



Arizona v. United States in the U.S. Supreme Court

A Primer on the Legal Arguments in Landmark States' Rights Case

Marshall Fitz and Jeanne Butterfield

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Introduction

This month the U.S. Supreme Court will hear oral arguments in a landmark case, *State of Arizona v. United States*,¹ which challenges the authority of a state to enact its own immigration enforcement laws instead of following federal regulations. A decision is expected in the case before the Court adjourns at the end of June.

The Supreme Court's decision will go far in delineating the extent to which, if at all, an individual state can engage in immigration enforcement and what rules a state can make related to the immigration status of individuals living in that state. Historically, state efforts to enforce immigration laws and make immigration policy have been constitutionally barred or pre-empted because immigration policy is exclusively a federal responsibility. The Arizona law, S.B. 1070, and similar measures in Alabama, Georgia, South Carolina, and Utah, are, in effect, challenging that principle of federal supremacy in the field of immigration.

Four key provisions in S.B. 1070 will be subjected to the Court's scrutiny:

- **Section 2(B):** the "show me your papers" section, which requires every Arizona law enforcement officer to verify the immigration status of every person stopped, arrested, or detained if the officer has a "reasonable suspicion" that the person is in the country unlawfully
- **Section 3:** the section that makes it a crime under Arizona law for an immigrant to fail to carry their "alien registration document"
- **Section 5(C):** the section of the law that criminalizes unauthorized work
- **Section 6:** the section that allows warrantless arrests if an officer has "probable cause" to believe that a person has committed a crime that makes that person removable from the country

Procedural timeline

APRIL 23, 2010: S.B. 1070 signed into law with the stated purpose of making "attrition through enforcement the public policy of all state and local government agencies in Arizona."

JULY 6, 2010: U.S. Department of Justice files suit to block the implementation of S.B. 1070.

JULY 28, 2010: U.S. District Court grants a preliminary injunction finding that federal law likely pre-empts four specific provisions of the Arizona law—sections 2B, 3, 5(C), and 6.

APRIL 11, 2011: Ninth Circuit Court of Appeals upholds the preliminary injunction.

AUGUST 10, 2011: State of Arizona files a petition for review with the U.S. Supreme Court.

DECEMBER 12, 2011: U.S. Supreme Court grants certiorari, agreeing to hear the case.

APRIL 25, 2012: Oral arguments begin before eight of the justices of the Supreme Court.¹

Specifically, the Court will consider whether these four provisions unconstitutionally usurp the federal government’s authority to regulate immigration law and enforcement. It bears noting that the Court’s ruling will not resolve all concerns and legal challenges posed by the Arizona law or by other state laws currently being litigated. Other state laws also create restrictions on education, housing, and private contracting, none of which will be conclusively decided by the court’s ruling in this case. Challenges to the law based on arguments that the law, as applied, invites profiling on the basis of race and violates the First Amendment, remain pending.² And lower courts reviewing the legality of similar state laws in Utah, Alabama, and South Carolina have recently indicated that they will reserve their decisions in those cases until after the Supreme Court has issued its ruling in the Arizona case.³

Although the legal doctrine in question may seem technical and esoteric, the implications of the Court’s decision are significant and will have profound implications for the citizens and immigrants living in the state of Arizona, as well as for the country as a whole.⁴ We tackle those issues in a separate [brief](#).

In this primer we outline the legal background and central arguments before the Court.

Doctrinal background

Some areas of law—for example, the power to declare war or print money—are exclusively reserved to the federal government under the U.S. Constitution. The Supremacy Clause of the Constitution states that in those instances where the federal government has exclusive jurisdiction or where there is a conflict between state and federal law, federal law trumps state law.⁵ A long line of Supreme Court cases has defined the contours of federal pre-emption doctrine and has applied it to a variety of state regulations and laws.

The Court, for example, has found that states are barred from legislating in areas where the federal government has already acted to set uniform national standards—such as safety requirements for automobiles, food and drug safety, national labor relations, and certain health and public safety liability issues, including those related to tobacco use and vaccine manufacturing.⁶

In determining whether a state statute is pre-empted by federal law, the Court generally will address several threshold questions, including:

- Is this area of law one that is traditionally reserved for the federal government?
- Is this a field that the states have traditionally occupied and has Congress demonstrated its clear intent to “occupy the field?”
- Is the state law in conflict with any federal statute?
- Does the state law create any obstacles to fulfillment of the purposes and objectives of Congress?

