FAIR

FEDERATION FOR AMERICAN IMMIGRATION REFORM

State of Arizona v. United States of America:
The Supreme Court Hears Arguments on SB 1070

Introduction

In its lawsuit against the state of Arizona, the United States Department of Justice (DOJ) has challenged four sections of SB 1070:

(1) Section 2: Requires state and local law enforcement officers, during a lawful stop, arrest or detention, to inquire about immigration status if the officer has reasonable suspicion to believe the individual is an illegal alien.
(2) Section 3: Provides that it is a violation of state law for an illegal alien to be in violation of the federal alien registration statutes.
(3) Section 5: Creates a misdemeanor offense which prohibits illegal aliens from applying for work, soliciting work in public places, or performing work in Arizona.
(4) Section 6: Authorizes state and local police officers to conduct a warrantless arrest of an individual if the officer has probable cause to believe the person has committed a removable offense.

The Federal District Court for the District of Arizona enjoined all four of these sections. The 9th Circuit Court of Appeals upheld that injunction. Among several factors for determining whether an injunction is appropriate includes a determination of whether the plaintiff will likely win on the merits. Thus, as part of its ruling, the Supreme Court must decide whether the DOJ will likely win its case on the merits.

The core of the DOJ's lawsuit against Arizona is based on the argument that federal law preempts SB 1070. Under the Supremacy Clause of the U.S. Constitution, if the federal law preempts state law, the state law becomes null and void. U.S. Const. art. VI, cl. 2.

In general, there are two types of preemption: express, and implied. Express preemption occurs when federal statute expressly preempts state legislation in a particular area (for example, 8 U.S.C. § 1324a(h)(2), which expressly preempts states from imposing criminal or civil sanctions, such as fines, on employers that knowingly employ unauthorized aliens). *Chamber of Commerce v. Whiting,* 131 S. Ct. 1968 (2011).

Within the category implied preemption, there are two subcategories, usually called conflict preemption and field preemption. *Fla. Lime & Avocado Growers, Inc.*, 373 U.S. 132, 142-143 (1963). Conflict

preemption occurs either when (1) "compliance with both federal and state regulations is a physical impossibility" or (2) "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Field preemption occurs where the "depth and breadth of a congressional scheme occupies the legislative field." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). In other words, Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law. *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 351 (2d Cir. 2008).

Finally, within the context of immigration, the courts have also recognized *per se* preemption. The United States Supreme Court has held that a state law related to immigration will be *per se* preempted if it is a regulation of immigration, meaning a "determination of who should or should not be admitted into the country and the conditions upon which a legal entrant may remain." *De Canas v. Bica*, 424 U.S. 351, 354-355 (1976).

The courts have held that "in every pre-emption case," "the purpose of Congress is the ultimate touchstone" in deciding whether to uphold a state law. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). And, "in all pre-emption cases" the court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 556 (2009). Therefore, in determining whether a state law is preempted, the Court looks to whether Congress "clear[ly]" and "manifest[ly]" intended for a state to be displaced of its power to enact the state law at issue.

This document is intended to give readers a brief summary of the arguments the Department of Justice and the state of Arizona have made in their briefs before the Supreme Court.

The Argument of the Department of Justice

I. SB 1070 is Preempted Because it Frustrates the Administration's Immigration Policy

Recognizing that the analysis of whether a state law is preempted depends on the intent of Congress and Congress alone, the DOJ attempts to redefine the meaning of Congressional intent. Specifically, the DOJ argues that Congressional intent *by definition* includes the discretionary authority Congress has given the Executive Branch. Therefore, the DOJ argues that SB 1070 is preempted because in some places it conflicts with the intent of Congress and in other places it conflicts with the Obama Administration's immigration policies.

The DOJ lays out its argument in stages. It first argues that the Framers of the Constitution intended the Federal Government to have authority over immigration. It then argues that Congress gave significant discretionary authority to the Executive Branch to enforce U.S. immigration laws. Finally, the DOJ argues that SB 1070 is preempted because it conflicts with the Administration's enforcement

priorities. This argument is summarized by the DOJ caption: "Arizona's Statute Impermissibly Seeks to Frustrate the Discretionary Judgments through which the Federal Government Sets Immigration Policy for the Nation."

