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## Supreme Court Upholds Arizona Law

### Penalizing Hiring of Illegal Immigrants

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May 30, 2011

The U.S. Supreme Court May 26 [upheld](#) the Legal Arizona Workers Act, a law that allows the state to revoke the business licenses of employers that knowingly hire illegal immigrants and requires employers in the state to use E-Verify (Chamber of Commerce v. Whiting, U.S., No. 09-115, 5/26/11).

Writing for the majority in the 5-3 decision, Chief Justice John Roberts said that the licensing portion of the Arizona law is not preempted by federal law because it falls under the Immigration Reform and Control Act's savings clause, which permits state "licensing and similar laws." The state law is a "licensing provision" that "falls squarely within the federal statute's savings clause" and "does not otherwise conflict with federal law," Roberts wrote. He also found that the mandatory E-Verify requirement does not conflict with the federal government's employment verification scheme.

The Supreme Court affirmed a 2008 decision by the U.S. Court of Appeals for the Ninth Circuit ([2 WIR 533, 9/22/08](#)) that upheld the Arizona law, rejecting arguments brought by a coalition of business and immigrant rights groups—including the U.S. Chamber of Commerce, Chicanos por la Causa Inc., and Arizona Employers for Immigration Reform—that argued the law was both expressly and impliedly preempted by federal law.

Justices Samuel A. Alito, Anthony M. Kennedy, and Antonin Scalia joined the full majority opinion. Justice Clarence Thomas joined the portions of the majority ruling finding that Arizona's employer sanctions provisions are not expressly preempted and that the mandatory E-Verify requirement does not conflict with the federal government's employment verification scheme. Thomas did not join in the portion of the majority opinion rejecting the argument that the licensing provisions are impliedly preempted by federal law. Thomas concurred in the judgment affirming the Ninth Circuit.

Meanwhile, Justice Stephen G. Breyer wrote a dissenting opinion, joined by Justice Ruth Bader Ginsburg, arguing that the Arizona law does not fit within the IRCA savings clause because it would broaden the definition of "license" to include articles of incorporation and partnership certificates that are not employment-related licensing systems.

In addition, Breyer said the E-Verify mandate was preempted because "by making mandatory that which the federal law seeks to make voluntary," the Arizona law stands as an "obstacle" to the purposes and objectives set out by Congress.

In a separate dissent, Justice Sonia Sotomayor wrote, "I cannot believe that Congress intended for the 50 states and countless localities to implement their own distinct enforcement and adjudication procedures for deciding whether employers have employed unauthorized aliens." The majority's reading of IRCA's savings clause "subjects employers to a patchwork of enforcement schemes," she wrote.

Justice Elena Kagan, who served as solicitor general until President Obama nominated her for the court, recused herself from the case.

*"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," Chief Justice Roberts wrote in the majority opinion.*"

### **Definition of 'Licensing' at Issue**

The court rejected the chamber's argument that the Arizona law is not a "licensing" law, and instead is simply an employer sanctions law preempted by IRCA.

The chamber asserted that because the Arizona law operates only to suspend and revoke licenses rather than to grant them, it is not a true licensing law.

"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," Roberts wrote.

Arizona's licensing law "falls well within the confines of the authority Congress chose to leave to the states and therefore is not expressly preempted," the court held.

### **Majority Sees No Tension with Federal Law**

"IRCA expressly reserves to the states the authority to impose sanctions on employers hiring unauthorized workers, through licensing and similar laws," Roberts wrote.

"In exercising that authority, Arizona has taken the route least likely to cause tension with federal law," by using the federal government's own definition of an "unauthorized alien" as part of the statute and relying on the federal government's determination of who is an unauthorized alien, he said.

"If even this gives rise to impermissible conflicts with federal law, then there really is no way for the state to implement licensing sanctions, contrary to the express terms of the savings clause," Roberts wrote.

The court held that the licensing portions of the Arizona law are not impliedly preempted by federal law, rejecting arguments that the state law upends the carefully balanced federal immigration scheme.