For purposes of this case, the federal government contends that three of these questions must be answered in the affirmative: This is an area of law reserved to the federal government; Arizona’s law conflicts with the federal regulatory scheme; and the implementation of the law would create obstacles to Congress’s priorities and objectives.⁷

What exactly are they arguing about?

Notwithstanding the clear Supreme Court precedent holding that the federal government has exclusive authority to regulate immigration policy and enforcement, the state of Arizona contends that federal law does not pre-empt S.B. 1070. Arizona maintains that federal law does not pre-empt its law because S.B. 1070 merely complements federal law and enables state authorities to assist with enforcement of federal law.

The federal government rejects that contention and argues that S.B. 1070 is pre-empted on three general bases. First, the U.S. government argues that immigration enforcement is an activity that has traditionally been occupied by the federal government because it relates directly to matters of national sovereignty, control of the nation's borders, relationships with foreign governments, and national security. Allowing states to enact their own immigration enforcement laws would have severe negative foreign policy implications, and additional negative consequences would flow from a patchwork of 50 state immigration laws. Accordingly, Congress has enacted a comprehensive regulatory and enforcement scheme for controlling immigration.

Second, several provisions in Arizona's immigration law intrude on this exclusive federal authority. In other words, some of the provisions in S.B. 1070 cannot be characterized as merely complementing federal immigration policy. Rather, the U.S. government argues that they impermissibly conflict or compete with federal authority.

Third, Congress has delegated to the Department of Homeland Security the power to set immigration enforcement priorities and to enforce the nation's immigration laws. If S.B. 1070 were implemented, the U.S. government argues that the federal agencies charged with enforcing the law would be diverted from executing their mission and exercising discretion in a manner consistent with those established priorities.

Let's turn now to the central legal arguments in this case in more detail.

The legal arguments

Immigration regulation and enforcement is reserved for the federal government

The Supreme Court has long confirmed this basic premise—the nation must speak with one voice, not many individual state voices, in immigration matters because of the foreign policy interests at stake. A unified and coherent national set of immigration laws is required in order to provide adherence to national economic and security priorities, to ensure that decisions about the treatment of foreign nationals does not have adverse foreign policy consequences, and to prevent an ad-hoc patchwork of 50 different state laws from developing. Congress has fulfilled that federal responsibility by creating a comprehensive regulatory and enforcement scheme designed to control immigration.

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Yet when it comes to immigration enforcement, states such as Arizona have argued that they can take whatever action they desire to enforce federal immigration laws. Even in the area of immigration enforcement, however, federal law pre-empts state action. As far back as 1875, the Supreme Court held that the national government, not the states, controls both “the character of [immigration] regulations” and “the manner of their execution.”⁸ The Court concluded that “a single State” that inserts itself into immigration enforcement contrary to federal policies and objectives “can, at her pleasure, embroil us in disastrous quarrels with other nations.”⁹

The Court went on to elaborate in a 1941 case, *Hines v. Davidowitz*, concerning a state’s attempt to impose its own alien registration requirements, that “international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government.”¹⁰ Unsurprisingly, the Court specifically ruled in *Hines* that Pennsylvania’s statute requiring aliens to register with the state and carry a state-issued identification card unconstitutionally interfered with federal policy even though it was characterized as complementing the federal requirements.¹¹

The language of that opinion is particularly instructive for the current case:

[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution. ...

When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute. ...

The federal government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.¹²

The treatment of foreign nationals who are lawfully visiting the United States, studying abroad, or doing business, has deep implications for how U.S. nationals are treated abroad. The same is true for those who are undocumented, as U.S. nationals who may overstay a visa or otherwise fall out of status or even inadvertently stray into another nation’s territory have learned from hard experience.¹³

As former Deputy Secretary of State James B. Steinberg declared, the Arizona law creates a risk of “reciprocal and retaliatory treatment of U.S. citizens abroad,” thereby implicating “the ability of U.S. citizens to travel, conduct business, and live abroad.” By antagonizing foreign governments, the Arizona law decreases the likelihood of international cooperation on “a broad range of important foreign policy issues,” including trade agreements and cooperation in efforts to combat terrorism and drug trafficking.¹⁴

It is a matter of common sense that a nation has an interest and a duty to control its own borders to determine who enters the country and in what numbers, to determine what conditions and rules a foreign national must observe while in the country, and to set penalties for the violation of these rules.

