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US IMMIGRATION & NATIONALITY LAW

# SOME PRELIMINARY REACTIONS TO THE DISTRICT COURT DECISION REFUSING TO ENJOIN PORTIONS OF ALABAMA'S IMMIGRATION LAW

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Chief U.S. District Judge Sharon Blackburn of the U.S. District Court for the Northern District of Alabama recently issued a memorandum opinion preliminarily enjoining the enforcement of certain portions of Alabama's new immigration law but upholding other portions. This decision has already attracted substantial criticism, with the New York Times describing it as "dismal". Additional useful background regarding the decision is available from Immigration Impact. As a follow-up to my previous article on our firm's website regarding constitutional and practical problems with the Alabama law, it seemed appropriate to examine how Judge Blackburn's decision does and does not address some of these problems.

Some of the most absurd portions of the statute were struck down, so there is some good news. Judge Blackburn did enjoin the portion of the Alabama statute that barred lawfully admitted refugees, and others such as those with Temporary Protected Status, from attending public universities. She enjoined the portion of the statute that attempted to make it illegal to rent housing to the unlawfully present, by deeming it "harboring", and she also enjoined the portion of the statute that attempted to criminalize work and the solicitation of employment by an "unauthorized alien". In addition, she enjoined portions of the statute that would have forbidden companies from deducting wages paid to unauthorized workers as a business expense, and allowed other workers to sue those companies.

Some deeply problematic provisions of the statute were left standing, however. One provision, similar to a provision of Arizona's much-criticized SB 1070,

criminalizes failure to register or carry an alien registration document, in violation of federal law, when committed by "an alien unlawfully present in the United States." As explained in this author's previous article on our firm's website regarding the Arizona law, the application forms used by certain battered women and crime victims to petition for relief under the Violence Against Women Act or for a "U-visa" do not constitute applications for alien registration under the governing regulations. Thus, certain such battered women and crime victims may arguably be in violation of the federal statutes regarding alien registration, but as a matter of prosecutorial discretion, it is exceedingly unlikely that the federal government would ever pursue such people for those technical violations. While Alabama may have somewhat reduced the set of truly absurd potential violations of its statute by covering only those who are "unlawfully present" rather than Arizona's reference to "a person who maintains authorization from the federal government to remain in the United States" -- since battered women actually granted deferred action will not qualify as unlawfully present even though they likely also do not qualify as maintaining authorization to remain in the United States -- the statute could still be applied by Alabama to applicants for VAWA or U-visa relief who have not yet been granted relief. This is merely an example of why it is a bad idea, as a matter of our constitutional structure, to allow a state to meddle in a field so comprehensively occupied by the federal government. Alabama's attempt to reserve the right to pursue such technical violations of the alien registration statutes, even in cases where the federal government does not wish to, should have been held pre-empted.

Another problematic provision that was left standing by Judge Blackburn's opinion again closely resembles one of the provisions of Arizona's SB 1070. According to Section 12(e) of Alabama's law, police officers must attempt to ascertain the citizenship and immigration status of any person they detain, if "reasonable suspicion exists that a person is an alien who is unlawfully present in the United States" and unless "the determination may hinder or obstruct an investigation." Along the lines of Arizona's SB 1070, Alabama's statute prohibits law enforcement officers from considering "race, color, or national origin . . . except to the extent permitted by the United States Constitution or the Constitution of Alabama of 1901." As with the Arizona law, the logical implication is that to the extent consideration of race, color or national original may be constitutional under whichever of the United States Constitution or the

state constitution is more permissive on the subject, the law enforcement officials and agencies of Arizona are invited to engage in it. In addition, the statute's list of documents which a person can present and thus be "presumed not to be an alien who is unlawfully present in the United States" includes a "foreign passport with an unexpired United States Visa and a corresponding stamp or notation by the United States Department of Homeland Security indicating the bearer's admission to the United States" but does not include any option for an expired visa and a document from DHS showing an unexpired period of authorized stay. If the "stamp or notation" indicates that the bearer's period of admission and authorized stay is unexpired, it is not at all clear why it should matter if the bearer's U.S. visa is expired or not. There is no logical reason to subject anyone who obtains an extension of stay or change of status with a validity period beyond the expiration date of their visa to more extensive detention while their status is electronically verified with DHS, if their DHS-issued Form I-94 clearly shows that their status is still valid. This legal illogic gives still more weight to the complaint made by the federal government that DHS may now be overwhelmed by requests for information and that substantial burdens may be placed by Arizona's law on lawfully present immigrants (and nonimmigrants). By meddling in areas which its legislators quite apparently did not fully understand, Alabama has created a system in which nonimmigrants who have been granted a change of status or extension of stay beyond the validity of their initial visa, as well as asylees and those having Temporary Protected Status, may be detained and an inquiry made to DHS because such persons lack "an unexpired United States Visa." This, too, should have been held preempted and was not.

Judge Blackburn's memorandum opinion also refused to preliminarily enjoin sections of the Alabama law that render unenforceable any contract entered into by an unlawfully present alien, with certain limited exceptions, and forbid unlawfully present aliens to enter into certain business transactions with the state and its subdivisions, such as obtaining a driver's license or business license. The difficulty with these sections is that, as explained in my previous article on our firm's website, unlawful presence, insofar as it is a defined term, does not correspond neatly to a set of people that it would have made any sense to subject to such prohibitions. Alabama appears to have forbidden from getting a driver's license, or entering into enforceable contracts, many people with pending applications for adjustment of status or cancellation of removal

filed for the first time in removal proceedings, who are considered unlawfully present but who may become lawful permanent residents if their applications succeed. Moreover, Alabama has forbidden many people who are specifically authorized to be employed in the United States from getting driver's licenses or entering into binding contracts in connection with that employment (unless perhaps the employment contracts fall within the terms of the statute's exception for "a contract authorized by federal law", which seems a gray area at best), since an applicant for adjustment of status can apply for employment authorization under 8 C.F.R. § 274a.12(c)(9), and an applicant for cancellation of removal can do so under 8 C.F.R. § 274a.12(c)(10). (Indeed, even some people who have been ordered removed may be authorized to accept employment while challenging that order in various ways or awaiting removal, as explained in a previous blog piece by this author.) Once again, by meddling in an area of law that is the responsibility of the federal government and that its legislators apparently did not fully understand, Alabama has created the possibility for truly absurd outcomes.

Finally, Judge Blackburn refused to preliminarily enjoin the section of the Alabama law that attempts to require students enrolling in public school to provide documents regarding their citizenship and immigration status. While it is conceivable that the section's apparent lack of a penalty provision might save it from unconstitutionality, there is some tension, to the extent that the statute may be an effort to coerce unlawfully present children not to attend Alabama public schools, between this provision and the Supreme Court's decision in Plyler v. Doe, 457 U.S. 202 (1982), forbidding a state to prevent children from attending public schools based on their immigration status. It has been reported that upon the coming into effect of this portion of the statute after Judge Blackburn's decision, "Hispanic students have started vanishing from Alabama public schools" because fear has caused "scores of immigrant families" to withdraw their kids from school or keep them home. Alabama should not be permitted to do indirectly what the Supreme Court has forbidden it to do directly.

Judge Blackburn's memorandum opinion only addressed whether to grant a preliminary injunction, so it is still possible that she may reverse herself before the conclusion of the case at the district court level. If she does not, the Court of Appeals for the Eleventh Circuit or the Supreme Court may need to step in to reverse those portions of her recent decision that uphold particularly

problematic portions of Alabama's law.