



Iowa General Assembly

2012 Legal Updates

Legislative Services Agency – Legal Services Division

<http://www.supremecourt.gov/opinions/11pdf/11-182.pdf>

Purpose. *Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.*

LEGAL UPDATE—STATE AUTHORITY TO REGULATE ILLEGAL IMMIGRATION

Filed by the United States Supreme Court

June 25, 2012

Arizona v. United States

No. 11–182

<http://www.supremecourt.gov/opinions/11pdf/11-182.pdf>

Background

In 2010, the state of Arizona enacted the Support Our Law Enforcement and Safe Neighborhoods Act (“the Act”), which contained various provisions intended to discourage the entry, presence, and economic activity in Arizona of aliens unlawfully present in the United States. Four provisions of the Act were at issue in this case.

- Section 3 established a misdemeanor for failure to comply with federal alien registration requirements.
- Section 5(C) established a misdemeanor for an unlawful alien to seek or engage in work in the state.
- Section 6 authorized warrantless arrests by state and local law enforcement officers if an officer has probable cause to believe a person has committed any public offense that would make the person removable from the United States.
- Section 2(B) required state and local law enforcement officers to make a reasonable attempt to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if reasonable suspicion exists that the person is an unlawful alien. Section 2(B) also required that officers determine the immigration status of any person who is arrested before the person is released.

The United States filed suit against the state of Arizona, seeking a preliminary injunction to prevent the four provisions from taking effect. The United States argued that the provisions were preempted by federal immigration law. The District Court for the District of Arizona found for the government on all four of the contested provisions. The Ninth Circuit Court of Appeals affirmed.

Issue

Whether §§ 2(B), 3, 5(C), and 6 of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act are preempted by federal law.

Arguments and Holding

The Court’s 5-3 majority decision (Justice Kagan did not participate) upheld the lower court’s ruling that §§ 3, 5(C), and 6 of the Act are preempted by federal law. The majority overturned the lower court’s ruling regarding § 2(B), holding that there was insufficient information to support a preemption claim.

State Penalty—Federal Registration Requirements. Section 3 established a misdemeanor for failure to comply with federal alien registration requirements. The provision essentially added a state law penalty to a federal law by regulating the same conduct. Arizona argued that this duplication was sufficient to survive a preemption challenge; there would be no conflict because the provision has the same substantive standards and the same goals as the federal law. The United States argued that federal regulation in the area of alien registration is comprehensive, meaning that the states cannot regulate in this area at all, even as a duplication of federal law. The Court ruled for the United States, finding that § 3 creates a specific conflict with the similar federal law and is thus preempted.

The Court noted that in addition to requiring registration, federal law requires that aliens carry proof of registration, be fingerprinted after 30 days, submit detailed information to the federal government including any change of address, and

other matters. The Court concluded that this extensive federal regulatory scheme is comprehensive. The Court described how federal law makes the federal government alone “responsible for maintaining a comprehensive and unified system to keep track of aliens within the [n]ation’s borders,” and thus each state could not be allowed to establish its own policy in this area which might conflict with federal policy. The Court also noted that the penalties for violating § 3 do not match the penalties for violating the similar federal law.

State Penalty—Unlawful Employment. Section 5(C) established a misdemeanor for an unlawful alien to seek or engage in work in the state. This provision has no counterpart in federal law, and was not expressly preempted. However, the United States argued that the provision presents an obstacle to the comprehensive federal regulatory scheme for the unlawful employment of aliens established by the federal Immigration Reform and Control Act of 1986 (IRCA) and thus is impliedly preempted. The Court agreed with the United States.

The Court discussed how the federal system established by the IRCA differs significantly from § 5(C). The IRCA prohibits employers from knowingly hiring or employing unlawful aliens and requires employers to verify the immigration status of prospective employees; violators are subject to various criminal and civil penalties. The IRCA also imposes civil penalties on unlawful aliens who accept employment in this country. However, the IRCA does not impose a criminal penalty on unlawful aliens for seeking employment, as § 5(C) does.