Most Americans understand that individual states cannot pass their own immigration laws opening their borders to anyone they choose. Nor can a state pass a law to bar those whom the federal government says may enter the United States lawfully to visit, study, or perform certain work.

As the U.S. government argues in its brief to the Supreme Court, “For each State, and each locality, to set its own immigration policy ... would wholly subvert Congress’s goal: a single national approach.”¹⁵

The Arizona law conflicts with federal law

The state of Arizona argues that its immigration law merely provides for its own law enforcement officials to cooperate with federal officials in the enforcement of immigration law. It is clear, however, that the four provisions of S.B. 1070 that are under consideration by the Supreme Court conflict with or exceed, rather than complement, federal law.

“Show me your papers” provision

Arizona law: S.B. 1070 Section 2(B) provides that every Arizona law enforcement officer must ask for identification papers from every person they stop, arrest, or detain, where the officer has “reasonable suspicion” that the person is “an alien” and is unlawfully present in the United States. Further, the law clearly suggest that any person who is arrested must be detained until their immigration status can be verified with the federal government.

Federal law: No federal law requires U.S. citizens to be in possession of a national identification card, a passport, or even a driver’s license at all times. And federal law does not mandate every federal law enforcement officer to demand that every individual they encounter “show me your papers.” Although federal law does require noncitizens to carry registration documents, state authorities cannot distinguish between who must carry such documents. The Arizona law goes beyond federal law by effectively requiring everyone, including citizens, to carry documents proving immigration status.

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Criminalizing failure to carry documents and unlawful presence

Arizona law: S.B. 1070 Section 3 creates a new state class 1 misdemeanor crime, and provides a state fine and a jail term for any individual who fails to carry immigration registration documents. This provision has the effect of criminalizing the mere presence of an undocumented person in the state.

Federal law: Federal law provides its own penalties for failure to carry registration documents, which include classification as a federal misdemeanor, fines, and imprisonment. The federal government does not, however, have a mandatory “show me your papers” scheme that requires individuals to present their registration documents at every traffic stop or face criminal prosecution. Those who are unlawfully present are deportable under federal law and are subject to other civil penalties and bars. Federal law, however, does not create a crime of unlawful presence.

Criminalizing unauthorized work

Arizona law: S.B. 1070 Section 5(C) makes it a state class 1 misdemeanor crime for any person who is unlawfully present in the United States to seek work or to perform work in the state.

Federal law: Federal law imposes civil and criminal penalties on those who employ undocumented persons but does not impose criminal penalties on the employee for the mere act of working or seeking work. Arizona’s law unquestionably goes beyond what Congress intended by assigning liability to the employee rather than only the employer.

Warrantless arrests

Arizona law: Section 6 permits warrantless arrests whenever an Arizona law enforcement officer has probable cause to believe that someone has committed a public offense that makes that person removable under U.S. immigration law. This section of the Arizona law applies not only to undocumented persons but also to lawful permanent residents and others who are lawfully present on valid visas.

Federal law: The Immigration and Nationality Act authorizes state and local law enforcement officers to arrest and detain a person who is unlawfully present in the United States and who has been previously deported after a felony conviction but only after the officers can confirm the person’s immigration status with the federal authorities. This provision of federal law does not permit warrantless arrests by state or local law enforcement officers. A warrantless arrest is only permitted where a federal officer actually observes an immigration violation and where there is a likelihood that the immigrant will escape before a warrant can be obtained.

The Arizona law undermines and diverts resources from congressionally mandated enforcement priorities

While Congress has provided for state cooperation with federal immigration law enforcement, it has set careful and strict terms for that cooperation in the Immigration and Nationality Act.

The entire mandatory enforcement scheme created by the Arizona law would have a profound impact on the immigration enforcement priorities set by Congress and the Department of Homeland Security. Congress has pegged immigration enforcement priorities to focus resources on removing those who have been convicted of a crime. Even within that overall priority, Congress has directed that DHS give the highest priority to removing those who have been convicted of serious crimes.¹⁶

In order to carry out this congressional mandate, Homeland Security has set as its highest priority the removal of those individuals who threaten public safety or national security, and those who are members of criminal gangs that smuggle humans, drugs, or weapons. The Department of Homeland Security further gives priority to removing repeat border crossers and immigrants who have been previously deported.¹⁷

If Homeland Security is required to respond to every call from an Arizona law enforcement officer to verify the immigration status of every person who is stopped, detained, or arrested—even for something as simple as jaywalking or walking a dog without a leash—then precious enforcement resources will be diverted from pursuing those who may truly pose a danger to the community or the nation.

