies within its compass. In particular, the Bill would replace the current section 7-68-103(b), in part, with the following:

> (b) The state, an official or a local governmental entity shall not limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.

(Section 3(b).) The Bill defines "State" as "an officer or agency that carries out state functions and programs." (Section 2.) "Officer" means "an elected or appointed official in the executive branch of state government." (*Id.*)

Section 4 of the Bill goes on to replace the current Tenn. Code Ann. § 7-68-104 with provisions that authorize an eligible voter "who believes" that the state or a local governmental entity or official "has violated § 7-68-103" to institute a suit in chancery court. (Section 4(a).) Provided that the complainant proves a violation (Section 4(b)), the court "shall" either mandate compliance with section 7-68-103 or enjoin its violation. (Section 4(c).) As previously described, Section 4 endows the chancery courts with significant power to levy sanctions against local governmental entities, officials, and the state in the event of noncompliance with their orders. (Section 4(d).)

At the outset, we note that the language of the proposed Tenn. Code Ann. § 7-68-103(b) is complex. Although the provision is couched in negative terms, both the ordinary meaning of its words and the remedies supplied suggest an intent to create positive duties of enforcement.

The provision contemplates "enforcement of federal immigration laws" to their "full extent"; relying on the ordinary meaning of "limit" as "to curtail or reduce in quantity or extent," litigants could fairly argue that any failure to enforce in particular circumstances would amount to a "limitation" in violation of the subsection. *See Webster's Ninth New Collegiate Dictionary* 693 (1991) (so defining "limit"); *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010) ("Courts must give these words their natural and ordinary meaning."). This reading is fortified by the provision of the remedy of mandamus in the proposed Tenn. Code Ann. § 7-68-104(c). The writ of mandamus generally presupposes an official duty to act. *See, e.g., State ex rel. Ledbetter v. Duncan*, 702 S.W.2d 163, 165 (Tenn. 1985) ("It is well settled that a writ of mandamus may properly be issued to compel a public official to perform a non-discretionary duty.").

Construed as creating positive duties of enforcement, the proposed Tenn. Code Ann. § 7-68-103(b) would have broad reach as to both the official conduct to be regulated and the officers who could be sued. Full enforcement of the immigration laws naturally would entail making arrests of aliens unlawfully present in the United States where authorized by federal law and otherwise permitted by state and local law. *See* 8 U.S.C. § 1252c(a) (authorizing state and local law enforcement officials to arrest previously deported alien felons); *id.* § 1344(c) (specifying, in provision criminalizing the bringing in and harboring certain aliens, "[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*" (emphasis added), potentially indicating congressional intent to allow arrests by state and local enforcement officers); Tenn. Code Ann. § 40-7-103(a) (authorizing warrantless arrests for felonies and for misdemeanors committed in the officer's presence). Notably, federal law authorizes state and local officers to perform functions relating to the "investigation, apprehension, or detention of aliens" by agreement with the United States Attorney General, and "otherwise to cooperate" with him "in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(1) & (10). In view of the wide range of enforcement opportunities contemplated by federal law, an affirmative duty of "full" enforcement could subject a broad swath of official decisionmaking to judicial scrutiny. Such a duty, moreover, would necessarily take precedence over non-mandatory enforcement actions otherwise permitted by law. Thus, for example, agencies would be obliged first to devote their resources to detecting aliens unlawfully present in the United States, notwithstanding a desire to give priority to investigating violent felonies or to law enforcement matters of pressing concern in local communities.

