

The New York Times

JUSTICES SEEM SYMPATHETIC TO CENTRAL PART OF ARIZONA LAW

By Adam Liptak
April 25, 2012

WASHINGTON – Justices across the ideological spectrum appeared inclined to uphold a controversial part of Arizona’s aggressive 2010 immigration law, based on their questions on Wednesday at a Supreme Court argument.

“You can see it’s not selling very well,” Justice Sonia Sotomayor, a liberal-leaning justice and the first Hispanic appointed to the court, told Solicitor General Donald B. Verrilli Jr. Mr. Verrilli, representing the federal government, was seeking to strike part of the law’s requirement that state law enforcement officials determine the immigration status of anyone they stop if the officials have reason to believe that the individual might be an illegal immigrant.

It was harder to read the court’s attitude toward other provisions of the law, and the final ruling, expected by June, may be a split decision.

Chief Justice John G. Roberts Jr. made clear that the case, like last month’s arguments over President Obama’s health care law, was about the allocation of state and federal power.

“No part of your argument has to do with racial or ethnic profiling?” the chief justice asked Mr. Verrilli, who agreed.

Unlike the narrow legal arguments, the political controversies have centered on whether the law unfairly singles out minorities, legal or not.

Should the court uphold most or all of the Arizona law or strike down the heart of the health care law, it would represent a political blow to President Obama in the final stretch of the campaign season. The decision on the health care law is also expected in June.

Wednesday’s argument, the last of the term, was a rematch between the main lawyers in last month’s case. Paul D. Clement, who argued for the 26 states challenging the health care law, represented Arizona. Mr. Verrilli again represented the federal government. In an unusual move, the court allowed the argument to last 20 minutes longer than the scheduled 60 minutes.

The two lawyers presented sharply contrasting accounts of what the Arizona law meant to achieve.

Mr. Clements said the state was making an effort to address an emergency situation with a law that complemented federal immigration policy. “Arizona borrowed the federal standards as its own,” he said.

Mr. Verrilli countered that Arizona's approach was in conflict with the federal efforts. "The Constitution vests executive authority over immigration with the national government," he said.

The Arizona law, sometimes called S.B. 1070, advances what it calls a policy of "attrition through enforcement," and it has been something of a trendsetter. It was followed by similar and sometimes harsher laws in Alabama, Georgia, Indiana, South Carolina and Utah. All have been subject to court challenges, and lower courts have blocked some of their provisions.

The Obama administration sued to block the Arizona law, saying it could not be reconciled with federal laws and policies. The case is thus not directly about civil rights but rather about the allocation of authority between the federal government and the states. In legal terms, it is about whether federal law "pre-empts," or displaces, the challenged state law.

As a general matter, federal laws trump conflicting state laws under the Constitution's supremacy clause. But no federal law bars the challenged provisions of S.B. 1070 in so many words, and the question for the justices is whether federal and state laws are in such conflict that the state law must yield.

Last year, a three-judge panel of the United States Court of Appeals for the Ninth Circuit, in San Francisco, blocked four provisions of the law on those grounds.

Most of the argument on Wednesday concerned the part of the law requiring state officials to check immigration status in some circumstances. That provision also requires that the immigration status of people who are arrested be determined before they are released.

Several justices said states were entitled to enact such provisions, which make mandatory practices that are already widespread.

"What does sovereignty mean if it does not include the ability to defend your borders?" Justice Antonin Scalia asked.

Chief Justice Roberts said the state law merely requires that the federal government be informed of immigration violations and leaves enforcement decisions to it. "It seems to me that the federal government just doesn't want to know who is here illegally and who's not," he said.

The law also makes it a crime under state law for immigrants to fail to register under a federal law and for illegal immigrants to work or to try to find work. In addition, it allows the police to arrest people without warrants if they have probable cause to believe that they have committed acts that would make them deportable under federal law.

The two sides advanced slightly different arguments concerning each provision. In general, though, the question for the justices is whether the priorities set by the state law and the harsher punishments in it would frustrate the ability of the federal authorities to strike a different balance.

In his brief, Mr. Verrilli urged the court to consider the question against the backdrop of both the federal government's role in controlling immigration and the foreign policy considerations arising from taking actions against citizens of other nations. Mr. Clement, by contrast, emphasized what he said was the disproportionate burden illegal immigration imposed on Arizona and the ineffectiveness of the federal response.

Last year, in *Chamber of Commerce v. Whiting*, the Supreme Court held that a different Arizona law, this one imposing harsh penalties on businesses that hire illegal workers, was not pre-empted by federal law. The vote was 5 to 3, and it split along ideological lines.

Chief Justice Roberts, writing for four of the justices in the majority, said the state law under review “simply seeks to enforce” a federal ban on hiring illegal workers. “Arizona went the extra mile,” he wrote last year, “in ensuring that its law closely tracks” the federal one.

Mr. Clement told the justices that S.B. 1070 took the same general approach.

Justice Elena Kagan disqualified herself from both the *Whiting* case and the one concerning the newer law, *Arizona v. United States*, No. 11-182, presumably because she had worked on them as solicitor general.

States around the nation are closely following the Arizona case, and a majority of them have joined friend-of-the-court briefs. Sixteen of them sided with Arizona, while 11 supported the federal government.