Arizona can cooperate with federal immigration enforcement under the existing provisions of the Immigration and Nationality Act

To the extent Arizona wants to support the federal government's efforts, it has ample opportunity to cooperate with federal law enforcement under the terms provided in the Immigration and Nationality Act. Under Section 287(g) of the law, for example, state and local law enforcement agencies can enter into a written agreement with the federal authorities, which, after special training, empowers state and local officers to “perform a function of an immigration officer in relation to the investigation, apprehension or detention of aliens in the United States.”¹⁸

In fact, various Arizona localities and agencies have already executed agreements with federal immigration enforcement pursuant to the provisions of 287(g). Further, the Department of Homeland Security has stated in recent guidance that it welcomes cooperative assistance from state and local law enforcement partners but under very explicit terms and conditions.¹⁹ Arizona's law, however, goes much further, ignoring and undermining federal immigration enforcement priorities.

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As the U.S. Court of Appeals for the Ninth Circuit held in its decision in the Arizona case, “By imposing mandatory obligations on state and local officers, Arizona interferes with the federal government’s authority to implement its priorities and strategies in law enforcement. ... contrary to the State’s view, we simply are not persuaded that Arizona has the authority to unilaterally transform state and local law enforcement officers into a state-controlled DHS force to carry out its declared policy of attrition.”²⁰

States do not have the inherent authority to take immigration enforcement matters into their own hands.

The state of Arizona argues that it has the inherent authority to enforce civil immigration laws without any authorization from the federal government.²¹ This assertion is unsupported by law or tradition.²² And it runs counter to the fact that Congress has created a carefully calibrated relationship between federal and state authorities when it comes to immigration enforcement.

As a general matter, immigration enforcement authority is reserved for specially trained officers of the federal government. But, the federal immigration statute does provide for two specific, narrow instances where state and local law enforcement officers may make arrests for violations of civil provisions of the law—where there is a federally declared immigration emergency, and the U.S. attorney general has authorized the state or local law enforcement authorities to act, or where the state or local law enforcement personnel are acting under the terms of a formal written 287(g) agreement. In both instances, state authority is clearly subsidiary to federal power.

The Federal statute at 8 U.S.C. Section 1252c provides one additional instance where state and local law enforcement personnel may make a *criminal* arrest—where a person has committed a criminal offense by illegally re-entering the United States after having been previously deported for a felony conviction. In light of this structure, concluding that states have inherent authority to act would render these explicit limitations meaningless.

As the Ninth Circuit held in its recent decision in the Arizona case, “We are not aware of any binding authority holding that states possess the inherent authority to enforce the civil provisions of federal immigration law—we now hold that states do not have such inherent authority.”²³

Conclusion

All eyes will be on the U.S. Supreme Court on April 25 as it considers whether to reject or uphold key provisions of Arizona's severe immigration law. The stakes are momentous, but the constitutional arguments seem clear-cut, so we remain optimistic that the Court will strike this measure down and send a clear signal to other states considering similar legislation. The credibility of the Court as the guardian of core constitutional principles that protect every resident of the nation hangs in the balance.

Marshall Fitz is Director of Immigration Policy at the Center for American Progress. Jeanne Butterfield is special counsel with The Raben Group and was formerly Executive Director of the American Immigration Lawyers Association.