Relatedly, the private right of action created by the proposed Tenn. Code Ann. § 7-68-104 would expose a number of officers and agencies in the executive branch to suit. By its terms, the Bill would authorize suit against the governor. (*See* Section 2 (defining "state" and "officer"); Section 4 (authorizing suit "to compel or enjoin the state").) The governor is an elected official, invested with the supreme executive power of the state, among whose duties is to "take care that the laws be faithfully executed." Tenn. Const. art. III, §§ 1, 2, 10. The enforcement decisions of the highway patrol and its overseer, the department of safety, also would be subject to review in chancery court. *See* Tenn. Code Ann. § 40-3-2003 (providing that the department exercise the powers and duties of the highway patrol). Although these agencies

are not of constitutional stature, we observe that the commissioner of safety is appointed by the governor, serves at his pleasure, and is a member of the governor's cabinet. *Id.* §§ 4-3-122, -2002. At the local level, members of governing bodies, boards, commissions, committees, and heads of department of counties and municipalities could be compelled or enjoined. *See id.* § 7-68-102 (defining "official"). Certain of these officials, such as county executives and sheriffs, potentially are officers of constitutional standing. *See* Tenn. Const. art. VII, § 1.

Mandamus and injunctive remedies directed to the executive branch—and fashioned at the instance of an eligible voter "who believes" that the executive has failed fully to enforce the law (Section 4)—raise significant separation of powers concerns. The Tennessee Constitution, Article II, § 1, states that "[t]he powers of the government shall be divided into three distinct departments: the Legislative, Executive, and Judicial," and by Article II, § 2, "[n]o person or persons belonging to one of these departments shall exercise any of the power properly belonging to either of the others, except in the cases herein directed or permitted." As a general matter, the legislative power is to make, order, and repeal laws; the executive power is to administer and enforce laws; and the judicial power is to interpret and apply laws. *See Underwood v. State*, 529 S.W.2d 45, 47 (Tenn. 1975); *Richardson v. Young*, 125 S.W. 664, 668 (Tenn. 1910). Pursuant to the separation of powers doctrine, we are of the opinion that Tennessee courts would lack judicial authority to consider any lawsuit against the governor brought pursuant to the Bill. Although officers and agencies of lesser stature would not enjoy the same constitutional immunity from such suits, we believe that courts would be hesitant to enlarge their mandamus jurisdiction to compel discretionary acts of enforcement that are a normal incident of executive authority.

The Tennessee Supreme Court has repeatedly declined to entertain common-law suits for mandamus against the governor on separation of powers grounds. In the 1875 case of *Turnpike Co. v. Brown*, the Court held:

> As to purely executive or political functions devolving upon the chief executive officer of a State, or as to duties necessarily involving the exercise of official judgment and discretion, we think it may be safely assumed that mandamus will not lie. This necessarily results from the nature of a government having three independent departments—executive, legislative, and judicial. Such is the doctrine well settled by authority.

Turnpike Co., 67 Tenn. 490, 1875 WL 4641, at *1 (Tenn. 1875). In a later suit seeking to compel the governor to declare the winner of an election, the Court simply declared:

> The Governor of the state constitutes one of the co-ordinate departments of the government, and he cannot be compelled by mandamus to perform any act which devolves upon him as Governor.
> …
>
> He is not subject to the mandate of any court.

> No court can coerce him. No court can imprison him for failing to perform any act, or to obey any mandate of any court.

State ex rel. Latture v. Frazier, 86 S.W. 319, 320 (Tenn. 1905).

Significantly, although the United States Supreme Court has left open the question whether the president might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty, *see Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992), Tennessee law appears to embrace no such distinction as it would pertain to the governor. The *Turnpike Co.* Court explained this result as a function of the unitary nature of the office:

> [I]n the case of the Governor it does not change the result that the duty might have been imposed upon a ministerial officer, and if imposed upon a ministerial officer, he might have been compelled to perform it. It does not follow that when the duty is imposed upon the Governor, the courts have jurisdiction to control his acts.
>
> The Governor holds but one office, that is the office of chief executive. Any duty which he performs under authority of law is an executive duty, otherwise we would have him acting in separate and distinct capacities. In some respects he would be the chief executive, an independent department of the government; as to other duties he would be a mere ministerial officer, subject to the mandate of any judge of the State . . . .