Elaborating on this argument, the DOJ describes what it considers the sweeping authority of the "Federal Government" over immigration (an argument that conflates Congress and the Executive Branch). It argues that under the U.S. Constitution and through the Immigration and Nationality Act (INA), the "federal government" comprehensively regulates immigration and enforces the immigration laws. (DOJ Brief, p.13-14, 17) The "National Government," the DOJ states, has plenary authority to admit aliens to this country, to prescribe the terms under which they remain, and generally "the authority to control immigration." (p.13) The Constitution gave this authority to the "National Government" because of the foreign policy implications of immigration policy. (p.17) Thus, the "National Government" has "the ultimate responsibility to regulate the treatment of aliens while on American soil." (p.13-14)

Then, the DOJ argues that "[i]n pursuance of the National Government's paramount authority," Congress vested the Executive Branch with the authority and discretion to make "sensitive judgments" with respect to aliens, "balancing numerous considerations…," including foreign policy. (p.14, 18-21) The DOJ argues that Executive Branch discretion is "especially strong in the area of immigration" (p. 14) because policy decisions regarding immigration depend on resource constraints and numerous other considerations that call for a decision maker to exercise sound judgment according to "a single standard." (p.14, 21).

The DOJ then concludes that SB 1070 is preempted because it conflicts with the Administration's immigration policy. Through SB 1070, the DOJ says, Arizona has adopted its own immigration policy -- attrition through enforcement -- without regard to the judgments "the INA provides for the Executive Branch to make." (p.14, 23) Arizona, therefore, *"seeks to enforce federal immigration law through means different from those Congress designated."* (p.25, emphasis added) For each state to do this would subvert Congress's goal: a single, national, approach.

II. Sections 2, 3, 5, and 6 of SB 1070 are preempted.

Having redefined Congressional intent to include the prerogatives of the Executive Branch, and thus turned long-standing preemption analysis on its head, the DOJ has one issue it must resolve before it can continue: What happens if Congress authorizes, or even requires, state and local officers to engage in enforcement activities, but doing so is contrary to Executive policy? Which governs: Congress's authorization to the states or the Executive policy?

The DOJ resolves this argument in favor of the Executive Branch. It acknowledges that the Constitution contemplated states assisting in the enforcement of federal law. (p. 44). However, it argues that any express authorization Congress gives to the states regarding enforcement efforts must

be exercised *in cooperation* with the federal government. The DOJ further argues that cooperation, by definition, means not contradicting the immigration policies set by the Executive Branch. (p. 46)

Based on the DOJ's analysis of the law, the DOJ sets out to show how Sections 2, 3, 5, and 6 of SB 1070 conflict with Congressional intent—now redefined to give primacy to the Executive Branch's immigration policies.

State requirement to follow federal alien registration laws. (Section 3) The DOJ argues that Section 3 is impliedly preempted both because it conflicts with Congress's comprehensive statutory scheme on alien registration and because it conflicts with the Administration's policies. (p.31-32) With respect to the latter argument, the DOJ asserts that Arizona cannot prosecute people the Executive Branch has decided not to prosecute based on important considerations that are consistent with the Executive Branch's reading of the INA. (p.31-33).

Prohibition on illegal aliens soliciting employment. (Section 5) The DOJ argues that Section 5 is impliedly preempted because Congress has comprehensively legislated in this field, eliminating room for the states to act. Congress, it says, has set forth a comprehensive scheme governing the employment of aliens that rejects the idea of punishing illegal aliens who seek work, instead opting to punish employers who hire them. (p. 15, 33-39) Therefore, because Section 5 provides criminal penalties for illegal aliens who work or seek work, Section 5 is preempted.

Requiring local police to conduct immigration status checks under certain circumstances. (Section 2) The DOJ argues that Section 2 is preempted because it frustrates the Executive Branch's immigration policy. The DOJ argues that local jurisdictions may only enforce federal immigration laws "cooperatively," a principle which the DOJ insists Congress embodied in INA § 287(g)(10). However, the DOJ argues that Section 2 is not cooperative enforcement because "by insisting indiscriminately on enforcement in all cases, … Section 2 forbids officers …from looking to the lead of federal officials and adhering to their judgment and discretion." (p.16) (However, the DOJ does not address two important points in its argument. First, the DOJ does not explain how Section 2 interferes with the Administration's enforcement priorities. Second, the DOJ ignores the fact that Congress in 8 U.S.C. § 1373(c) requires DHS to respond to every immigration inquiry from a local officer and subordinates the Congressional directive with its own desire not to respond to inquiries from state and local officers.)

