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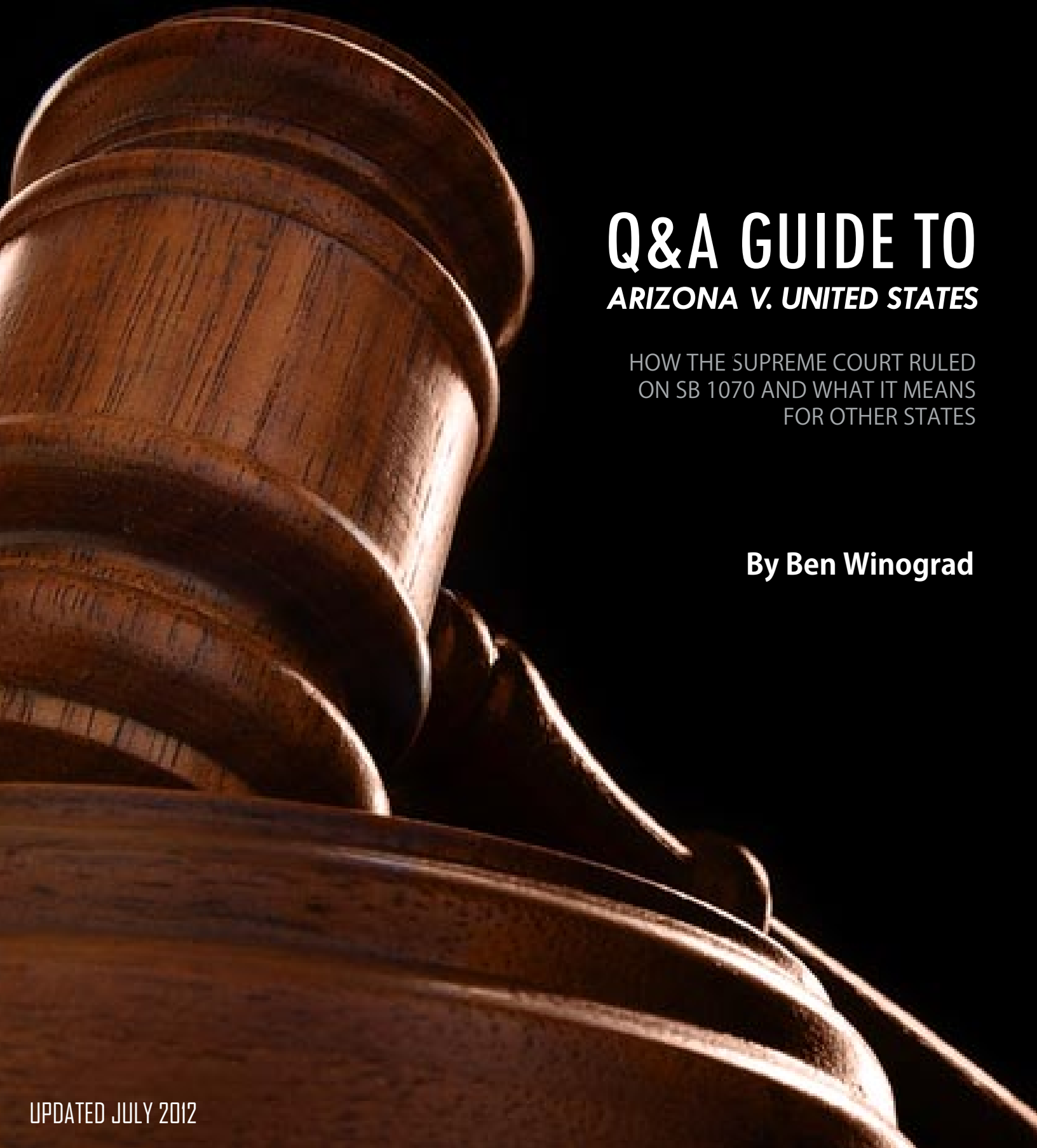

Q&A GUIDE TO
ARIZONA V. UNITED STATES

HOW THE SUPREME COURT RULED ON SB 1070 AND WHAT IT MEANS FOR OTHER STATES

By Ben Winograd

UPDATED JULY 2012

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ABOUT SPECIAL REPORTS ON IMMIGRATION

The Immigration Policy Center's Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

ABOUT THE AUTHOR

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THE BASICS

Q: Why do I need this guide?

