

DC OR THE STATES WHO SHOULD MAKE IMMIGRATION LAW?

Q. Do states have a free hand in making immigration law – can they pass any kind of legislation they want?

No. Which branch of government has the power to make immigration law is a complex legal issue currently being disputed in courts across the country.

For more than a hundred years, immigration law was considered a federal prerogative – a realm in which the states had virtually no role to play. That changed dramatically in recent years as congressional inaction led many state and local jurisdictions to take matters into their own hands, passing measures to crack down on illegal immigration. Many of these state laws have been challenged in court, and the decisions have been inconsistent. The U.S. Supreme Court ruled on one facet of the issue in May 2011 and will rule on another in coming months – but even then many questions will remain undecided. Bottom line: immigration is a very uncertain area of the law, and states venture in at their own risk.

Q. What is preemption?

Federal preemption is a legal term used when the Constitution or Congress give the federal government exclusive power to legislate on an issue. Under the Constitution, federal law is the supreme law of the land, and when a state law clashes with federal law, it's up to the courts to decide whether the state law is preempted by federal law. If a judge decides that either a specific provision or the entire state law is preempted, the measure is declared unconstitutional.

Q. What does the Constitution say about preemption?

The preemption doctrine derives from the Supremacy Clause in the Constitution (Article VI, clause 2), which says that when there's a conflict, the Constitution and federal law are the supreme law of the land. This doctrine works like a kind of tie breaker, giving the upper hand to Congress when it gets into turf battles with the states. When Congress is empowered by the Constitution to legislate on an issue, it preempts or overrides related state legislation.

Q. What has happened so far in the lower courts?

Federal immigration law is as complicated as the tax code, covering as many issues and reaching into as many areas of American life – not just visas and the border, but also the workplace, policing, education and more. And in the past five years, three types of preemption cases have been working their way through the courts.

Some involve municipal ordinances that restrict access to housing based on immigration status. Others involve state and local legislation regulating what happens in the workplace and sanctioning employers for hiring undocumented workers. Still others are focused on state policing powers of the kind mandated by Arizona's controversial 2010 policing law, SB 1070.



The court cases involving housing-related laws have been fairly straightforward. In virtually every case, local ordinances were found to be preempted and therefore invalid: in Hazleton, PA, Riverside, NJ, Escondido, CA, and Farmers Branch, TX. The employment and policing cases have been much more controversial, with courts across the country divided about how far the states can go.

Q. What was at issue in the cases on E-Verify and worksite immigration enforcement?

On employer sanctions, the appellate courts were divided – some arguing that workplace immigration enforcement was exclusively a federal matter, others giving the states a significant role to play. The conflicting decisions were based on different readings of the 1986 Immigration Reform and Control Act. IRCA explicitly prohibits states from imposing sanctions on businesses that hire unauthorized workers. But one phrase in the statute – a seven-word parenthesis known as the “savings clause” – allows states some leeway in the matter of “licensing and similar laws.” The question before the courts was just how much leeway.

Federal judges in Oklahoma and Pennsylvania ruled that state and municipal efforts to mandate E-Verify and impose sanctions were preempted and therefore invalid. A federal judge in Arizona found that Arizona’s 2007 E-Verify mandate, the Legal Arizona Workers Act, was not preempted and could stand. The U.S. Supreme Court stepped in to decide which opinion was right.

Q. What did the Supreme Court decide about state laws mandating E-Verify?

The Supreme Court’s May 2011 decision in the *U.S. Chamber of Commerce v. Whiting* case ruled that Arizona was within its rights to mandate E-Verify and use state licensing provisions to sanction employers found to have hired unauthorized workers.

The 5-3 decision was based on the court’s expansive interpretation of the IRCA savings clause. Chief Justice John Roberts, writing for the majority, said the Legal Arizona Workers Act “falls well within the confines of the authority Congress chose to leave to the states.” According to the majority, the Arizona law does not conflict with federal immigration enforcement, and the federal statute establishing E-Verify does not constrain state action. In other words, in this specific case – worksite immigration enforcement involving state business licenses – there is no need to choose between federal and state law, so both are valid.

Q. Where does this leave states considering mandating E-Verify?

The Supreme Court’s *Whiting* decision created some room to maneuver for states considering immigration enforcement. But the ruling was decided on very narrow grounds – the court’s interpretation of a seven-word parenthesis. And it dealt with only one kind of state immigration enforcement: employer sanctions laws involving state business licenses.

In the wake of the decision, states may require employers to enroll in E-Verify, and states may suspend or revoke the business licenses of employers found to have hired unauthorized immigrants. That, the court said, is constitutional. But *Whiting* did not open the door to any other kind of state immigration enforcement – policing laws, restrictions on government benefits, laws mandating the collection of data about immigration status or any others.