The Court pointed out that Congress explicitly rejected imposing criminal penalties on unlawful aliens for seeking employment when the IRCA was passed. The Court held that by imposing such a criminal penalty, § 5(C) represents an obstacle to the balance Congress struck regarding unlawful employment of aliens when it enacted the IRCA. While Arizona had similar policy goals in mind when it enacted § 5(C), that fact was not sufficient to overcome a preemption challenge. The Court also noted that state laws such as this had been permissible before the federal statute was enacted to regulate this area.

Warrantless Arrests. Section 6 authorized warrantless arrests by state and local law enforcement officers if an officer has probable cause to believe a person has committed any public offense that would make the person removable from the United States. Arizona argued that § 6 was authorized by a federal statute which permits state officers to “cooperate” with the federal government in the identification, apprehension, detention, and removal of unlawful aliens. The Court rejected this argument, stating that cooperation could not be understood to include a unilateral decision by a state officer to conduct an arrest. The United States argued that such arrests would be an obstacle to the system for the removal of unlawful aliens created by Congress and thus are impliedly preempted. The Court agreed. While this provision was not expressly preempted by federal law, the Court noted that “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States.” Under federal law, an unlawful alien can only be arrested under certain specific circumstances. If a potentially removable alien is encountered, federal law sets out an administrative process, which may ultimately result in arrest and removal from the country. If, after a hearing, an alien is ordered to be removed from the country, then the Attorney General will issue an arrest warrant.

There are other situations in which an unlawful alien may be arrested, including if the alien is likely to escape before a warrant can be obtained. However, federal law does not permit the arrest of an alien solely because the alien is unlawfully present in the United States. The Court also noted that state officers can only arrest an unlawful alien under an even narrower set of circumstances than those applicable to federal officers. The Court ruled that allowing state officers to make warrantless arrests of aliens based on their own judgment, without adhering to federal law or even consulting with the federal government, “would allow the [state of Arizona] to achieve its own immigration policy,” when “[d]ecisions of this nature touch on foreign relations and must be made with one voice.” Thus, the Court determined § 6 imposes an obstacle on the federal removal process and is preempted.

Law Enforcement—Immigration Checks. Section 2(B) requires state and local law enforcement officers to make a reasonable attempt to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if reasonable suspicion exists that the person is an unlawful alien. Section 2(B) also requires that officers determine the immigration status of any person who is arrested before the person is released. The accepted way to check a person’s immigration status is to contact Immigration and Customs Enforcement (ICE), a federal agency which maintains a database of immigration records. Section 2(B) also contains three limitations: a detainee is presumed not to be an unlawful alien if the detainee provides valid identification such as an Arizona driver’s license; officers may not consider race, color, or national origin except to the extent permitted by the Arizona and U.S. Constitutions; and § 2(B) must be implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons, and respecting the privileges and immunities of U.S. citizens. The United States argued that these immigration status verification requirements pose an obstacle to the federal immigration scheme. The Court disagreed.

The Court noted that federal law obligates ICE to respond to any request made by state officials for verification of a person’s immigration status. Federal law also provides that a state or local government entity cannot be prohibited from sending to or receiving from ICE information regarding a person’s immigration status. Federal law further provides that a formal agreement or special training is not necessary for mere communication with the federal government regarding

a person's immigration status. Thus, the Court ruled that even though these immigration checks are mandatory and make no consideration of federal objectives in immigration policy, they are within the broad latitude for such communication provided by federal law.

Others opposing § 2(B) argued that the required immigration checks would result in prolonged detentions of some persons solely for the purpose of conducting the checks, which would be an unconstitutional seizure, as well as preempted by federal immigration law. While the Court agreed that such prolonged detentions would be unconstitutional, the Court did not agree that § 2(B) would require prolonged detentions. The Court explained that if a person is stopped or even arrested, the "reasonable attempt" requirement in § 2(B) could be interpreted to not require a prolonged detention of the person; the person's immigration status might be determined quickly or even after the person has been released. Such an interpretation would be constitutional. Additionally, it is not clear if § 2(B), when read as a whole, requires an immigration status check for every person arrested, or only when "reasonable," a word which is undefined in this context. Ultimately, the Court determined that it could not answer such constitutional issues until the Arizona courts gave a definitive answer as to how the language of this provision of Arizona law would be interpreted. Unless it is shown that § 2(B) is being interpreted in such a manner that it would be unconstitutional, the Court will presume in favor of constitutionality. The Court did caution that § 2(B) could be challenged again later depending on how it is interpreted and applied going forward.