Turnpike Co., 1875 WL 4641, at *2; *see also Latture*, 86 S.W. at 320 ("And this is true whether the act to be performed is ministerial, executive, or political."); *Clements v. Roberts*, 230 S.W. 30, 35-36 (Tenn. 1921) (following *Turnpike Co.* and *Latture* in refusing to uphold injunction against certification by governor of resolution passed by the legislature). Rather, the remedy available against the governor is the political one of impeachment. "If the governor acts corruptly, he is amenable to the legislature; and if, in an honest endeavor to discharge his duty, he mistake the law and prejudice individual rights, the injured person may, in proper cases, restrain the one benefited from using his advantage." *Bates v. Taylor*, 11 S.W. 266, 268 (Tenn. 1889); *see Turnpike Co.*, 1875 WL 4641, at *2 ("If the Governor corruptly act in violation of law and right, he may be impeached. It does not follow, because the right claimed depends upon a construction of our laws, that the court must therefore decide it."). In light of these decisions, we think it unlikely that the governor will be held to be amenable to suits for mandamus or injunctive relief as contemplated by the Bill.

State commissioners and local officials, by contrast, can be subject to mandatory relief ordered by the courts. *See, e.g., State ex rel. Motlow v. Clark*, 114 S.W.2d 800, 803 (Tenn. 1938) (considering petition for writ of mandamus against county officials); *North British & Mercantile Co. v. Craig*, 62 S.W. 155, 159 (Tenn. 1901) (considering propriety of injunctive relief against insurance commissioner). The same basic separation of powers concern that counsels in favor of gubernatorial immunity—that the judiciary not superintend over the exercise of executive discretion—still obtains in such proceedings. *See North British & Mercantile Co.*,

62 S.W. at 159 ("The rule is so general and obvious as to be almost axiomatic that a public officer clothed with discretionary or quasi judicial power, as contradistinguished from mere ministerial duty, cannot be coerced by mandamus or restrained by injunction in the exercise of his judgment under that power; otherwise, the court would substitute its judgment for his, which is not permissible."); *see also Decatur v. Paulding*, 39 U.S. 497, 516 (1840) (stating, in mandamus action against secretary of the navy, "[t]he interference of Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief"). Thus, for an official act to be enforced by a writ of mandamus, the act must be purely "ministerial". *See Motlow*, 114 S.W.2d at 802-803 ("„Mandamus' is a remedy through which a public officer, charged by law with a duty ministerial in character, may be compelled to perform it."). "Nothing is better settled with respect to the law governing mandamus than that the writ is never granted to control or coerce the exercise of discretionary power on the part of a board or officer." *State ex rel. Park v. Beasley*, 188 S.W.2d 333, 335 (Tenn. 1945) (further stating, in case in which mandamus review was provided by statute, that relator's rights were "limited to the relief which the limited scope of a writ of mandamus affords"). Although the proposed Tenn. Code Ann. § 7-68-103(b) apparently creates positive duties of enforcement—and evidently contemplates that enforcement of the federal immigration laws to their "full extent" be, in a sense, non-discretionary, it is difficult to characterize such duties as being ministerial. The subsection prescribes no "specific act, which is due in point of time," *North British & Mercantile Co.*, 62 S.W. at 159, and enforcement determinations generally are "based on investigation, knowledge and decision," *Park*, 188 S.W.2d at 335; *see also United States ex rel. Tucker v. Seaman*, 58 U.S. 225, 230 (1854) ("He [the superintendant of public printing] was obliged, therefore, to examine evidence, and form his judgment before he acted; and whenever that is to be done, it is not a case for a mandamus."). Consequently, many categories of claims that private litigants might raise under the auspices of Section 4 of the Bill—that officials have improperly "limited" enforcement of the immigration laws by, for example, failing satisfactorily to resolve allegations that (potentially arrestable) aliens unlawfully reside in the jurisdiction or failing fully to act as accessories to federal law enforcement, *see* 8 U.S.C. § 1357(g)—are apt to be viewed as non-justiciable on the remedies provided. Mandamus and injunction are suitable vehicles for testing the legality of policies that agencies or officials adopt or affirmatively implement. *See, e.g., Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 479 (Tenn. 2004) (holding that mandamus was proper to challenge ordinance not enacted in accordance with statutory zoning law). As tools for challenging executive inaction, even at the local level, these remedies have the potential to raise separation of powers concerns.

