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Arizona Immigration Law Passes Muster

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WASHINGTON - In a ruling that boosts state efforts to police immigration, a divided U.S. Supreme Court upheld an Arizona law that punishes businesses for employing undocumented immigrants.

The court's five Republican-appointed justices upheld a 9th U.S. Circuit Court of Appeals finding that federal law does not pre-empt Arizona's workplace statute, which also requires employers to check the immigration status of potential hires on the federal E-Verify system. *Chamber of Commerce v. Whiting*, 09-115.

Although the 5-3 ruling is narrowly written and deals with a carefully crafted statute, the opinion signaled that the court considers immigration a valid area for state regulation. That stance could be further tested soon, as several state laws dealing with immigration face legal challenges, including California's statute governing tuition rates for undocumented immigrants.

"There is an overriding federalism that hovers over this decision," said Bill O. Hing, professor at the University of San Francisco School of Law and founder of the Immigrant Legal Resource Center. "In that sense, the court is willing to defer to states if states come up with a plausible argument."

State immigration ordinances are generally restrictive, highlighted by another Arizona law, SB 1070. In April, the 9th Circuit held that the most controversial provisions of that tough, divisive law cannot be enforced while the Obama administration's legal challenge against it proceeds. *U.S. v. State of Arizona*, 10-16645.

California's tuition law is an outlier because it grants, rather than denies, benefits to undocumented immigrants. The Supreme Court will announce as early as next week if it will review that law, which allows undocumented immigrants to pay in-state rates to attend public colleges and universities, giving them a lower price than some U.S. citizens hailing from other states would pay. The California Supreme Court unanimously found that federal law does not preempt that statute. *Martinez v. Regents of the University of California*, 10-1029

Immigration law experts said the Supreme Court ruling upholding Arizona's workplace law could encourage copycat laws in other states. But they added that California, which has a large and diverse immigrant population, is unlikely to jump on the bandwagon, especially considering the political blowback that followed the 1994 passage of the anti-immigration measure Proposition 187.

The Arizona workplace law establishes an independent state ban on hiring illegal immigrants, imposes sanctions on employers who violate the ban by taking away their licenses to do business in the state and mandates the use of E-Verify. The state exerts its authority via its licensing law, which is exempted from a 1986 federal immigration law.

The U.S. Chamber of Commerce and the Obama administration teamed up to challenge the Arizona law, arguing that federal law pre-empts it. But the court said their arguments fail, under both express and implied pre-emption analyses. Writing for the court, Chief Justice John G. Roberts Jr. pointed to features of the law that safeguard it from pre-emption.

"It uses the federal government's own definition of 'unauthorized alien,' it relies solely on the federal government's own determination of who is an unauthorized alien, and it requires Arizona employers to use the federal government's own system for checking employee status," Roberts wrote. "If even this gives rise to impermissible conflicts with federal law, then there really is no way for the state to implement licensing sanctions, contrary to the express terms of the savings clause."

The decision drew a dissent from Justice Sonia Sotomayor and another from Justice Stephen G. Breyer, which Justice Ruth Bader Ginsburg joined. Justice Elena Kagan was recused from the case, presumably due to her work on it while at the Justice Department.

Breyer argued in his dissent that enforcing the law could lead to discriminatory hiring practices, since employers may err on the side of not hiring somebody based on their appearance. The likelihood of discrimination is compounded by the high error rate in the E-Verify system, he added.

While the majority dismissed that argument, the workplace law could face another legal challenge if it does produce discrimination in hiring.

"What the court said was that Arizona can create its own workplace law," said Evelyn Cruz, law professor and director of Arizona State University College of Law's Immigration Law & Policy Clinic. "It didn't say employers have carte blanche in their hiring practices."

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