Concurrence and Dissent

Three dissents were filed in this case. All three dissents concurred with the majority's ruling that § 2(B) is not preempted by federal law. Justice Alito in his dissent also concurred with the majority's ruling that § 3 is preempted.

Justice Scalia began his dissent by discussing the history of immigration laws in the United States. He described how the individual states, prior to the adoption of the federal Constitution, had the power as sovereigns to exclude from their territory people who had no right to be there. He then argued that the federal Constitution did little to diminish that power; for the first 100 years of the nation's history, the individual states commonly enacted their own immigration laws, while the power of the federal government to enact immigration laws at all was a matter of dispute. Only in 1882 was the first general federal immigration law enacted. He agreed that the United States possesses its own sovereign power to regulate immigration. He argued, however, that the federal government could not deprive the states of their own sovereign power in this area through preemption unless such preemption was unequivocally expressed in federal law. Thus, the frustration of federal immigration policy would be an insufficient reason to hold that state immigration laws are preempted. He also noted what he described as the executive branch's "refusal to enforce the [n]ation's immigration laws" and argued that the sovereign states should not be forced to accept the consequences of such a policy decision. He discussed the Act in this context.

In addressing § 3, Justice Scalia stated that it is an accepted legal principle that a state may provide that a violation of federal law is a violation of state law as well. He argued that this is especially so when a state is protecting its own interests, and in this case the state interest was protecting the integrity of its borders. While he acknowledged case law which held that states may not impose additional or auxiliary registration requirements for aliens, he argued that nowhere in federal law are states preempted from establishing additional penalties for violating existing federal registration requirements, which is all that § 3 does.

In addressing § 5(C), he rejected the majority's argument that federal law which penalizes employers for hiring unauthorized aliens while largely preempting states from imposing such penalties also implicitly preempts states from penalizing unauthorized aliens for seeking employment. He argued that absent a showing of specific intent by Congress to preempt such state laws, preemption cannot be implied here.

In addressing § 6, he argued that statutory limitations on federal officials' authority to make arrests relating to immigration status did not imply any limitation on such authority for state officials. He argued that a state official arresting a person based on probable cause in conformity with federal standards for removal could not be construed to conflict with federal immigration policy, particularly given that the federal government would still ultimately decide whether the person would be removed. He also argued that a federal statute which permits state officers to "cooperate" with the federal government regarding illegal immigration does not require the states to seek prior federal approval before cooperating. Regardless of these points, he reiterated that states are entitled to have their own immigration policies.

Justice Thomas in his dissent adopted similar arguments regarding §§ 3, 5(C), and 6, as did Justice Alito for §§ 5(C) and 6.

Impact and Applicability

The Court held that states cannot establish criminal penalties for failure to comply with federal alien registration requirements or for an unlawful alien to seek or engage in work. The Court also held that states cannot permit warrantless arrests based on probable cause to believe a person has committed a public offense making the person removable from the United States.

The Court did hold that federal law does not preempt states from requiring law enforcement officers to make a reasonable attempt to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if reasonable suspicion exists that the person is an unlawful alien. States are also not preempted from requiring that law enforcement officers determine the immigration status of any person who is arrested before the person is released. However, this case was limited to the issue of preemption; the Court noted that § 2(B) could still be challenged on other grounds and that a further preemption challenge could arise later depending on how it is applied by Arizona law enforcement officers and interpreted by Arizona courts. Section 2(B) became effective in September 2012.

In recent years, several states have enacted laws similar to the provisions at issue in this case. The Iowa Code does not include similar provisions, although similar provisions have been included in bills introduced but not enacted. This case identifies legal principles applicable to the enactment and enforcement of such laws.

LSA Monitor: Jack Ewing, Legal Services, (515) 281-6048.