II. Prolonged Detention Based on Mere Suspicion of "Unlawful Presence" in the United States Could Be Construed as an Unconstitutional Seizure.

Section 8 of the Bill would add the following two sections to Title 40, Chapter 7, Part 1 of the Code:

40-7-124.

(a) Except as otherwise provided in subsection (b), when any law enforcement officer acting in the enforcement of any state law or local ordinance makes a lawful stop or detention of a person for a violation of a state law or local ordinance, and the officer has reasonable suspicion to believe that the person stopped or detained is unlawfully present in the Un[it]ed States, the officer shall request verification of the immigration status of such person from federal immigration authorities, pursuant to 8 U.S.C. § 1373(c).

(b) A law enforcement officer is not required to request verification of immigration status pursuant to subsection (a) if the officer reports to the law enforcement agency that the attempt would hinder or obstruct a criminal investigation or the treatment of a medical emergency.

(c) A person subject to verification of immigration status pursuant to subsection (a) is presumed to be lawfully present in the United States if the person provides to the law enforcement officer any of the following forms of identification:

(1) A valid Tennessee driver license;

(2) A valid Tennessee photo identification card;

(3) A valid tribal enrollment card or other form of tribal identification issued by a federally recognized Indian tribe that bears a photographic image of the holder; or

(4) Any valid United States federal, state or local government issued identification, if the entity that issued such identification requires proof of legal presence in the United States before issuance that bears a photographic image of the holder.

40-7-125.

Notwithstanding any other law to the contrary, a law enforcement agency or law enforcement officer may securely transport an alien whom the agency has verified is unlawfully present in the United States, and who is in the agency's custody, to a federal facility in this state or, with the concurrence of the receiving federal agency, to any other point of transfer into federal custody that is outside this state.

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and "article 1, section 7 [of the Tennessee Constitution] is identical in intent and purpose with the Fourth Amendment." *State v. Downey,* 945 S.W. 2d 102, 106 (Tenn. 1997) (internal quotation marks omitted). Warrantless searches are presumptively unreasonable, subject to a few specifically established and well-delineated exceptions. *See Katz v. United States,* 389 U.S. 347, 357 (1967); *State v. Tyler,* 598 S.W.2d 798, 801 (Tenn. Crim. App. 1980). One such exception to the warrant requirement exists when a police officer conducts an investigatory stop based on a reasonable suspicion that a criminal offense has been or is about to be committed. *Terry v. Ohio,* 392 U.S. 1, 21 (1968); *State v. Binette,* 33 S.W.3d 215, 218 (Tenn.

2000). Reasonable suspicion is "a particularized and objective basis for suspecting the subject of a stop of criminal activity . . . ." *Binette,* 33 S.W.3d at 218.

