Why Missouri Lawmakers Should Oppose SB 612

SB 612 is Clearly Unconstitutional

SB 612 purports to create a separate state criminal penalty for conduct proscribed by federal law – the federal immigration crime of illegal re-entry (8 U.S.C. § 1326). This attempt is clearly preempted by federal law and therefore unconstitutional. In the landmark decision *Arizona v. United States*, the U.S. Supreme Court struck down a similar attempt by the state of Arizona to create a state crime for failure to carry one's immigration "papers." There the Supreme Court indicated that in an area such as alien registration, Congress has occupied the entire field leaving no room for state regulation of any kind, "even complementary" state regulation. *Arizona v. United States*, 132 S.Ct. 2494, 2502 (2012). As the Supreme Court explained, "permitting the State to impose its own penalties for the federal offense here would conflict with the careful framework Congress adopted." *Id.*

Contrary to the Missouri Senate Division of Research memorandum, which concluded that the Supreme Court's treatment of this Arizona provision was a "narrow holding that the statute was field preempted," the Supreme Court's holding with respect to Section 3 of Arizona's SB 1070 found that the provision was both field and conflict preempted. *See* Missouri Senate Division of Research, Memo. From Scott Svagera to Senator Schaaf, Feb. 1, 2016 at 3 ["Senate Memo"]. The Court's conflict preemption analysis with respect to Section 3, is closely analogous and therefore, extremely helpful in demonstrating the unconstitutionality of Missouri's bill, SB 612. Section 3 represented Arizona's attempt to create an additional state law criminal penalty for failure to register and carry registration documents – conduct that was already regulated at the federal level. This is exactly the same issue presented by Missouri's SB 612, which attempts to create a state law criminal penalty for the federal criminal immigration violation of illegal re-entry (8 U.S.C. § 1326). Simply because SB 612 parrots the federal re-entry provision without making explicit reference to it, nor hinging its enforcement on a violation of the federal counterpart does not make it any less preempted than Arizona's failed attempt.[1] The Court rejected Arizona's contention that its provision was not preempted because it shared the same aims as the federal alien registration provisions, stating "[p]ermitting the State to impose its own penalties for the federal offenses here would conflict with the careful framework Congress adopted." *Arizona*, 132 S.Ct at 2502. The Court explained the inherent conflict further: "Were § 3 to come into force, the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Id.* at 2503. The same reasoning applies with equal force to SB 612.

After the Supreme Court's decision, the Eleventh Circuit Court of Appeals followed its guidance in striking down attempts by the states of Georgia and Alabama to layer state-created criminal penalties on top of federal immigration violations. *See Georgia Latino Alliance for Human Rights v. Deal* (*"GLAHR"*), 691 F.3d 1250, 1266-67 (applying the reasoning of *Arizona* to strike

[1] The Senate Memo claims that Missouri's bill is distinguishable because "[w]hile Arizona attempted to make violation of federal alien registration requirements an Arizona offense, the crime that would be created by SB 612 is its *own* crime that happens to have a federal counterpart." Senate Memo at 4. This argument is completely circular and does not create any meaningful distinction. In both the Missouri and Arizona contexts, federal law already regulates and criminally proscribes the underlying conduct, and the state is clearly preempted from layering its own state law criminal penalty.

down Georgia's attempt to create state criminal penalties for the federal crime of inducing, harboring or transporting undocumented individuals); *United States v. Alabama*, 691 F.3d 1269, 1288-89 (rejecting similar provision in Alabama law). In rejecting the Georgia provision, the Eleventh Circuit specifically addressed Georgia's contention that the object of their law was consistent with federal law, finding that "identity of ends does not end our analysis of preemption" and ultimately striking down the Georgia provision because the end result was to "layer additional penalties atop federal law in direct opposition" to the Supreme Court's instructions regarding federal preemption. *GLAHR*, 691 F.3d at 1266-67. Thus, even where a state's attempt to create its own criminal penalty for violation of federal immigration law mirrors exactly the federal law provision, the state's attempt is preempted because the state simply enjoys no authority to regulate at all in this field. *See id.* ("Even though section 13 contemplates consistency with [federal law], its enforcement is noticeably 'not conditioned on respect for federal concerns or the priorities that Congress has explicitly granted executive agencies the authority to establish.'") (internal citations omitted).

Significantly, the Senate Memo does not point to a single example of a state's attempt to create a state criminal penalty for conduct already proscribed by federal law in the immigration context that has survived judicial scrutiny. The examples provided include state criminal laws related to marijuana, to the use of false or fraudulent identification, to regulations on weapon possession, and to criminal sentencing. *See* Senate Memo at 4-5.[2] These examples are clearly and easily distinguishable from SB 612 because they deal with matters traditionally within the State's policing powers, where the courts recognize a legal presumption against finding the state regulation preempted. *See United States v. South Carolina*, 720 F.3d 518, 529 (4th Cir. 2013). However, in the field of immigration, the states enjoy no such presumption. *Id*. ("We further decline to apply the presumption to state laws that concern immigration, an area with extensive federal presence."). Therefore, the Senate Memo's reference to these examples of state laws upheld by federal and state courts does not support an argument that SB 612 is constitutional.

The Senate Memo concludes that "[a]t any rate, the present case is certainly distinguishable from the statute considered in *Arizona*" without providing any details or basis for such a conclusion. Senate Memo at 6. Indeed, this conclusion is utterly unsupportable. Just as the Supreme Court found Arizona's attempt to layer state law criminal penalties atop violation of the federal registration provisions preempted, and as the Eleventh and Fourth Circuit Courts of Appeal found Georgia, Alabama, and South Carolina's attempts to do similarly with regard to federal immigration laws regulating harboring and transporting individuals unlawfully present also preempted, so too Missouri's attempt to layer additional penalties atop the federal immigration crime of illegal re-entry is preempted and therefore unconstitutional.

SB 612 Exposes Missouri to Legal Liability

[2] In *LULAC*, for example, while the court struck down much of California's Prop 187 as a preempted state regulation of immigration it upheld the provision regulating false documents because "the criminal penalties, criminalizing conduct that is dishonest and deceptive, [was] a legitimate exercise of the police power of the state." *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 775 (C.D. Cal. 1995); *cf.* Senate Memo at 5. SB 612 does not attempt to regulate an area within the legitimate and tradition police powers of the state.

Passage of SB 612 will undoubtedly bring a civil rights lawsuit challenging its constitutionality. In just the first two years of Arizona's continuing attempt to defend portions of SB 1070, the State reportedly spent more than $3 million dollars in legal fees.[3]

SB 612 should be rejected because it is also impracticable. It places state law enforcement agencies, including police, state prosecutors, and state courts in the position of making determinations regarding an individual's immigration status. State actors are not trained in making these determinations, inevitably leading to erroneous decisions and exposing these state agencies to legal liability. This too, creates another grounds to find SB 612 preempted. In *GLAHR*, the Eleventh Circuit reasoned, "interpretation of [the state law provision] by state courts and enforcement by state prosecutors unconstrained by federal law threaten the uniform application of the [immigration laws]…[e]ach time a state enacts its own parallel to the [immigration laws], the federal government loses 'control over enforcement' … 'further detract[ing] from the integrated scheme of regulation created by Congress." *GLAHR*, 691 F.3d at 1266 (internal citations omitted); *see also Arizona*, 132 S.Ct. at 2503 (addressing dilution of federal power).

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[3] "SB 1070 legal defense supported by private funds," The Arizona Republic (June 25, 2012), http://archive.azcentral.com/arizonarepublic/news/articles/2012/06/21/20120621sb1070-legal-defense-private-funds.html.