"As with any piece of legislation, Congress did indeed seek to strike a balance among a variety of interests when it enacted IRCA," Roberts wrote. "Part of that balance, however, involved allocating authority between the federal government and the states," and through IRCA's savings clause, Congress chose to preserve state authority over sanctions imposed through licensing laws, he said.

### **E-Verify Mandate Upheld**

The majority also rejected the chamber's argument that the state E-Verify mandate impedes the purpose of the federal government's voluntary employment verification program.

"Arizona's use of E-Verify does not conflict with the federal scheme," Roberts wrote.

One reason there is no conflict, the court found, is that the consequences of not using E-Verify under the Arizona law are the same as the consequences under the federal program. In both instances, the only consequence of not using E-Verify to verify the work

authorization of new hires is to forfeit the otherwise available rebuttable presumption that the employer complied with immigration laws, according to the court.

In addition, the court found no language in the statute establishing E-Verify that circumscribes state action relating to the program.

In a portion of the majority opinion that Thomas did not join, the majority found that the Arizona requirement that employers use E-Verify in no way obstructs achieving the aims of the federal E-Verify program.

"The federal government has consistently expanded and encouraged the use of E-Verify," and the Department of Homeland Security acknowledges that state laws mandating E-Verify will not overburden the system, Roberts wrote.

### **Breyer Questions Definition of 'Licensing.'**

In his dissent, Breyer argued that the majority erred in finding the Arizona law to be a "licensing" law within the scope of the IRCA savings clause.

The Arizona statute "strays beyond the bounds of the federal licensing exception, for it defines 'license' to include articles of incorporation and partnership certificates," that makes the licensing exception broader than Congress intended, Breyer wrote.

"Context, purpose and history make clear that the 'licensing and similar laws' at issue involve employment-related licensing systems," he wrote.

In addition, Breyer expressed concern about the Arizona law upending the careful balance IRCA created between sanctioning employers that knowingly hire unauthorized workers and protecting workers from discrimination.

"The state statute seriously threatens the federal act's antidiscriminatory objectives by radically skewing the relevant penalties," Breyer wrote. Under federal law, an Arizona employer that knowingly hired an illegal alien for the second time would risk a penalty of \$6,500, while the Arizona law would result in the mandatory, permanent loss of the right to do business in Arizona, a "business death penalty," he said.

This is a concern because it encourages employers to discriminate against new hires instead of risking the "business death penalty," Breyer wrote.

He also disagreed with the majority's decision to uphold the E-Verify mandate. In his dissent, Breyer wrote that Congress had "strong reasons" for insisting on the voluntary nature of the E-Verify program, and Arizona's "co-opting" of the program "ignores both federal language and the reasoning it reflects."

### **Savings Clause Not That Broad, Sotomayor Says**

Sotomayor, who wrote a separate dissenting opinion, said that having created a carefully constructed, uniform federal scheme for determining whether a person has employed an unauthorized alien, Congress "could not plausibly have meant to create such a gaping hole in that scheme through the undefined, parenthetical phrase 'licensing and similar laws.' "

According to Sotomayor, the IRCA savings clause only permits states to impose sanctions on businesses following a final federal determination that a specific alien had been hired illegally.

Sotomayor also agreed with portions of the Breyer dissent that found federal law impliedly preempts the Arizona E-Verify mandate.

In addition to Breyer's reasoning, Sotomayor said Congress considered the costs of a mandatory employment verification program when constructing E-Verify. "Permitting states to make use of E-Verify mandatory improperly puts states in the position of making decisions for the federal government that directly affect expenditure and depletion of federal resources," she wrote.

### **Some See 'Broad Implications' for State Enforcement**

The Federation for American Immigration Reform, a group opposing higher levels of immigration, said the ruling will have "broad implications" for immigration enforcement at the state level.

The Supreme Court ruling "once and for all clarifies that states may require employers to use E-Verify and allows them to sanction employers if they knowingly hire illegal aliens," said FAIR President Dan Stein.

"With this opinion, the Supreme Court has dealt a game-changing blow to special interests that have misused federal preemption claims to impede meaningful immigration enforcement at the local level," he said.