When a stop is initiated based on probable cause or reasonable suspicion, a resulting investigation is reviewed under the framework established in *Terry v. Ohio. See United States v. Brignoni-Ponce,* 422 U.S. 873 (1975). Such investigations require that an officer's actions be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry,* 392 U.S. at 20. The detention "must be temporary and last no longer than necessary to effectuate the purpose of the stop." *Florida v. Royer,* 460 U.S. 491, 500 (1983); *see State v. England,* 19 S.W.3d 762, 767-68 (Tenn. 2000). Moreover, the officer should employ the least intrusive means reasonably available to investigate his or her suspicions in a short period of time. *Royer,* 460 U.S. at 500. "The proper inquiry is whether during the detention, the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *State v. Simpson,* 968 S.W.2d 776, 783 (Tenn. 1998) (citation omitted). "If the time, manner or scope of the investigation exceeds the proper parameters, a constitutionally permissible stop may be transformed into one which violates the Fourth Amendment and article 1, section 7." *State v. Webb*, No. E2009-02135-CCA-R3-CD, 2011 WL 486850, at *8 (Tenn. Crim. App. Feb. 11, 2011) (internal quotation marks omitted). In the context of determining whether investigative methods run afoul of the Fourth Amendment and article I, section 7, the Tennessee Court of Criminal Appeals has stated that "requests for driver's licenses and vehicle registration documents, inquiries concerning travel plans and vehicle ownership, computer checks, and the issuance of citations are investigative methods or activities consistent with the lawful scope of any traffic stop." *Id.* (internal quotation marks omitted); *see also Muehler v. Mena*, 544 U.S. 93, 101 (2005) (holding that officers did not need reasonable suspicion to ask detainee for name, date and place of birth, or immigration status where questioning did not prolong otherwise lawful detention). If the time, manner, or scope of the investigation exceeds the proper parameters of a constitutionally permissible stop, an unreasonable seizure occurs unless independent reasonable suspicion or probable cause has developed to justify prolonging the stop. *See Webb*, 2011 WL 486850, at *8.

Unlawful presence in the United States is not a crime. The Bill does not make it one, and it is not, standing alone, a federal offense, although it may make an alien removable. *See* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(1)(B)-(C). In *United States v. Urrieta*, a case arising from a routine traffic stop in Tennessee, the government initially sought to justify an extended detention on grounds of suspicion that the driver was an undocumented immigrant. *Urrieta,* 520 F.3d 569, 574 (6th Cir. 2008). The government ultimately withdrew this argument, conceding that it misstated the law, and in passing over that concession, the United States Court of Appeals for the Sixth Circuit cited provisions of the Immigration and Nationality Act for the proposition that "local law enforcement officers cannot enforce completed violations of civil immigration law (i.e., illegal presence) unless specifically authorized to do so by the Attorney General under special conditions that are not applicable in the present case." *Id.*; *see also id.* at 571-72 ("illegal reentry after deportation is the only immigration violation that Deputy Young had the authority to enforce"); 580 (McKeague, J., dissenting) ("I acknowledge Deputy Young had no authority to arrest Urrieta and Montes for an immigration violation because neither of them had reentered the country illegally"). We note a lack of unanimity with this observation in other jurisdictions.

See, e.g., United States v. Arizona, No. 10-16645, 2011 WL 1346945, at*17 (9th Cir. Apr. 11, 2011) (discussing *Urrieta* with approval, and holding that states do not have inherent authority to enforce the civil provisions of federal immigration law); *cf. Carrasca v. Pomeroy*, 313 F.3d 828, 836-37 (3rd Cir. 2002) (noting distinction between civil and criminal law and expressing "uncertainty . . . with respect to state rangers' authority to detain immigrants"); *but see United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001) (noting that state law enforcement officers have general authority to investigate and make arrests for violations of federal immigration laws).

Section 8 of the Bill requires that law enforcement officers having reasonable suspicion to believe that a detainee is unlawfully present in the United States request verification of the immigration status of the detainee from federal authorities. It does not, however, expressly require or authorize officers to prolong a detention in order to do so.[1] As the *Urrieta* dictum is apt to be viewed as persuasive by courts in this jurisdiction, we are of the view that the Bill should not be read to allow a prolonged detention on the mere basis of suspicion of "unlawful presence" in the United States, and if it were so read or applied it would be vulnerable to a challenge to its constitutionality under the Fourth Amendment and Article I, section 7 of the Tennessee Constitution. Because unlawful presence is itself not a crime, the length of any detention must be determined only by the circumstances that led officers to believe that the suspect had violated "a state law or local ordinance" (Section 8) in the first place. *See Royer,* 460 U.S. at 500. There may be circumstances in which officers, on the basis of identification otherwise lawfully requested, *see Webb*, 2011 WL 486850, at *8, can promptly verify a detainee's immigration status with federal authorities without unconstitutionally prolonging the detention. *See, e.g., Urrieta*, 520 F.3d at 571 (noting that call to El Paso Intelligence Center seeking information as to whether individual had crossed the border at a checkpoint, had been deported, or was under federal investigation took eleven minutes). We understand, however, from the record of the litigation in *United States v. Arizona*, No. 10-16645, 2011 WL 1346945 (9th Cir. Apr. 11, 2011)—a case which we will discuss more fully in the following section—that the federal government has represented that immigration status inquiries submitted to the Department of Homeland Security's Law Enforcement Support Center may involve multiple databases, can require search of paper files, and may average over 80 minutes to resolve. Detentions of that duration occurring in the course of such routine police encounters as traffic stops would likely be held to violate the Fourth Amendment and Article I, section 7 of the Tennessee Constitution.