On June 25, 2012, the Supreme Court issued its decision in *Arizona v. United States*, a dispute over four provisions of the immigration law known as "SB 1070." More than any matter in recent history, the case settled a range of important questions regarding the role that states may play in the enforcement of federal immigration law. The Court's decision will affect not only the future of SB 1070, but the fate of other state immigration laws being challenged in court and the odds of similar laws being passed around the country.

This guide provides brief answers to common questions about *Arizona v. United States*, including how the litigation began, what the contested provisions do and do not say, and how the Supreme Court decided the case. As debates over the ruling continue, knowing the basis for the Court's opinion will prove critically important in furthering a rational discussion about the implications of the Court's decision.

Q: What is SB 1070?

SB 1070 is the legislative name of the "Support Our Law Enforcement and Safe Neighborhoods Act," an immigration enforcement law enacted by the state of Arizona in April 2010.[1] According to the statement of legislative intent, the law was designed to make "**attrition through enforcement**" the official policy of all state and local agencies in Arizona. Attrition through enforcement is a strategy promoted by individuals and organizations—including Kansas Secretary of State Kris Kobach and the Federation for American Immigration Reform (FAIR)—who believe that aggressive enforcement of the immigration laws will make life so difficult for unauthorized immigrants that they will choose to "self-deport." Following the passage of SB 1070, numerous other states—including Alabama, Georgia, Indiana, South Carolina, and Utah—passed legislation with similar provisions.[2]

Q: How did the suit against Arizona reach the Supreme Court?

Soon after Arizona Gov. Jan Brewer signed SB 1070 into law, the Obama administration filed suit alleging its provisions were inconsistent with—and therefore "preempted" by—federal immigration law. (See page 3 for a more detailed discussion of the legal theory of "preemption.") In July 2010, a federal district judge in Phoenix entered a preliminary injunction against four of the law's provisions while permitting others to go into effect.[3] The following April, a federal appeals court in San Francisco upheld the injunction,[4] causing Arizona to file a petition with the Supreme Court.

The legality of SB 1070 has also been challenged by numerous private plaintiffs and organizations, including the American Civil Liberties Union and the National Immigration Law Center. Those cases remain pending before the lower courts, however, and the merits of the private parties' suits were not before the Supreme Court.

Q: When was the case argued and decided by the Supreme Court?

Oral arguments before the Supreme Court took place on April 25, 2012. The Court issued its decision on June 25, 2012.

Q: Who argued the case at the Supreme Court?

Arizona argued in favor of SB 1070 and the United States argued against it. Arizona was represented by Paul Clement, an attorney in private practice who served as Solicitor General of the United States during the most recent Bush administration. The United States was represented by Donald Verrilli, Jr., who succeeded Elena Kagan as Solicitor General after her appointment to the Supreme Court.

Q: Why did Justice Kagan recuse herself from the case?

When the Supreme Court announced it would hear the case, it revealed that Justice Kagan would not take part in the decision. While no specific reason was given, it is fair to assume she participated in internal discussions about the lawsuit while serving in the Obama administration.

Q: What outside parties supported and opposed Arizona?

In addition to briefs from the parties themselves, the Supreme Court frequently receives "amicus" (friend of the court) briefs from outside individuals and organizations wishing to share their views of the case. Those who filed briefs supporting Arizona's position on SB 1070 include 16 states and 56 Republican members of Congress. Those who filed briefs opposing Arizona's position include 11 states; 68 Democratic members of Congress; two Commissioners of the former Immigration and Naturalization Service; three former Cabinet members; 17 foreign countries; and more than 40 U.S. cities and counties.

Q: Why did the Obama administration sue Arizona but not states that have policies limiting information sharing between state and local police and federal immigration agencies?

