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States Get a “License” to Enforce Immigration Laws

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Buried under the cacophony of news about the debt ceiling, the budget deal, and the race for 2012, there is good news in the battle for sound immigration law and policy. On May 26, the U. S. Supreme Court issued its ruling in *Chamber of Commerce v. Whiting*.¹ In a 5–3 decision, the Court upheld the Legal Arizona Workers Act of 2007, allowing states to force employers to use the E-Verify system and revoke the business licenses of employers who knowingly hire illegal immigrants.

On the heels of that decision, Arizona recently petitioned the Supreme Court to hear *Arizona v. United States*, a case involving an Arizona immigration law called the “Support Our Law Enforcement and Safe Neighborhoods Act” (S.B. 1070). That petition, and ultimate success in the Court, seems all the more likely now given the holding and rationale in *Whiting* and the not-so-secret fact that the federal government’s inaction on immigration enforcement has crippled states like Arizona.

Threats from Activist Groups. Predictably, pro-illegal immigrant groups like the Mexican-American Legal Defense and Education Fund (MALDEF) and the American Civil Liberties Union (ACLU) have criticized the *Whiting* decision. MALDEF President Thomas A. Saenz called the decision “regrettable” and a “tortured product of judicial activism responding to perceived political views of the moment.” He, like the ACLU, said the decision “provides little predictive value” regarding S.B. 1070, and states should “tread carefully” in areas “touching immigration.” Translation: Do not pass

any immigration laws at the state level, or MALDEF will sue.

The problem for MALDEF and others is that the decision in *Whiting* was clear—it provides clarity to states and the federal government regarding their respective roles in immigration enforcement and ultimately gives states a green light to pass laws consistent with its decision.

Furthermore, as Arizona’s petition to the Supreme Court makes abundantly clear, the federal government’s failure to enforce current immigration law has resulted in Arizona’s bearing “the brunt of the problems caused by illegal immigration.” To quote Kris Kobach—Kansas Secretary of State, immigration law expert, and one of the drafters of S.B. 1070—“the federal government’s failure to enforce immigration laws is a massive unfunded mandate.”² And that unfunded mandate in Arizona alone is “several hundred million dollars each year,” according to Arizona’s petition.

What Was at Stake in *Whiting*. Two key portions of the Legal Arizona Workers Act (LAWA) were at issue in *Whiting*. First, LAWA called for the suspension or revocation of business licenses of Arizona employers that knowingly or intentionally

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employed unauthorized immigrants. Relying on the federal Immigration Reform and Control Act (IRCA), the U.S. Chamber of Commerce and the Obama Department of Justice (in a separate “friend of the court” brief) each attacked this provision, arguing that the doctrine of express preemption invalidated LAWA. The Chamber noted that a section of IRCA prevented the enactment of “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.” Based on the language of the statute, the Chamber argued that LAWA did not fall within IRCA’s licensing exception, because it dealt only with the suspending or revoking of licenses, and because subsequent federal legislation limited the scope of the licensing exception. The Chamber also argued that federal immigration law impliedly preempted this LAWA provision because Congress intended for the federal immigration system to be exclusive.

The second LAWA provision at issue in *Whiting* mandated that all Arizona employers use the E-Verify system to ensure employment eligibility by determining an individual’s legal status. E-Verify is “a real-time, Web-based verification system run by the Department of Homeland Security (DHS) and the Social Security Administration (SSA), [that] can determine with great accuracy the authenticity of the personal information and credentials offered by new hires. In most cases, verification occurs almost instantly.”³ The Chamber argued that state-mandated use of the voluntary federal E-Verify system would conflict with the federal immigration scheme and thus create tension between state and federal law.

The *Whiting* Decision: No Conflict with Federal Immigration Law. Despite the Chamber’s and

Justice Department’s arguments, the Court held that the statute did not conflict with federal immigration law, and the licensing provisions fell “squarely within the federal statute’s savings clause.”⁴ The Court dispensed with the notion that IRCA expressly preempted LAWA by pointing to the specific language of the IRCA section cited by the Chamber.

