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Supreme Court Immigration Showdown: Why States Can Enforce Immigration Laws

Elizabeth Garvey

On April 25, the Supreme Court will hear oral arguments in a case with significant implications for immigration policy and enforcement well beyond the immediate statute at issue. *Arizona v. United States* is a challenge to much of the state enforcement scheme of Arizona Senate Bill 1070 (S.B. 1070), which was enacted to detect and address illegal immigration in Arizona. The passage of S.B. 1070 created a media frenzy and led some immigrants' rights groups and even one Member of Congress to call for economic boycotts in Arizona. Just weeks after S.B. 1070 was passed, Attorney General Eric Holder announced that the Department of Justice was considering filing a lawsuit against Arizona. Yet during a congressional hearing on May 13, 2010, Holder admitted that he had not read the 17-page bill.

This paper, in its entirety, can be found at **http://report.heritage.org/ib3573**

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

After two years of legal action, the narrow legal issue before the Supreme Court is whether Arizona's law is preempted by federal immigration law—not whether it violates equal protection or federal civil rights laws. Nevertheless, the preemption issue remains an important one that will largely determine the range of options states have to assist in federal immigration enforcement actions.

S.B. 1070 in the District Court and Ninth Circuit. In April 2010, Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act, which created a number of state immigration offenses in an attempt to stem the tide of illegal immigration. The Obama Administration sued Arizona in federal district court, arguing that federal law preempts S.B. 1070, and sought to enjoin implementation of the law before it went into effect. The district court enjoined four of S.B. 1070's provisions, finding that these provisions were preempted not so much by explicit federal statutes but because they were in conflict with the Obama Administration's preferred enforcement priorities.

The four sections of the state law that the district court enjoined were drafted to mirror similar federal enforcement provisions.[1] The first provision instructs state law enforcement officials to make "a reasonable attempt ... when practicable, to determine the immigration status" of any person who is lawfully stopped, detained, or arrested, where that officer has a reasonable suspicion that the person is an illegal immigrant. The second provision provides that a "person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 U.S.C. §§ 13042(e) or 1306(a)." The third provision makes an illegal immigrant's unlawful presence and knowing attempt to solicit or perform work in Arizona a class 1 misdemeanor. The final provision authorizes warrantless arrests, provided that the law enforcement official has probable cause to believe the "person to be arrested has committed any public offense that makes the person removable from the United States."

The State of Arizona appealed the district court decision to the U.S. Court of Appeals for the Ninth Circuit, where a three-judge panel ruled in favor of the federal government. The panel determined that these four provisions were preempted by federal law. As Judge Carlos Bea pointed out in his partial dissent,

the panel effectively turned one of the relevant federal immigration laws, 8 U.S.C. § 1357(g), on its head to rule that Arizona law enforcement officials could not assist federal officials in checking the immigration status of suspected illegal immigrants. Section 1357(g) provides for both formal and informal partnerships between federal, state, and local law enforcement officials. Yet the Ninth Circuit panel interpreted the law, which states, "*Nothing* in this subsection shall be construed to require an agreement" between the federal and local officials, to mean, "*Everything* in this subsection shall be construed to require an agreement."[2]

Likewise, Judge Bea wrote that his court should have considered Congress's intent, rather than the Obama Administration's, in evaluating whether federal immigration laws preempt S.B. 1070. Judge Bea noted that the case involves "*enforcement* of immigration law... not whether a state can decree who can come into this country."[3] The State of Arizona petitioned the Supreme Court for review, and the Court agreed to hear oral argument on whether federal immigration laws preclude Arizona's efforts and impliedly preempt the four provisions of S.B. 1070 that the district court enjoined.

The Court's Preemption Jurisprudence. The Constitution grants to Congress the power "[t]o establish an uniform Rule of Naturalization" in Article 1, § 8, cl. 4. To that end, Congress passed the Immigration and Nationality Act and various related provisions, which encourage both formal and informal partnerships between federal, state, and local law enforcement. States may engage in cooperative law enforcement to address illegal immigration through their traditional police powers reserved under the 10th Amendment. Indeed, Congress has also made clear that cooperation between federal, state, and local governments is essential to effective enforcement of federal immigration laws.

