



WHAT THE SUPREME COURT SAID

JUNE 2012 RULING ON ARIZONA SB 1070

What the case was about

In the past six years, states across the country have taken immigration into their own hands. Frustrated by Congress' failure to get control of illegal immigration, state lawmakers enacted their own enforcement measures – laws depriving unauthorized immigrants of state benefits, laws penalizing employers who hire unauthorized immigrants and laws giving local police new powers to question and arrest unauthorized immigrants, among other provisions. Together, these statutes added up to a federalist revolution of historic proportions, and if they were allowed to stand would mark a dramatic shift in who has the power to make immigration law, Washington or the states.

Many of the new state laws were challenged in court, and two challenges made their way to the U.S. Supreme Court. Last year, in *Whiting v. U.S. Chamber of Commerce*, the high court upheld the states' power to require employers to enroll in the federal E-Verify program and penalize businesses found to have hired unauthorized immigrants. This year, in *Arizona v. United States*, the justices considered the legality of Arizona's controversial 2010 policing law, SB 1070, giving state police new powers to question and arrest unauthorized immigrants.

The question before the court

The justices considered four provisions of the Arizona law that had been challenged in 2010 by the Obama administration and temporarily blocked by a federal judge:

- **Section 2(B)** requires state and local police to inquire about the immigration status of people they stop for other reasons who they suspect are in the country illegally.
- **Section 3** imposes penalties under state law on immigrants who fail to carry "registration" papers.
- **Section 5(C)** imposes penalties under state law on unauthorized immigrants who work or solicit work.
- **Section 6** authorizes the warrantless arrest of any immigrant, authorized or unauthorized, who police suspect has committed an offense for which they could be deported.

Contrary to popular understanding, the question before the court was not the constitutionality of the Arizona statute. What the justices were considering was whether the four provisions of SB 1070 conflict with federal immigration law. In cases where state and federal law conflict, federal law prevails and the state law is blocked – in legal terms, federal law "preempts" the state measure.

What the justices said

The Supreme Court's June 25 decision struck down three of the four provisions under consideration – Sections 3, 5(C) and 6. It upheld one, Section 2(B) – but with reservations.

In the days immediately following the ruling, some legal experts read it as a split decision – an amber light, both cautionary and encouraging, for state lawmakers. But after considering the opinion

more closely, many scholars have come to the conclusion that in fact it is a flashing red light – a stern warning to state legislatures trying to take immigration enforcement into their own hands.

As legal scholar Ben Winograd, attorney at the American Immigration Council, put it, the justices' verdict on SB 1070 amounted to "three Fs and an incomplete" – three provisions were overturned and the one that was upheld came back surrounded by question marks. The decision does not close off all avenues to state lawmakers seeking to assist with federal law enforcement, but it sharply limits their scope of action – a strong assertion of federal primacy sure to reduce the flow of immigration enforcement statutes coming from the states.

Why three provisions were struck down

Section 3: According to the majority opinion, the federal government is responsible for registering immigrants, and a state law imposing additional penalties for failing to carry registration papers would conflict with that authority.

Section 5(C): As the majority noted, Congress has expressly declined to impose criminal penalties on immigrants who work without authorization, and a state law imposing penalties for working or soliciting work would reach further than Congress intended the law to reach.

Section 6: The majority found this provision too in direct conflict with federal law. "By authorizing state officers to decide whether an alien should be detained for being removable," Justice Kennedy wrote, it "violates the principle that the removal process is entrusted to the discretion of the Federal Government."

One provision upheld – but with an asterisk

The Supreme Court upheld the section of SB 1070 that has gotten the most media attention – the section requiring local police to investigate the immigration status of people they stop for other reasons who they suspect are in the country illegally. But the justices made clear they were concerned about how the provision would be implemented – so concerned that they explicitly mentioned the possibility of "other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."

The court upheld Section 2(B) – but only provisionally. The justices are skeptical. They and others will be watching to see if SB 1070 as implemented leads to profiling or other abuses – and if it does, Arizona is sure to find itself back in court, answering yet another round of even tougher questions, this time about the constitutionality of the statute.

What leeway does this leave the states?

Five other states – Alabama, Georgia, Indiana, South Carolina and Utah – have laws on the books modeled on SB 1070, and all are being challenged in court, some by the U.S. Department of Justice, some by immigrant advocacy groups. Legal experts say it's hard to predict how those cases will go: the laws are all written slightly differently and will be argued differently in court. But a team of legal scholars convened by ImmigrationWorks to interpret the decision believes it sees a bright line emerging. "What's the difference between the three measures the justices blocked and the one they upheld?" asked immigration lawyer and influential law blogger, Greg Siskind, founder of the Siskind Susser law firm. "One way to look at 2(B) is that officers are assisting the federal government" – not crafting or executing a separate state immigration policy, merely helping out in a subsidiary role at the invitation of federal authorities.

One thing is clear: other states should now proceed with caution. The federalist revolution on immigration isn't over – there will surely be more battles to come. But the Supreme Court spoke more clearly than many expected and told the states to trim their sails.