Ultimately, the DOJ concludes: "Section 2 is preempted because in every instance, by interposing a mandatory state law between state and local officers and their federal counterparts, it 'stands as an obstacle to the accomplishment' of the federal requirement of cooperation… and the full effectuation of the enforcement judgment and discretion Congress has vested in the Executive Branch under the INA." (p.50) "Section 2 changed Arizona's policy from one of cooperation to one of confrontation." (p.16)

Authorizing Warrantless Arrest of Aliens for Deportable Offenses (Section 6): The DOJ argues that Section 6 is impliedly preempted because it frustrates Congressional intent by deviating from the

Administration's immigration policy. Again, the DOJ argues that apprehension and detention of aliens must be done in cooperation with federal officers. Section 6, however, does not represent cooperation, according to the DOJ. It allows local officers to detain aliens based on their "perception" that the individuals are removable without regard to the federal government's priorities. (p.53) The DOJ argues that even if the local officer is correct in determining that an alien for removal exists, whether and when to pursue removal is within the Secretary's plenary discretion. (p.54)

The Argument of the State of Arizona

I. States may regulate illegal immigration in a manner consistent with federal law.

Arizona argues this case is about implied preemption. (Arizona Brief, p.27) It then sets forth the legal principles of the preemption doctrine. Arizona states that whether a state statute is preempted "depends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone.'" (p.27) Quoting the Supreme Court, Arizona argues, "Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was 'the clear and manifest purpose of Congress' would justify th[e] conclusion" that states could not act in areas where federal laws exist." (p.27)

Because Congress is the branch of government whose intent controls a preemption analysis, Arizona asserts that a state law is not preempted merely because the Executive Branch claims the law is out of step with its enforcement priorities. The Executive Branch's preference for a relatively lax enforcement regime does not drive the preemption analysis. (p.28) Arizona states that the burden here is on the federal government; the federal government must point to a specific Act of Congress that preempts the provisions of SB 1070. (p.28)

Arizona then argues that the states have inherent authority to enact measures regarding illegal immigration. Arizona notes that the Supreme Court has upheld the states' authority through several cases, including:

- *DeCanas v. Bica*, 424 U.S. 351 (1976): The Supreme Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted." (p. 29-30) The INA does not preempt a State's regulation of illegal aliens that is harmonious with federal regulation.

- *Plyler v. Doe*, 457 U.S. 202 (1982): States possess the "authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." (p.30) "Despite the exclusive federal control of this Nation's borders, we cannot conclude that the states are without any power to deter the influx of persons entering the United States

against federal law, and whose numbers might have a discernible impact on traditional state concerns." (p.30)

- *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011): "[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." "Implied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'" (p.31)

Arizona argues that not only has the Supreme Court affirmed that states have the inherent authority to enact measures on illegal immigration such as SB 1070, Congress has done the same. Specifically, Arizona points to 8 U.S.C. 1357(g)(10), which provides that the creation of the 287(g) program shall not be construed to require states to enter into a 287(g) agreement in order to: (1) to communicate with DHS regarding the immigration status of any individual, including reporting an illegal alien or (2) otherwise to cooperate with DHS in the identification, apprehension, detention, or removal of illegal aliens. (p.32)

Having established that states have inherent authority to legislate with respect to illegal immigration in a manner that is consistent with Congressional intent, Arizona sets out to demonstrate why Sections 2, 3, 5, and 6 of SB 1070 are constitutional (and not preempted).

II. The requirement to conduct immigration status checks if there is reasonable suspicion is constitutional. (Section 2)

Arizona argues that Congress has authorized the communication and cooperation provided for in Section 2 of SB 1070 through multiple federal statutes. For example:

- 8 U.S.C. § 1357(g)(INA § 287(g)) expresses Congress's intent that States use their inherent police powers to communicate with and cooperate with the federal government in immigration enforcement.

- 8 U.S.C. § 1373(c) requires federal government to respond to all local inquiries about immigration status.