The Obama administration sued Arizona because it believed the provisions of SB 1070 were inconsistent with federal law, and because the Supreme Court had previously struck down similar state measures. The administration has not brought suit against any so-called "sanctuary" cities because community policing policies that forbid questioning individuals about their immigration status do not violate federal law.[5] In fact, the Supreme Court has specifically held that the Constitution forbids the federal government from requiring municipalities to assist in the enforcement of federal law.[6]

THE DECISION

Q: What was the issue before the Supreme Court?

The issue before the Supreme Court was whether four provisions of SB 1070 were "preempted" by federal law and should therefore be prevented from taking effect. "Preemption" is the legal principle whereby federal laws take precedence over conflicting state laws. It is why states cannot pass less stringent environmental protections than the federal government, or set a minimum wage below that established by Congress. The concept of preemption comes from the Constitution, which says that federal statutes are the "supreme" law of the land.[7]

However, simply because a state law is "preempted" by federal law does not mean it violates the Constitution itself. It simply means that it conflicts with existing federal statutes, which Congress may subsequently change. As presented to the Supreme Court, the question in *Arizona v. United States* was not whether various provisions of SB 1070 violated the Constitution, but whether they were "preempted" by existing federal immigration laws.

Q: Which provisions of SB 1070 did the Supreme Court consider?

The Supreme Court did not rule on the entirety of SB 1070; it only considered four provisions of SB 1070 that were initially enjoined by the federal district court in Phoenix: Section 2(B), Section 3, Section 5, and Section 6.

Q: Which provisions of SB 1070 did the Supreme Court strike down, and why?

The Supreme Court found Section 3, Section 5(C), and Section 6 of SB 1070 "preempted" by federal law, thereby allowing the preliminary injunctions to become permanent.

Section 3 would have made it a crime under Arizona law for unauthorized immigrants to violate the provisions of federal law requiring them to apply for "**registration**" with the federal government and to carry a registration card if one has been issued to them. In other words, it would have created an additional state penalty for the commission of a federal offense. Violations of this provision would have been punishable by up to 20 days in jail for a first violation and 30 days in jail for subsequent violations.

The Court found Section 3 preempted because the registering of immigrants in the United States is an area of law that Congress has entrusted entirely to the federal government. (In legal terms, the Court said the federal government has "occupied the field.")[8] The Court also said that if Arizona could enforce Section 3, it could prosecute immigrants even where federal officials determine that initiating charges would frustrate federal priorities.[9]

Section 5(C) would have made it a crime under Arizona law for immigrants who are not authorized to work in the United States to apply for work, solicit work in a public place, or perform work within the state's borders. The term "**solicit**" would have included any form

of communication indicating that a person is willing to be employed. Violations of this provision would have been punishable by up to six months in jail and a $2,500 fine.

The Court found Section 5(C) preempted because when Congress passed legislation barring employers from hiring unauthorized immigrant workers, lawmakers specifically declined to impose criminal penalties on employees themselves. Thus, as the Court found, "making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives."[10]

Section 6 would have authorized state and local police officers to arrest immigrants without a warrant where "**probable cause**" existed that they committed a public offense making them removable from the United States. (Note: "probable cause" means having enough evidence of unlawful activity to obtain a warrant or make an arrest.) Under the provision, Arizona law enforcement officers would have been able to arrest *lawfully* present immigrants for crimes committed outside the state, or for crimes for which they were previously incarcerated, if the commission of such a crime was grounds for deportation.

The Court found Section 6 preempted because it would have given Arizona police more power to arrest immigrants than is possessed by federal immigration officers, who must generally obtain a warrant before making an arrest. The Court also found that Congress set forth limited circumstances in which local police may perform the functions of federal immigration officers—such as when they are deputized under a "287(g) agreement." Otherwise, the Court held that local police cannot unilaterally decide to arrest an immigrant solely for being in the country unlawfully or violating his or her immigration status. In so doing, the Court implicitly rejected Arizona's argument that local police have "**inherent authority**" to make arrests for civil violations of the immigration laws.

Q: Which provision of SB 1070 did the Supreme Court not strike down, and why?

The Supreme Court found that Section 2(B) of SB 1070 was not preempted by federal law but, as explained more below, did not preclude future legal challenge to the provision.

