

ISSUE BRIEF

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Arizona v. United States: What the States Can Do to Enforce Immigration Laws

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Since the Supreme Court issued its decision on June 25 on Arizona’s immigration law,¹ numerous news reports and commenters have mistakenly said that most of the Arizona law was struck down. That is simply wrong. The error is apparently based on the mistaken assumption that the four provisions reviewed by the Supreme Court were the entire law. But in reality, most provisions of the law were upheld by the federal district court in Arizona that issued the initial injunction against the four provisions at issue before the Supreme Court.² The remaining provisions will allow Arizona—and, by extension, other states—to assert some control over immigration within their borders.

Court Upheld the “Heart” of the Law. It certainly would have been better for the security of the country as well as the system of

federalism if the majority of justices had followed the dissents of Justices Antonin Scalia and Clarence Thomas and respected state sovereignty by upholding all four of the provisions of S.B. 1070 that were before the court. But Governor Jan Brewer (R) is correct when she said that the provision the court upheld was the “heart” of the law.³

The Supreme Court did throw out three provisions of S.B. 1070 that made failure to comply with federal alien-registration requirements a state misdemeanor, made it a misdemeanor for an illegal alien to seek or engage in work, and authorized state and local officers to arrest without a warrant anyone whom the officers had “probable cause to believe” had committed a public offense that made them removable from the U.S.

But the Supreme Court upheld the main provision of S.B. 1070 that allows Arizona law enforcement officials to check the immigration status of individuals they arrest, stop, or detain if they have a “reasonable suspicion” that they are in the country illegally. This was the provision that was constantly attacked by President Obama and his Attorney General, Eric Holder.

Some critics of this provision have claimed that its constitutionality is

still very much in doubt because of language in the majority opinion that says that the court’s holding “does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.” But *all* statutory provisions that survive a facial challenge are liable to as-applied challenges; Justice Anthony Kennedy’s statement is little more than a truism.

Arrows in the States’ Quivers. Checking the immigration status of arrestees is not all that Arizona can still do. The Justice Department did not appeal the refusal of the original trial court to toss out other provisions of S.B. 1070. Those provisions that are in force in Arizona include the following:

- A prohibition on state officials implementing any policy that limits the enforcement of federal immigration laws. Any legal resident of Arizona can bring an action in court against any official who adopts or implements such a policy—and can receive attorneys’ fees and costs if he or she prevails. A violation is punishable by a civil penalty of up to \$5,000 a day “for each day that the policy has remained in effect”

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after the lawsuit is filed—quite a hefty deterrent. So there will be no sanctuary cities in Arizona or other policies implemented by local officials favoring illegal aliens over the law.

- A requirement that federal officials be notified when an illegal alien who was convicted of a state offense is discharged from prison. This will provide Arizona with interesting (and politically embarrassing) statistics if the federal government refuses to pick up illegal (and dangerous) alien felons and other criminals.
- A prohibition on state and local governments and agencies imposing any limits or restrictions on providing information on immigration status that will be used for the purposes of determining eligibility for public benefits or licenses, to verify claims of residence or domicile, or to check whether the alien is in compliance with federal registration laws.
- A ban making it a misdemeanor for the “occupant of a motor vehicle that is stopped on a street, roadway or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.” This is obviously aimed at day labor spots where illegal aliens wait to be picked up to go “work at a different location”—and

it is also a misdemeanor for the illegal alien to enter the “motor vehicle” to be hired.

- A prohibition on encouraging or inducing an illegal alien “to come to or reside” in Arizona, punishable as a misdemeanor.
- A provision making it a felony to “intentionally engage in the smuggling of human beings for profit or commercial purpose,” with *smuggling* being defined very broadly as “the transportation, procurement of transportation or use of property or real property by a person ... that knows or has reason to know that the person or persons transported ... are not” U.S. citizens or permanent resident aliens or are otherwise lawfully in the country.
- Authority for the state to impound the vehicle of any person “in violation of a criminal offense” (such as smuggling) who transports or attempts to transport, conceals, harbors, or shields from detection in a vehicle someone the person “knows or recklessly disregards the fact that the alien has come to, has entered or remains in the United States in violation of law.”

The Obama Administration also did not challenge amendments in S.B. 1070 to a prior Arizona law that forces employers in the state to use the federal E-Verify system to confirm the eligibility of all employees and imposes a series of penalties

on employers who knowingly or intentionally employ “unauthorized aliens.” This includes suspension of the employers’ business licenses, which is a death sentence for businesses. This Arizona statute was upheld by the Supreme Court in 2011 in *Chamber of Commerce v. Whiting*⁴ and provides a much more powerful weapon in stopping employment of illegal aliens than the minor misdemeanor charge thrown out by the Court.

States Can Go Forward. States can (and should) work within the parameters set out by the Supreme Court in *Arizona v. U.S.* and *Chamber of Commerce v. Whiting*. Even without the three provisions in the Arizona law the Supreme Court threw out and an executive branch that is defying federal immigration law by providing amnesty to the millions of illegal aliens present in the country, these cases allow states to reduce the alien problem by regulating key elements such as transportation and employment necessary for illegal aliens to remain in their respective states.

Arizona and other states could also copy the part of Alabama’s immigration law⁵ that requires anyone getting a license plate to verify citizenship or legal presence in the United States. Licensing of motor vehicles is an area exclusively within the power of state governments, and both an Alabama federal district court and the Eleventh Circuit Court of Appeals refused to issue an injunction to stop this provision from

1. *Arizona v. United States*, 567 U.S. --, 2012 WL 2368661 (2012).
2. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).
3. *Brewer: Supreme Court’s Arizona Decision a ‘Victory for the Rule of Law,’* FOX News (June 25, 2012), <http://www.foxnews.com/politics/2012/06/25/brewer-supreme-court-arizona-decision-victory-for-rule-law/>.
4. *Chamber of Commerce v. Whiting*, 563 U.S. --, 131 S.Ct. 1968 (2011).
5. ALA. CODE § 31-13-1 et seq. (2011).

going into effect when the Obama Administration filed a similar Arizona-style lawsuit in federal court against Alabama.⁶

Allowing States to Compete.

Arizona's implementation of such policies does not require a change in the sanctuary policies of states such as California and New York, although Arizona's actions may encourage illegal aliens to move to such states. Given the competition between the "laboratories of democracy," their

governments will experience the effects of the amnesty policy they have encouraged and implemented, from higher unemployment of citizens and more crime to budget-busting increases in their states' costs for education, health care, and law enforcement.

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6. United States v. Alabama, 443 Fed.Appx. 411 (11th Cir. 2011). The section of the Alabama law upheld also prevents illegal aliens from getting a business license or driver's license. In fact, it is a felony for an illegal to even attempt to obtain a license plate, business license, or driver's license. See ALA. CODE § 31-13-29 (2011).