- 8 U.S.C. § 1644 prohibits federal, state, and local laws that prohibit or restrict in any way, the sending or receiving from DHS information regarding the immigration status of an alien. (p.33)

These statutes, Arizona says, expressly reserve to the states the authority to enforce immigration laws—authority which Arizona is exercising through SB 1070. (p.32, 34) And, because Section 2 requires that Arizona officers use the federal Law Enforcement Support Center (LESC) to determine immigration status pursuant to 8 U.S.C. § 1373(c) – as opposed to making an independent determination of immigration status – there is no tension with federal law. (p.34)

Arizona then argues that the 9th Circuit's holding that 8 U.S.C. 1357(g)(10) only permits states without a 287(g) agreement to engage in immigration enforcement on an "incidental and as needed basis" is wrong because it is not supported by the text of the statute. (p.34-35) Arizona argues that 8 U.S.C. 1357(g)(10) expresses congressional intent that states continue to exercise their authority in assisting in immigration enforcement, just as Arizona and other states have done prior to the enactment of SB 1070. Arizona explains that all Section 2 does is "codify[] those already systematic and routine practices" and therefore is not be preempted. (p.37-39)

III. The granting of authority for state and local officers to make warrantless arrests of persons they have probable cause to believe are removable from the U.S. is constitutional. (Section 6)

Arizona argues that the 9th Circuit's holding that only federal officers can arrest aliens for civil immigration violations was in error. (p.42) The states, Arizona says, have inherent authority to make arrests for immigration law violations, both civil and criminal. Years of appellate case law supports this principle, as does federal statute. (p.44-45) As an example, Arizona points to 8 U.S.C. 1357(g), which expressly recognizes the states' authority to participate in the "apprehension" and "detention" of unlawfully present aliens without regard to whether they have committed another crime.

Moreover, Arizona argues, Section 6 of SB 1070 does not require any arrests without a warrant, it merely authorizes them. Thus, the Court should read Section 6 as authorizing warrantless arrests in a manner consistent with federal law. Read in this light, the DOJ's facial challenge to Section 6 cannot stand.

IV. The requirement that aliens in Arizona follow federal registration laws is constitutional. (Section 3)

Arizona argues that Section 3 fits squarely within a long line of Supreme Court cases which have held, absent field preemption, states are well within their authority to prohibit the same conduct federal law prohibits. (p.49) Arizona points out that Section 3 penalizes only illegal aliens who are in violation of the federal registration laws and that the penalties in this section are exactly the same as federal law provides. (p.49) Thus, Section 3 is not preempted by federal law.

V. The criminal penalty imposed on illegal aliens who solicit or perform work is constitutional. (Section 5)

Arizona argues that Section 5 is a valid exercise of the traditional state authority to regulate employment. (p.53) Section 5, Arizona states, furthers a legitimate state goal; each state has the authority to protect its fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens. (p.54)

Arizona rejects the 9th Circuit's assumption that Congress' inaction in not criminalizing aliens who work illegally, joined with its action of criminalizing employers who hire illegal workers, justifies the inference that Congress intended to bar states from enacting measures like Section 5. This would leave illegal workers entirely immune and is inconsistent with judicial precedent. The legislative history of the 1986 law that created employer sanctions (the Immigration Reform and Control Act, or IRCA) shows only that Congress decided not to impose sanctions on illegal workers; it does not show that Congress intended to prohibit the states from doing so. (p.57)

Arizona argues that while federal law punishes only employers who hire illegal aliens, Section 5 is valid because it mirrors the federal objective behind IRCA and furthers a legitimate state goal of combating illegal work by addressing the problem from the supply side. (p.53) Furthermore, because federal law is silent on illegal workers, Arizona argues that "nothing overcomes the presumption against preemption" with respect to this provision. (p.53-54)

VI. Foreign criticism of SB 1070 has no preemptive effect.

Foreign nations and foreign officials cannot invalidate a state's law simply by criticizing it. (p.57, 59) Those foreign governments and officials who are complaining are really complaining about the Congressional acts and intent that authorize SB 1070. (p.59)

VII. SB 1070 does not raise concerns of "disuniformity"(a patchwork of state laws).

Arizona argues that through the passage of SB 1070, it is not "regulating immigration" as defined by the federal courts, but that it is merely exercising authority granted by Congress. It is illogical for the DOJ to argue that Congress would grant the states such authority, but then it is unconstitutional for the states to act on it. Moreover, Arizona argues here is no more threat of disuniformity with respect to SB 1070 than Arizona's mandatory E-verify law, which the U.S. Supreme Court upheld in the *Whiting* decision. (p.60)

Arizona adds that it is not enough for the Executive Branch to show that, all things being equal, it would be easier for the Executive Branch if the state law did not exist. (p.61) When states adopt the federal substantive standard as their own and either authorize state cooperation in enforcement or add state penalties, the potential for serious conflict with federal law is eliminated. (p.61)

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