Q. Why has the Supreme Court now stepped in to consider state policing laws?

On policing measures, as on worksite enforcement, the lower courts are divided. On policing as on worksite enforcement, Arizona lawmakers led the way, passing the controversial SB 1070 in April 2010. Since then, four other states have followed suit, passing similar laws that give local police authority to check the immigration status of people they stop for other reasons who they suspect are in the country illegally. All five laws have been challenged in court, and four – Arizona’s, Utah’s, Georgia’s and South Carolina’s – were temporarily blocked by judges who thought the statutes were or might be unconstitutional. In the fifth case, in Alabama, a federal judge went the other way, upholding the policing section of Alabama’s 2011 law. Then last year, two appellate courts ruled on the issue – one, the Ninth U.S. Circuit Court of Appeals, upholding the Arizona judge who blocked a policing measure, and a second, the Eleventh U.S. Circuit of Appeals, upholding the Alabama judge who ruled exactly the other way.

In order to resolve this confusion, the Supreme Court has agreed to hear *Arizona v. United States* and decide whether SB 1070 violates the Constitution by intruding into an area traditionally regulated by the federal government.

Q. What are the arguments in the policing case now before the Supreme Court?

The state of Arizona and its allies argue that SB 1070 is an example of “cooperative law enforcement.” The Arizona statute, these advocates say, runs “parallel” to federal immigration law. State and federal measures even prohibit “the exact same conduct” – entering the United States without proper documentation. In this interpretation, there is no conflict and so no preemption. Supporters of SB 1070 also claim that local police have “inherent authority” to act on immigration – powers implied by the Constitution but not spelled out explicitly. And if anything, advocates argue, the federal government’s inadequate immigration enforcement has left a vacuum that compels the states to act.

Opponents of state policing measures, including the U.S. Department of Justice, disagree. In their view, laws like SB 1070 are a violation of the Supremacy Clause and the federal immigration code, the Immigration and Nationality Act. Arizona is not endeavoring to cooperate with the federal government, the Justice Department and others say. On the contrary, SB 1070 is “designed to establish Arizona’s own immigration policy” and “supplant” what Arizona Gov. Jan Brewer has called the federal government’s “misguided” approach. Critics also argue that Arizona’s policing law will open the way to racial profiling and increase the likelihood of arbitrary arrest and detention.

Q. When will the Supreme Court decide *Arizona v. United States*?

Oral argument is expected in April, a decision a few months later – probably just before the Fourth of July.

Q. Will this decision settle the preemption issue?

Unlikely. Just as the *Whiting* decision was a narrow ruling, covering only one kind of immigration enforcement, so the policing case, too, is likely to be decided on narrow grounds and leave a great many questions unanswered. The high court’s opinion will provide guidance to lower courts considering policing measures modeled on Arizona’s. But the decision is unlikely to say anything at all – opening or closing the door – about laws that



block immigrants from receiving government benefits, laws requiring teachers and doctors to ask about immigration status, laws canceling contracts with unauthorized immigrants or any other kind of immigration statutes being contemplated by the states.

Q. What should state legislators do about immigration in the meantime?

States should not attempt to pass immigration enforcement law that goes beyond explicit guidelines laid down by the Supreme Court.

On E-Verify, there is some room to act – within limits. The narrowly tailored *Whiting* decision allows states to require that businesses enroll in the federal E-Verify program. It also allows states to punish employers found to have knowingly or intentionally hired unauthorized workers by suspending and revoking their business licenses. But states cannot establish their own worksite enforcement protocols. They cannot order employers to use E-Verify in any special or unique state-mandated way – only in keeping with existing regulations issued by the federal government. And states cannot punish employers for failing to use E-Verify, which is after all voluntary under federal law – only for knowingly hiring unauthorized immigrants.

Employers and other business advocates can help state legislators abide by the law, educating them about the clearly defined limits and boundaries in the *Whiting* decision. E-Verify mandates, yes. Penalties involving business licenses, okay. “Creative” state efforts to apply E-Verify in novel ways, for example, to verify who is eligible for state unemployment insurance or other benefits, absolutely not.

As for state immigration enforcement outside the workplace, the Supreme Court has said nothing yet – and states should proceed with extreme caution. Arizona-like policing laws, state efforts to repeal birthright citizenship, mandates that state authorities check the immigration status of students or hospital patients – none of these have been sanctioned by the court. And however politically appealing it may seem to get tough, cracking down on illegal immigration, legislating in these areas runs the risk of incurring costly, time-consuming litigation and national opprobrium of the kind experienced by Arizona, Alabama and other states.

A rule of thumb: when in doubt, wait. The courts have only begun to answer the complex, multifaceted question of who should be making immigration law, Washington or the states, and prudent lawmakers should tread carefully. There is nothing to be gained by passing legislation that is ultimately declared unconstitutional.

ImmigrationWorks USA is a national nonprofit organization building a grassroots business constituency in favor of immigration reform. The national network links major corporations, trade associations and 25 state-based coalitions of small to medium-sized employers working to advance better immigration law. Their shared aim: legislation that brings America's annual legal intake of foreign workers more realistically into line with the country's labor needs.

For more information about preemption or for a consultation with ImmigrationWorks' Legal Advisory Committee, please email sweiss@immigrationworksusa.org.