Endnotes

- 1 *Arizona, et al., Petitioners v. United States*, U.S. Supreme Court No. 11-182, docketed on August 12, 2011; oral argument calendared for April 25, 2012.
- 2 The first lawsuit challenging the Arizona immigration law, S.B. 1070, was brought by a coalition of civil rights organizations, including the American Civil Liberties Union, the Mexican American Legal and Education Defense Fund, the National Immigration Law Center, the Asian Pacific American Legal Center, the National Day Laborer Organizing Network, and the National Association for the Advancement of Colored People. The case remains pending in the district court, which recently granted the plaintiffs' motion for a preliminary injunction enjoining Section 5 of S.B. 1070 pertaining to day laborers. See: *Friendly House v. Whiting*, No. CV 10-1061-PHX-SRB, U.S. District Court for the District of Arizona, February 29, 2012.
- 3 Andrew Harris, "Utah Immigration Act Judge Awaits Top Court's Arizona Ruling," *Bloomberg*, February 22, 2012, available at <http://www.bloomberg.com/news/2012-02-22/utah-immigration-act-judge-awaits-top-court-s-arizona-ruling-1-.html>; Brian Lawson, "11th Circuit won't rule on Alabama/Georgia immigration laws until after Supreme Court rules on Arizona," *The Huntsville Times*, March 1, 2012, available at http://blog.al.com/breaking/2012/03/alabama-immigration-law_in_11t.html.
- 4 We explore those implications in a companion policy brief. See: Marshall Fitz and Jeanne Butterfield, "Arizona's 'Show Me Your Papers' Law in the U.S. Supreme Court: What's at Stake?" (Washington: Center for American Progress, 2012), available at http://www.americanprogress.org/issues/2012/04/az_social_implications.html.
- 5 U.S. Constitution, Article VI, Section 2.
- 6 *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Machinists v. Wisconsin Emp. Rel. Commission*, 427 U.S. 132 (1976); *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003); *Bruesewitz v. Wyeth*, 131 S. Ct. 1068 (2011).
- 7 "Plaintiffs Motion for Preliminary Injunction and Memorandum of Law in Support Thereof," available at <http://www.scribd.com/doc/33972992/U-S-v-A-Z-Brief> (last accessed March 28, 2012).
- 8 *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).
- 9 *Ibid.*
- 10 *Hines v. Davidowitz*, 312 U.S. 52, at 64 (1941).
- 11 *Ibid.*
- 12 *Ibid.*
- 13 As, for example, happened to three Americans hiking on the border between Iran and Iraq when they were taken into custody by Iranian authorities. One hiker was released after just over than a year, while the others were kept in Iran for more than two years, and ultimately convicted of espionage before being released in September 2011. See: "Iran 'jails US hikers for eight years for spying,'" *BBC News*, August 20, 2011, available at <http://www.bbc.co.uk/news/world-middle-east-14602835>; J. David Goodman and Alan Cowell, "American Hikers Leave Iran After Prison Release," *New York Times*, September 21, 2011, available at <http://www.nytimes.com/2011/09/22/world/middleeast/iranian-lawyer-says-2-american-hikers-hopefully-are-about-to-be-freed.html>.
- 14 Steinberg Decl. ¶ 9-10 [SER 69], quoted in *U.S. v. Arizona*, Brief for Appellee, Ninth Circuit Court of Appeals, No. 10-16645, at 58.
- 15 "Plaintiffs Motion for Preliminary Injunction and Memorandum of Law in Support Thereof."
- 16 Department of Homeland Security Appropriations Act of 2010, Public Law 83, 111th Congress (October 28, 2009).
- 17 John Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," Memorandum, June 17, 2011, U.S. Immigration and Customs Enforcement, available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.
- 18 Immigration and Nationality Act, Public Law 414, 82nd Congress (1952). Section 287(g)(1) was added to the Immigration and Nationality Act by the Illegal Immigration Reform and Immigrant Responsibility Act on 1997, Public Law 208, 104th Congress (September 30, 1996).
- 19 U.S. Department of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters, available at <http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf>.
- 20 *United States of America v. State of Arizona*, Opinion No. 10-16645 (9th Cir. April 11, 2011), available at http://www.ca9.uscourts.gov/datastore/general/2011/04/11/10-16645_opinion.pdf.
- 21 *Ibid.* The state of Arizona makes reference to a 2002 U.S. Department of Justice Office of Legal Counsel memorandum that concludes that states have inherent authority to arrest persons for violations of federal immigration law. This 2002 Legal Counsel memo contradicts two previous Legal Counsel memos on the same topic, issued in 1989 and in 1996, which held the opposite. As the Ninth Circuit Court notes in citing these memoranda, "It is an axiomatic separation of powers principle that legal opinions of Executive lawyers are not binding on federal courts."
- 22 *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983); *United States v. Urrieta*, 520 F.3d 569 (6th Cir. 2008); *Martinez-Medina v. Holder*, ___ F.3d ___, 2011 WL 855791 (9th Cir. 2011).
- 23 *United States of America v. State of Arizona*, Opinion No. 10-16645.