Dating back to the early 19th century, the Supreme Court has properly held that under the Supremacy Clause, state laws that conflict with federal laws are preempted, or "without effect."[4] Over the years, the Court has developed a number of preemption doctrines, including express, field, and implied or conflict preemption. Arizona argues that federal immigration laws neither expressly prohibit the four provisions of S.B. 1070 at issue nor do they occupy the field of immigration enforcement to the exclusion of Arizona's parallel state laws. Indeed, just last term, the Supreme Court settled the dispute of whether the federal government occupies the field of immigration enforcement to the exclusion of Arizona's law requiring employee verifications: The Court held that it does not.[5] Thus, the Obama Administration's remaining option is to argue that federal immigration law impliedly preempts S.B. 1070.

Obama Administration Priorities Are Not Federal Law. The Obama Administration argues that S.B. 1070 is not an attempt at cooperative law enforcement, but rather Arizona's effort to set its own immigration policy. Allowing states to set immigration policy, the Administration contends, would "wholly subvert ... [the] single, national approach" enacted by Congress.[6] Further, the Administration asserts that S.B. 1070 threatens to thwart its enforcement priorities. For example, Congress laid out a "single federal framework governing [illegal immigrants'] obligations to register," and allowing Arizona to impose penalties for failure to comply with that federal framework frustrates the Obama Administration's decision not to prosecute certain illegal immigrants.[7] Yet, that argument misses the mark, because the Obama Administration's exercise of discretion or lack of enforcement does not constitute federal law.

The Supreme Court has previously held that courts "may not find state measures pre-empted in the absence of clear evidence that Congress intended to do so."[8] Congressional intent may only be inferred "to the extent [a state law] actually conflicts

1. See Ariz. Rev. Stat. Ann. §§§§ 11-1051(B); 13-1509(A); 13-2928(C); 13-3883(A)(5) (2010).
2. *United States v. Arizona*, 641 F.3d 339, 372 (C.A. 9 2011) (Bea, J. dissenting), *cert. granted*, 132 S. Ct. 845 (U.S. Dec. 12, 2011) (No. 11-182).
3. Id. at 369.
4. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (quoting McCullough v. Maryland, 4 Wheat. 316, 427 (1819)).
5. *Chamber of Commerce v. Whiting*, __ U.S. __, 131 S. Ct. 1968 (2011).
6. Brief for the United States at 15, *Arizona v. United States*, No. 11-182.
7. Id. at 15.
8. *California v. FERC*, 495 U.S. 490, 497 (1990).

with federal law."[9] As the State of Arizona argues, S.B. 1070 does not conflict with federal immigration laws, and the Court should afford S.B. 1070 a presumption of validity given that immigration enforcement has typically fallen "within the historic police powers of the States."[10] Further, the Supreme Court already determined that state regulation of illegal immigrants that is "harmonious with federal regulation" is not preempted by federal law.[11] Thus, Arizona logically argues that it may regulate illegal immigrants who are present in the state, and S.B. 1070 does not attempt to determine who "should or should not be admitted into [the United States]."[12]

As the Court held last term in *Whiting*, there is a "high threshold [that] must be met if a state law is to be preempted for conflicting with the purposes of a federal Act."[13] The Obama Administration failed to meet this standard, because Congress has been clear that states should partner with the federal government in combating illegal immigration. S.B. 1070 is a valid exercise of cooperative law enforcement, and the Court should not strip Arizona of "its plenary authority" and leave states to the mercy of the Obama Administration's "lax enforcement polic[ies]."[14]

Court Should Uphold S.B. 1070. Arizona enacted S.B. 1070 in an attempt to reinforce the very federal immigration laws that the Obama Administration has declined to enforce. S.B. 1070 was intentionally written not to conflict with federal immigration laws, and in fact, Congress has acknowledged that federal, state, and local law enforcement must work together to combat the influx of illegal immigrants. Given its past preemption cases and its *Whiting* decision last year, the Supreme Court should uphold S.B. 1070 and give states the green light to engage in cooperative enforcement as contemplated by federal immigration laws.

*—**Elizabeth Garvey** is a Legal Policy Analyst in the Center for Legal & Judicial Studies at The Heritage Foundation.*

9. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987).
10. Brief for Petitioners at 29, *Arizona v. United States*, No. 11-182.
11. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976).
12. Brief for Petitioners at 29.
13. *Whiting*, 131 S. Ct. at 1985.
14. Brief for Petitioners at 26.