Section 2(B) says that when a law enforcement officer stops, detains or arrests someone for a valid reason, and then develops "**reasonable suspicion**" that the person is unlawfully present in the United States, the officer must make a reasonable attempt to determine the person's immigration status. (Note: "reasonable suspicion" means having a valid reason to suspect unlawful activity, but not enough evidence to make an arrest.) Section 2(B) also says that any person who is arrested must have their immigration status checked before they are released, regardless of whether the person is suspected of being in the country unlawfully. In both circumstances, state and local police officers are required to contact federal immigration authorities to determine whether an immigrant is unlawfully present, not make a determination themselves.

The Court said it was unclear whether Section 2(B) was preempted by federal law because there was a basic uncertainty about how it would be enforced. Accordingly, the Court said the provision should be allowed to take effect but left the door open to future legal challenges. For example, the Court said the provision would raise constitutional problems if law enforcement officers stopped people solely to determine their immigration status or continued holding them in custody after they were entitled to release. The Court also said the provision would disrupt the federal framework envisioned by Congress if state officers held people for immigration violations without federal direction or supervision.

Q: What did the Supreme Court say about immigration and prosecutorial discretion?

The Court stressed the importance of "**prosecutorial discretion**," i.e., the legal principle allowing the government not to enforce the law to its fullest extent in any particular case. Just as police officers often decline to arrest people for minor offenses (e.g. jaywalking), the majority recognized that immigration officials may validly choose to not seek the deportation of immigrants who could otherwise be placed in removal proceedings. As Justice Kennedy wrote in the majority opinion:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission.[11]

In emphasizing the importance of prosecutorial discretion, the Court's decision recognized that the removal of unauthorized immigrants is one of many competing objectives in the enforcement of the immigration laws.

Q: What did the Supreme Court say about immigration and foreign relations?

The Court's ruling affirmed that an inherent connection exists between federal immigration policy and the nation's relationships with foreign countries. As Justice Kennedy stated, "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws."[12] The majority noted that the perceived mistreatment of immigrants in the United States may result in similar treatment of U.S. citizens in foreign countries. Thus, the Court concluded that "foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States."[13]

Q: What did the Supreme Court say about immigration reform?

The Court's ruling recognized that Arizona faces unique problems on account of its location along the border with Mexico, and that states may be justifiably frustrated with Congress for failing to solve problems relating to illegal immigration. However, the Court emphasized that the federal government—and only the federal government—has the power to pass meaningful immigration legislation. As Justice Kennedy said at the conclusion of the majority opinion:

> The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. **Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law.**[14]

THE AFTERMATH

Q: Which side "won" *Arizona v. United States*?

Because the Supreme Court did not strike down every provision of SB 1070 under consideration, supporters of the law—including Arizona Gov. Jan Brewer—have attempted to claim the ruling as a victory. However, because the Court struck down three provisions—and left open future legal challenges to the fourth provision—most legal commentators have concluded that the Court's ruling represented a win for the federal government.[15]

Q: What is the status of SB 1070 in Arizona?

As a result of the Supreme Court's ruling, the preliminary injunctions against Section 3, Section 5(C), and Section 6 will become permanent. The status of Section 2(B) is less clear, however, because the Court's ruling has not officially taken effect and civil rights groups have filed a motion in a separate case seeking a new injunction against the provision.

When the Supreme Court releases an opinion, the ruling does not take effect until the Court issues a "judgment," which typically occurs 32 days after the decision is issued. (The delay is meant to give the parties time to ask the Court to reconsider its opinion.) Thus, the preliminary injunction against Section 2(B) that was in place before the Supreme Court's decision will remain in force until at least July 27.

On July 17, civil rights groups sought a preliminary injunction against Section 2(B) in a separate case—*Valle del Sol v. Whiting*—based on additional arguments and evidence.[16] The motion argues that if Section 2(B) goes into effect, Arizona law enforcement will inevitably detain individuals solely to determine their immigration status, a practice the Supreme Court said would raise constitutional problems. The motion also argues that

Arizona legislators were motivated by anti-Latino bias in enacting SB 1070, citing, among other evidence, inflammatory comments about Mexico and unauthorized immigrants in emails from the law's chief sponsor, former State Sen. Russell Pearce.