[1] In contrast, the Arizona statute that is the subject of federal litigation provides that "[f]or any lawful stop, detention or arrest" made by a law enforcement official in the enforcement of any other law or ordinance, where "reasonable suspicion" exists that the person is an alien and unlawfully present, a "reasonable attempt" shall be made to determine the person's immigration status and "[a]ny person who is arrested shall have the person's immigration status determined before the person is released." Ariz. Rev. Stat. § 11-1051(B). Section 8 of the Bill does not include the term "arrest" and does not explicitly require that a person be detained until his or her immigration status has been determined.

III. Section 8 Is Subject to Challenge Under the Supremacy Clause of the United States Constitution.

The Supremacy Clause of the United States Constitution makes federal law "the supreme law of the land." U.S. Const. art. VI, cl. 2. While holding that the "[p]ower to regulate immigration is unquestionably exclusively a federal power," the United States Supreme Court has recognized that, "standing 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."*DeCanas v. Bica*, 424 U.S. 351, 354, 355 (1976). Absent an attempt to regulate that subject matter directly, a state law dealing with aliens still can be held preempted where Congress clearly manifests an intent to "occupy the field," or the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the immigration laws. *See id.* at 357-58 & n.5, 363.

Federal law envisions areas of cooperation in immigration enforcement among the federal government and state and local authorities. Three of these are of particular relevance here. First, state and local law enforcement officials are authorized to arrest aliens unlawfully present in the United States who have previously been convicted of a felony and deported (or left the United States after such conviction), after obtaining confirmation of the person's immigration status and for such time as may be required for federal authorities to take the person into federal custody. 8 U.S.C. § 1252c(a). Second, the United States Attorney General is permitted to enter into agreements whereby appropriately trained and supervised state and local officials can perform immigration officer functions relating to the investigation, apprehension, or detention of aliens in the United States. *Id.* § 1357(g)(1)-(9). This provision specifies:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—
>
> > (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
> > (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

Id. § 1357(g)(10). Finally, 8 U.S.C. § 1373—a provision cited by the Bill—establishes parameters for information-sharing between state and local officials and federal immigration officials, stating in particular that:

> The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the

> agency for any purpose authorized by law, by providing the requested verification or status information.

Id. § 1373(c).

In *United States v. Arizona*, No. 10-16645, 2011 WL 1346945 (9th Cir. Apr. 11, 2011) ("*U.S. v. Arizona*"), the United States Court of Appeals for the Ninth Circuit considered a facial preemption challenge to an Arizona law, Ariz. Rev. Stat. § 11-1051(B), that is similar to—but not identical with—the proposed Tenn. Code Ann. § 40-7-124 to be added by Section 8 of the Bill. *U.S. v. Arizona*, 2011 WL 1346945, at *4-10. The court upheld a preliminary injunction as to this portion of the Arizona law. *Id.* Although the Arizona statute contains a subsection, Ariz. Rev. Stat. § 11-1051(D), that is similar to the proposed Tenn. Code Ann. § 40-7-125, the lower court had ruled that the government had failed specifically to challenge this provision, and thus it was not subject to the Ninth Circuit's review. *See United States v. Arizona*, 703 F. Supp. 2d 980, 986, 992-93 (D. Ariz. 2010).

