

WALL STREET JOURNAL

JUSTICES WEIGH ARIZONA LAW

Jess Bravin
April 25, 2012

Supreme Court justices on Wednesday challenged the Obama administration's assertions that Arizona exceeded its powers by directing police officers to check the immigration status of people they stop, suggesting that at least part of the state's effort to push out illegal immigrants could pass constitutional scrutiny.

But after oral arguments that ran 20 minutes over the scheduled one hour, it was unclear whether tougher provisions of the state law, such as making it a crime for illegal immigrants to seek work, would survive.

The justices suggested it was acceptable for Arizona to make rules in areas where Congress had contemplated an enforcement role for states, and observed that federal law already requires U.S. immigration officials to answer questions from state police about a person's status. But they were more skeptical of any state effort to pile penalties on illegal immigrants beyond what Congress envisioned.

The 2010 Arizona law declares state policy against illegal immigrants as "attrition through enforcement." Its key provisions have never been implemented, because lower courts found that they interfered with federal authority over immigration policy.

The law is at the center of the broader national debate over immigration. Democrats accuse the law's supporters of having an anti-immigrant agenda, while the law's mostly Republican backers say they want to secure the nation's borders.

On the high court, even justices in the liberal wing – including the nation's first Hispanic justice, Sonia Sotomayor – indicated that Arizona had strong arguments for its authority to require immigration-status checks for people lawfully stopped by police.

Justice Sotomayor and others sharply questioned the government's lawyer, Solicitor General Donald Verrilli, who conceded it was acceptable for local police to check immigration status on an ad hoc basis, but said the state couldn't adopt a rule requiring such checks. The justices said they couldn't understand the legal distinction between those two scenarios.

"You can see it's not selling very well," Justice Sotomayor said to Mr. Verrilli.

Arizona's lawyer, Paul Clement, said the state law simply added teeth to existing federal immigration laws. In creating new state crimes, Arizona "looked to the precise provisions in the federal statute," he said, and "imposed parallel penalties" for acts that already were illegal.

That argument drew some skepticism, in particular for a provision making it a crime for illegal immigrants to seek jobs. Federal law penalizes employers who hire illegal immigrants, as well as aliens who use false papers to get a job. But merely seeking work, which federal law doesn't punish, becomes a crime under the law, with a six-month maximum sentence, Chief Justice John Roberts observed.

"The state of Arizona, in this case, is imposing some significantly greater sanctions" than Congress did, he said.

Most of the argument focused on the provision that calls for status checks if police officers have reasonable suspicion a person they stopped is in the country illegally. Critics have called the provision an invitation to racial profiling of Hispanics.

The provision, by itself, includes no state penalties. Mr. Clement said police wouldn't hold someone when federal authorities decided to take no action. "The individual at that point is released," he said.

Chief Justice Roberts cited that fact. "All it does is notify the federal government, here's someone who is here illegally," he said, and it is up to them whether to do anything about the person.

The administration, focusing on the tension between federal and state authority over immigration policy, hasn't raised racial profiling as a legal argument against the law, and Chief Justice Roberts immediately underscored that when Mr. Verrilli stepped up to argue.

"Before you get into what the case is about, I'd like to clear up at the outset what it's not about. No part of your argument has to do with racial or ethnic profiling, does it?" the chief justice said.

"That's correct," Mr. Verrilli replied.

Instead, Mr. Verrilli argued, the provision illegally substituted Arizona's judgment regarding immigration enforcement for that of Washington, making every police officer check the papers of suspected illegal immigrants.

Justice Stephen Breyer, one of the court's liberals, suggested the requirement posed little problem if it didn't result in police holding people longer than they would have without an immigration check. A phone call to verify status typically takes a total of about 70 minutes, Mr. Verrilli said.

Mr. Verrilli said that the status-checking provision had to be considered along with the other challenged sections, including one authorizing up to 30 days in jail for those lacking federal immigration papers. In effect, Arizona was seeking to implement a policy of "mass incarceration," he said, contrary to federal priorities and potentially undermining diplomatic relations with Mexico.

Justice Antonin Scalia, who was the most sympathetic to Arizona's position, asked, "So we have to enforce our laws in a manner that will please Mexico. Is that what you're saying?" Mr. Verrilli said he wasn't, adding that the Constitution leaves foreign relations up to the federal government.

The case is one of two blockbusters this term, along with the Supreme Court's consideration of the Obama administration's health-care law. Arguments in the health-care case were more ideologically charged, with the court's liberal and conservatives repeatedly clashing over the law's constitutionality. Both decisions are expected toward the end of June.

Because the justices said little about the law's other provisions, it was difficult to predict whether a majority was inclined to invalidate them. But Chief Justice Roberts pointedly

mentioned a majority opinion he wrote last year. In it, he upheld a related Arizona law that revoked the corporate charters of employers that repeatedly hired illegal immigrants, effectively putting them out of business.

By a 5-3 vote, the court found that measure didn't interfere with federal law because Congress explicitly gave states power to regulate businesses that employ illegal immigrants through licensing statutes.

A similar approach would let the status verification stand because Congress contemplated state officials inquiring about immigration papers. But the justices may be more skeptical of the law's provisions – such as those punishing job-seeking or failure to carry registration papers – without implicit congressional authorization.

Justice Elena Kagan, who was solicitor general when the Obama administration filed suit against the Arizona law, recused herself from the case. Should the remaining eight justices split evenly, the lower-court opinion invalidating the Arizona law's provisions would remain unchanged.