Chief Justice John Roberts focused on the plain wording of the statute in question and noted that the applicable portion of the clause expressly reserved for the states the ability to impose sanctions through licensing and similar laws. Based upon a simple definition of “licensing,” the Court succinctly dispatched the express preemption argument, holding that there was simply no basis for that argument: “There is no basis in law, fact, or logic for deeming a law that grants licenses a licensing law, but a law that suspends or revokes those very licenses something else altogether.”⁵

Furthermore, the Court noted that even if the Chamber’s arguments were valid, and laws regulating partnerships and articles of incorporation could not specifically be considered “licensing laws,” the laws would be similar to licensing laws and fall comfortably within IRCA’s licensing exception.

Additionally, the Court found that LAWA was not impliedly preempted by any federal law. Again, the Court cited the specific language of IRCA as evidence that LAWA fell squarely within Congress’s licensure exception. However, the Court looked at the specific provisions of LAWA and noted that Arizona “went the extra mile” to ensure that LAWA reflected IRCA’s provision in “all material aspects.” The Court noted that LAWA adopted the federal definitions for key terms such as “unauthorized alien” and barred state officials from making any independent decision regarding the status of suspected unauthorized aliens.

1. 131 S. Ct. 1968, 563 U.S. ___ (2011)

2. Kris Kobach, “Law and Border,” *National Review Online*, July 4, 2011, at <http://www.nationalreview.com/articles/271090/law-and-border-kris-w-kobach?page=1> (August 19, 2011).

3. Robert Rector, “Reducing Illegal Immigration Through Employment Verification, Enforcement, and Protection,” Heritage Foundation *Backgrounder* No. 2192, October 7, 2008, at <http://www.heritage.org/Research/Reports/2008/10/Reducing-Illegal-Immigration-Through-Employment-Verification-Enforcement-and-Protection>.

4. *Whiting*, 131 S.Ct. at 2-3.

5. *Ibid.*, 11.

Despite the Chamber's implied preemption arguments, the careful work of LAWAs drafters ensured that no material conflict existed between LAWAs and any federal law.

The *Whiting* Decision: The E-Verify Mandate. The Court also looked to the specific federal statutes that established and regulated the use of E-Verify. Chief Justice Roberts noted that Congress included no prohibition for state use of E-Verify and chose to issue specific instructions only for the Department of Homeland Security. Because no federal laws regulated state use of E-Verify, LAWAs E-Verify mandate presented no conflict with existing federal law.

The Court noted that, ironically, President Obama signed an executive order requiring all federal contractors to use E-Verify as a condition of receiving a federal contract. When that order was challenged, the Obama Administration defended it, writing that the "State of Arizona has required all public and private employers in that State to use E-Verify... This [Arizona mandating use of E-Verify] is permissible because the State of Arizona is not the Secretary of Homeland Security."⁶ For these reasons, the Supreme Court rejected the Chamber's preemption claims and delivered a landmark decision protecting the role of states in imposing certain sanctions and requirements on employers with regard to illegal immigration.

The Impact of *Whiting*. *Whiting* settles the broad question of whether immigration enforcement is exclusively assigned to the federal government: It is not. Federal immigration laws "expressly contemplate and authorize cooperative law enforcement efforts between federal and state officials."⁷ Despite wishful claims to the contrary, *Whiting* does have strong predictive value, and it will be powerful precedent in the forthcoming S.B. 1070 case.

Given that the Arizona statute carefully tracks with existing federal laws, the Obama Justice Department will have to assert some flavor of implied preemption to support its claim of unconstitutionality. But as the Court said in *Whiting*, "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.'"⁸

Though the Court's decision in *Whiting* will have a direct impact on both the government and citizens of Arizona, the most profound impact will likely be seen beyond the borders of the Grand Canyon State. It represents a major victory for states seeking to curb the negative impact of illegal immigration, especially in the employment context.

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6. *Ibid.*, 23.

7. Petition for Writ of Certiorari, *State of Arizona v. United States* (No. 11-182), at 4.

8. *Whiting*, 131 S. Ct. at 22, quoting *Gade v. National Solid Wastes Mgmt. Ass'n.*, 505 U.S. 88, 111 (1992).