The Ninth Circuit began its preemption analysis with the text of 8 U.S.C § 1357(g). *U.S. v. Arizona*, 2011 WL 1346945, at *5. The court considered the provisions for the performance of immigration officer functions by state officers by written agreement set forth in subsections (g)(1)-(9) to "demonstrate that Congress intended for states to be involved in the enforcement of immigration laws under the Attorney General's close supervision." *Id.* Subsection (g)(10), in the court's view, does not operate as a broad alternative grant of authority for state officers to systematically enforce immigration laws outside of that restriction. *Id.* Rather, the court read subsection (g)(10)(A) to mean that "state officers can communicate with the Attorney General about immigration status information that they obtain or need in the performance of their regular state duties," but held that the provision "does not permit states to adopt laws dictating how and when state and local officers *must* communicate with the Attorney General regarding the immigration status of an individual." *Id.* at *6. The court further construed subsection (g)(10)(B) to mean that "when the Attorney General calls upon state and local law enforcement officers—or such officers are confronted with the necessity—to cooperate with federal immigration enforcement on an incidental and as-needed basis, state and local officers are permitted to provide this cooperative help without the written agreements that are required for *systematic* and *routine* cooperation." *Id.*

Turning to 8 U.S.C. § 1373(c), the court acknowledged that the provision contemplates state assistance in the identification of undocumented immigrants. *Id.* at *7. That assistance, the court ruled, must occur "within the boundaries established in § 1357(g), not in a manner dictated by a state law that furthers a state immigration policy." *Id.* The court additionally noted that § 1357 delegates to the federal executive branch a fair amount of discretion to determine how federal officers enforce immigration law. *Id.* A state regime that imposes mandatory obligations on state and local officers interferes with that delegation, the court stated, by hindering "the federal government's authority to implement its priorities and strategies in law enforcement . . . ." *Id.* at *8. Consequently, the court concluded that the Arizona law stood as an obstacle to the accomplishment of the full purposes of Congress:

> The law subverts Congress' intent that systematic state immigration enforcement will occur under the direction and close supervision of the Attorney General. Furthermore, the mandatory nature of Section 2(B)'s immigration status checks is inconsistent with the discretion Congress vested in the Attorney General to supervise and direct State officers in their immigration work according to federally-determined priorities.

Id.

The court identified two further considerations that weighed in favor of preemption. First, the court found that the record demonstrated that the Arizona law had had a deleterious effect on the United States' foreign relations, pointing to criticism by several foreign leaders and bodies and to affirmative steps taken by Mexico to protest the law. *Id.* at *9. Second, the court observed that "the threat of 50 states layering their own immigration enforcement rules on top of the INA [Immigration and Nationality Act] also weighs in favor of preemption." *Id.* at *10.

In a vigorous dissent, Judge Bea questioned each of the rationales offered by the majority. As to the construction of 8 U.S.C. § 1357(g), the dissent stated: "Unless state officers are subject to a written agreement described in § 1357(g)(1)-(9), which would otherwise control their actions, the state officers are independently authorized by Congressional statute „to communicate with the Attorney General regarding the immigration status of any individual.'" *Id.* at *27 (Bea, J., concurring in part and dissenting in part)(quoting 8 U.S.C. § 1357(g)(10)(A)). The dissent further noted that "identification" of aliens not lawfully present in the United States was included in the cooperation envisioned by § 1357(g)(10)(B), but was excluded from the constraints of the written agreements provided by § 1357(g)(1)-(9). *Id.* at *29. This difference in language, in the dissent's view, "leads to the conclusion that Congress intended that state officers be free to inquire of the federal officers into the immigration status of any person, without any direction or supervision of such federal officers—and the federal officers „*shall* respond' to any such inquiry." *Id.* (quoting 8 U.S.C. § 1373(c)).

