

Supreme Court Strikes Down Key Sections of Arizona Immigration Law S.B. 1070, Upholds “Show Me Your Papers” Provision

On June 25, 2012, the US Supreme Court, in a 5-3 decision, issued its much anticipated decision in *Arizona v. United States*, striking down three provisions of the Arizona law S.B. 1070, and upholding a fourth. Enforcement of these four contested provisions of the law, officially known as the Support Our Law Enforcement and Safe Neighborhoods Act, had been enjoined by a temporary injunction issued by the US District Court for the District of Arizona in 2010. Together the four sections at issue attempted to create two new misdemeanors in Arizona for undocumented immigrants and give local police more authority to enforce federal immigration laws. The Court declared that three provisions were preempted by federal law and cannot be enforced. However, the controversial “show me your papers” provision, requiring state officers to make a “reasonable effort” to determine the immigration status of anyone they stop, detain or arrest, and as to whom there is “reasonable suspicion” of unlawful presence in the US, was not found to be preempted by federal law and will now be enforced by Arizona law enforcement officers.

S.B. 1070 was enacted in April 2010 to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.” The United States Department of Justice immediately filed suit in the US District Court for the District of Arizona, seeking to enjoin the new law as preempted by federal law. In July 2010, the district court granted a preliminary injunction, which was upheld by a three-judge panel of the 9th Circuit in April 2011. The Supreme Court accepted *certiorari* to resolve important issues relating to federal and state roles concerning immigration.

Three provisions of the law were struck down by the Court. Section 3 would have created a state misdemeanor for willfully failing to comply with federal law requiring an alien to complete or carry an alien registration document. The Supreme Court held that this section is preempted by federal law because Congress occupied this field by creating the registration system and its penalty structure in the first place. To impose further punishment for violations of the same law would conflict with the framework Congress established.

Section 5(C), which would have made it a state crime for an unauthorized worker to seek work or work in Arizona, was declared preempted by federal law as it frustrated the intent of Congress. Even though there is no direct federal counterpart to this section, the Court cited the legislative history of the Immigration Reform and Control Act of 1986 (IRCA), stating that Congress very clearly chose to impose criminal liability only on those who employ unauthorized workers, not on the workers themselves.

Finally, the Court held that Section 6, which would have given local police more authority to arrest immigrants they believe have committed public offenses making them removable from the country, amounted to a state usurpation of federal power.

The only provision the Court upheld was Section 2(B), which will require state officers with a reasonable suspicion that a person is in this country unlawfully to make a reasonable attempt to determine the immigration status of anyone they stop, detain or arrest on some other legitimate basis; how long officials can hold a person while awaiting a response from Immigration and Customs Enforcement (ICE) on the immigration status was not decided, but the Court said that “Detaining persons solely to verify their immigration status would raise constitutional concerns.” The statute prohibits stops based on racial profiling, and the decision did not address that issue. Because this

provision only requires that state officers consult and communicate with ICE, something Congress has never prohibited or discouraged, the Court declared the law may go into effect. The Court did, however, make clear that its ruling did not prohibit individuals from bringing further suit against the law if it is enforced in a discriminatory and unconstitutional manner.

While the case dealt only with the law in Arizona, many states are affected by the decision because they have enacted or are considering similar legislation. Alabama, Georgia, Indiana, South Carolina, and Utah have all passed laws modeled after S.B. 1070, and 24 other states have had similar bills introduced in their legislatures. The fate of these laws has not yet been completely determined, but any provisions modeled after Sections 3, 5(C) and 6 of S.B. 1070 will not likely be enforced.

In the wake of the decision, employers should be aware that while states cannot create new immigration laws or attempt to bolster the penalties for existing federal immigration laws, many states can and will encourage their police to determine the immigration status of those they detain. Moreover, several states can be expected to push the limits of this ruling, encouraging their officers to enforce existing federal law under the auspices of consultation and communication with the federal government. In addition, last year's Supreme Court decision in [*Chamber of Commerce v. Whiting*](#) upheld state enactment of laws requiring employers to register with the federal government's web-based E-Verify program for I-9 employment authorization verification purposes. Employers should ensure that they are complying with all federal laws and E-Verify requirements, especially when employing foreign national employees in states that have enacted immigration legislation and E-Verify requirements.

For further information regarding this decision, state-based E-Verify requirements or other immigration matters, please contact your principal Squire Sanders lawyer or one of the individuals listed below.

Contact

D. Lewis Clark, Jr.
T +1 602 528 4065
lew.clark@squiresanders.com

Brian E. Schield
T +1 213 689 5109
brian.schild@squiresanders.com

Donald A. Wall
T +1 602 528 4005
donald.wall@squiresanders.com

Rebekah J. Poston
T +1 305 577 7022
rebekah.poston@squiresanders.com

Gregory A. Wald
T +1 415 393 9828
gregory.wald@squiresanders.com