Q: If Section 2(B) takes effect, will it be immune from future legal challenges?

No. The Supreme Court specifically said that it was not foreclosing future challenges to Section 2(B). For example, the Court made clear that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns."[17] In addition, the Court said that Section 2(B) would be preempted by federal law if it "put state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision."[18]

Q: How will the Supreme Court's ruling affect other state and local immigration laws?

Because Supreme Court decisions apply nationwide, the principles announced in its ruling are not limited to Arizona. However, the extent to which the Court's ruling applies to other state and local immigration laws depends on the similarity between those laws and the provisions of SB 1070 at issue in the case.

For example, unless Congress enacts a law allowing such measures, no state will be able to enforce laws modeled on the provisions the Supreme Court struck down (Section 3, Section 5(C), and Section 6). Thus, unless authorized by Congress, states cannot impose their own penalties for the commission of federal immigration offenses, or authorize local police to arrest immigrants solely on suspicion of being deportable. By the same token, unless Congress enacts a law forbidding such measures, states may enforce laws modeled on Section 2(B)—subject, of course, to the constitutional and other legal constraints mentioned in the Court's opinion, or the outcome of any future legal challenges.

At the same time, the Supreme Court's ruling did not directly determine the legality of state measures that were not before the Justices. For example, the decision did not definitively resolve the legality of the provision of Alabama HB 56 that requires school administrators to ascertain the immigration status of newly enrolling students. Similarly, the decision did not resolve the legality of local laws—like those enacted by Farmers Branch, Texas, and Hazleton, Pennsylvania—that seek to prevent unauthorized immigrants from renting apartments or other housing. The validity of these and other state and local immigration laws will be determined during future litigation.

Q: Could Congress override the Supreme Court's decision?

Yes. The question under consideration was whether the four enjoined provisions were preempted under federal law, *not* whether they were prohibited by the Constitution itself. Thus, Congress may override the Court's decision by enacting new laws or amending the relevant federal provision(s) to eliminate the source of the conflict. In addition, the Arizona legislature could pass modifications to SB 1070, the validity of which would be determined in light of the Court's opinion.

End Notes

[1] The full title of the law is the Support Our Law Enforcement and Safe Neighborhoods Act. Following the passage of SB 1070, the Arizona Legislature enacted a follow up measure (HB 2162) amending some of its provisions.
[2] For more information on immigration enforcement laws in other states, see the Immigration Policy Center Special Report, *A Q&A Guide to State Immigration Laws* (Updated February 2011).
[3] *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010)
[4] *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011).
[5] Lynn Tramonte, *Debunking the Myth of "Sanctuary Cities"*, Immigration Policy Center Special Report (April 2011).
[6] *Printz v. United States*, 521 U.S. 898 (1997).
[7] U.S. Constitution, Article VI.
[8] *Arizona v. United States*, No. 11-182, at page 9. The full opinion is available at http://www.supremecourt.gov/opinions/11pdf/11-182.pdf.
[9] *Arizona v. United States*, No. 11-182, at page 11.
[10] *Arizona v. United States*, No. 11-182, at page 14.
[11] *Arizona v. United States*, No. 11-182, at pages 4-5.
[12] *Arizona v. United States*, No. 11-182, at page 3.
[13] *Arizona v. United States*, No. 11-182, at page 3.
[14] *Arizona v. United States*, No. 11-182, at page 25.
[15] See, e.g., David A. Martin, *Reading Arizona*, 98 Va. L. Rev. In Brief 41 (2012); Lauren Gilbert, *Patchwork Immigration Laws and Federal Enforcement Priorities*, ImmigrationProf Blog, June 27, 2012; Peter Spiro, *Supreme Court (Mostly) Guts S.B. 1070*, SCOTUSblog, June 25, 2012.
[16] See Plaintiffs' Motion for Preliminary Injunction, *Valle del Sol v. Whiting*, No. 10-1061 (D. Ariz. filed July 17, 2012).
[17] *Arizona v. United States*, No. 11-182, at page 22.
[18] *Arizona v. United States*, No. 11-182, at page 22.