With respect to 8 U.S.C. § 1373(c), the dissent observed, "Congress would have little need to obligate federal authorities to respond to state immigration status requests if it is those very same federal officials who must call upon state officers to identify illegal aliens." *Id.* at *28. Although the dissent recognized that § 1357 invested the federal executive branch with some measure of discretion, "Congress explicitly withheld any discretion as to immigration status inquiries by obligating the federal government to respond to state and local inquiries pursuant to § 1373(c) and by excepting communication regarding immigration status from the scope of the explicit written agreements created pursuant to § 1357(g)(10)." *Id.* at *31. Finding no established foreign relations policy goal with which the Arizona law could be claimed to conflict, the dissent maintained that "any negative effect on foreign relations caused by the free flow of immigration status information between Arizona and federal officials is due not to Arizona's law, but to the laws of Congress." *Id.* at *32. Finally, in light of § 1373(c), the dissent concluded that the prospect of "all 50 states enacting laws for inquiring into the immigration status of suspected illegal aliens is *desired* by Congress, and weighs against preemption." *Id.* at *33.

In light of the Ninth Circuit's decision in *U.S. v. Arizona*, the proposed Tenn. Code Ann. § 40-7-124 is subject to challenge on grounds of federal conflict preemption. However, the opinion may be subject to further review by the Ninth Circuit sitting en banc or by the United States Supreme Court. Furthermore, the *U.S. v. Arizona* decision is not binding on courts in this jurisdiction, and the reasoning of the dissent—that communication with federal authorities about the immigration status of specified persons would not be preempted but in fact allowed by federal law under 8 U.S.C. §§ 1357(g), 1373(c)—potentially could be held to have merit by federal courts here.

The proposed Tenn. Code Ann. § 40-7-125, the Arizona analogue of which the *U.S. v. Arizona* court did not reach, poses even more formidable preemption concerns. This section would provide that a law enforcement agency or officer "may securely transport an alien whom the agency has verified is unlawfully present in the United States, and who is in the agency's custody, to a federal facility in this state or, with the concurrence of the receiving federal agency, to any other point of transfer into federal custody that is outside this state." "Secure transport" is itself a detention—though the provision evidently contemplates that the alien already has been arrested, since he or she is "in . . . custody"—and that detention is carried out with an eye toward the alien's removal. Consequently, this provision falls squarely within the ambit of 8 U.S.C. § 1357(g)(10), which envisions such actions being taken in "cooperat[ion] with the Attorney General." The proposed Tenn. Code Ann. § 40-7-125 might be construed to allow officers to securely transport unlawfully present aliens without any cooperation, since the federal authorities' "concurrence" is mentioned only in connection with transports to out-of-state facilities. *See, e.g. Overstreet v. TRW Commercial Steering Div.,* 256 S.W.3d 626, 633 (Tenn. 2008) ("A familiar canon of statutory interpretation expresses: *expressio unius est exclusio alterius* („to express one thing is to exclude others')."). Put simply, the provision might be fairly read to authorize Tennessee officers to appear unannounced at a federal facility with an undocumented immigrant in custody—even if the alien is one whom federal authorities ordinarily would not proceed against by removal or if the facility simply were full. Such a rendering would stand in obvious tension with § 1357(g)(10). Nevertheless, it may be possible to resist a facial preemption challenge to the provision on the ground that a "set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). The proposed Tenn. Code Ann. § 40-7-125 is permissive—an officer "may" securely transport—rather than mandatory, and the Bill generally provides that it is to be construed "in a manner consistent with federal laws regulating immigration," (Section 13). So long as officers can implement the provision by acting with the assent of the Attorney General or his designees either by agreement, *see* 8 U.S.C. § 1357(g)(1), or by less formal means, *see id.* § 1357(g)(10), legitimate arguments can be made in support of the section. We observe, however, that the preemption question raised by this provision is a serious one.

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