Similarly, Arizona Gov. Jan Brewer (R) said she is "gratified" by the Supreme Court decision. "Arizona and all states are now free to take down the 'Help Wanted' sign for illegal aliens in their states," she said in a May 26 statement.

Brewer said that the ruling has made her "more adamant than ever that states do have a complimentary role in enforcing federal immigration laws, despite the Obama Administration's opposition at every turn."

In April 2010 Brewer signed into law S.B. 1070, a law that makes it a state offense for an unauthorized alien to solicit, apply for, or perform work, and to fail to carry immigration papers, among other things.

The controversial law was challenged by the Justice Department, and the Ninth Circuit April 11 upheld a lower court injunction blocking key portions of the law (*United States v. Arizona*, 9th Cir., No. 10-16645; [5 WIR 191, 4/18/11](#)). Brewer then said the state will petition the Supreme Court to lift the injunction ([5 WIR 262, 5/16/11](#)).

"While S.B. 1070 and the Legal Arizona Workers Act are obviously different laws, I am hopeful and optimistic that the U.S. Supreme Court will hear Arizona's future appeal of the Ninth Circuit Court of Appeals' decision against S.B. 1070 and apply the same general principle of federalism by rejecting the claims of federal preemption," Brewer said.

### **Rep. Smith Praises E-Verify Mandate**

House Judiciary Committee Chairman Lamar Smith (R-Texas) May 26 applauded the ruling, particularly the court's decision to uphold Arizona's E-Verify mandate.

"Not only is this law constitutional, it is commonsense," and will help preserve American jobs for native-born workers and legal immigrants, he said.

Smith said he will soon introduce legislation to make E-Verify mandatory nationwide because the program is "so successful and well-liked by employers."

"Today there are seven million individuals working in the United States illegally," and "E-Verify will help turn off the jobs magnet that encourages illegal immigration," Smith said.

### **Labor, Business Groups Disappointed**

Eliseo Medina, secretary-treasurer of the Service Employees International Union, called the ruling "deeply disappointing," but emphasized that the decision is "limited in scope" and does not address the broader legal issues at issue in the S.B. 1070 case.

"In this narrow case," the court decided that the Arizona statute meets the definition of a licensing law saved from federal preemption, Medina said. This is a separate issue from whether S.B. 1070 is preempted, he said.

"Unfortunately, the ruling may create the wrong perception that states are now free to carry out their own immigration laws," Medina said.

He also took issue with the court's decision to uphold the E-Verify mandate. "Currently the E-Verify system is voluntary and is fraught with high costs for small businesses and too many errors that dislocate legal workers," Medina said. "Making it mandatory and then stripping away the license to do business is surely a business death penalty that hurts the economy," he added.

The Arizona Chamber of Commerce and Industry said that while the ruling is "disappointing," so far the state has enforced the law in a fair and evenhanded way.

"While E-Verify still has its problems, especially in the area of identity theft, the high use of the system by Arizona employers has led to an environment where hiring can be conducted with increased confidence over a worker's immigration status," Glenn Hammer, president of the Arizona chamber, said.

"Very little will change for Arizona employers as a result of the court's decision," Hammer said. However, "the decision will likely entice other state legislatures across the country to pass their own state-level immigration laws," he said.

### **U.S. Chamber Says Ruling No 'Blank Check.'**

Robin Conrad, executive vice president of the National Chamber Litigation Center, the U.S. Chamber of Commerce's public policy law firm, said the ruling was a blow, but "does not give states or local governments a blank check to pass any and every immigration law."

"State and local laws that do not carefully and assiduously track federal law, or that merely masquerade as 'licensing' laws, would still be preempted," Conrad said.

In addition, the ruling "does not change the reality that businesses from Main Street to Wall Street are overwhelmed by a cacophony of conflicting state and local immigration legislation," Conrad said. Instead, the Supreme Court decision "makes it all the more urgent" for Congress to pass an overhaul of the nation's immigration laws that includes preemption of employment-related state immigration laws, she said.

According to Conrad, nothing in the decision approves states' setting up their own verification scheme or endorses states' adoption of "shadow immigration regimes." Instead, the court was clear that the Arizona law was upheld because it "takes federal law as it is," she said.