

Talking Points on U.S. Supreme Court's Decision in *Chamber of Commerce v. Whiting*

What does the majority opinion say?

- In a 5-3 decision written by Chief Justice Roberts, the Court held that the Legal Arizona Workers Act of 2007 is not preempted by federal law. The Arizona law mandates the use of E-Verify by all employers within the state and allows Arizona courts to suspend or revoke the business license of any employer who “knowingly or intentionally” violates federal employment verification requirements.
- A majority of the Supreme Court rejected the argument that Arizona’s law was preempted, relying on a specific exception in the Immigration and Nationality Act that permits state governments to regulate employment verification through licensing. Adopting a broad definition of licensing, the opinion emphasized that federal government determinations regarding an employee’s authorization to work control liability under Arizona’s law.
- While conceding that the Immigration and Nationality Act precludes the Secretary of Homeland Security from mandating participation in E-Verify by employers other than the federal government, the majority found that this restriction does not impact the states’ ability to do the same thing. Chief Justice Roberts noted that, in the face of a challenge to a 2008 Executive Order mandating the use of E-Verify by federal government contractors, the Justice Department had used Arizona’s E-Verify mandate to justify the government’s position that only the Secretary is prohibited from requiring E-Verify compliance. The majority opinion does not address the many good reasons—including pervasive system errors and high implementation costs—that Congress opted to make E-Verify voluntary.

What do the dissenting opinions say?

- Justice Breyer, joined by Justice Ginsburg, emphasized that Arizona’s law disrupts the careful balance struck by Congress between two of the law’s most important goals: preventing the hiring of unauthorized workers and deterring employers from discriminating against authorized workers. Federal law imposes equivalent penalties for either type of violation. Under Arizona’s law, employers who discriminate still face civil fines, but employers who hire undocumented workers can lose their business licenses entirely. Justice Breyer predicted that this “business death penalty” would be likely to increase discrimination against foreign-born workers.

- Writing separately, Justice Sotomayor noted that Arizona’s law—and the majority opinion—is based on a false premise. Arizona’s argument relied heavily on a section of federal law (8 U.S.C. § 1373) obligating the federal government to respond to inquiries from state agencies seeking to verify an individual’s “citizenship or immigration status.” But as Justice Sotomayor recognized, “work authorization status...is oftentimes distinct from immigration status,” and is governed by “technical questions of immigration law.” Justice Sotomayor also noted that permitting Arizona’s law to stand could lead to the very “patchwork” of enforcement schemes that Congress sought to eliminate in crafting federal immigration law.
- In Justice Breyer’s view, the “licensing and similar laws” contemplated by Congress were limited to *employment-related* licenses, such as those awarded to firms specializing in the recruitment and referral of agricultural workers. Taking a slightly broader view, Justice Sotomayor did not take issue with Arizona’s definition of licensing, but stated that only the federal government—and not the states—could make an initial determination of whether an employer engaged in unauthorized hiring. As to the legality of the E-Verify provision, both Justice Breyer and Justice Sotomayor wrote that permitting states to require participation completely undercuts Congress’ decision to make the program voluntary.

How will this decision affect the pending litigation on SB 1070?

- Even though challenges to both laws involve the concept of preemption—whether the federal government has the sole authority to make and enforce laws on a particular issue—the underlying laws in question are significantly different.
- The Arizona law was an effort to regulate the employment of undocumented immigrants by permitting the suspension or revocation of business licenses in the event that employers knowingly hired undocumented immigrants.
- The *Whiting* decision was more about employment than immigration. While states have historically possessed the power to regulate employers within their borders, they have no authority to regulate immigration itself. This is the exclusive domain of the federal government—and the issue at stake in the SB 1070 litigation.
- In creating an otherwise exclusive federal scheme for employment authorization, Congress carved out an exception allowing states to pass “licensing and similar laws.” By contrast, there is no comparable provision permitting states to pass laws—like SB 1070—relating to the enforcement of the immigration law
- SB 1070 has as its express purpose to make “attrition through enforcement” the policy of the state. In other words, the state of Arizona decided in SB 1070 to make it so onerous for immigrants to live there that they would just leave. And while it was written to root out undocumented immigrants, the practical effect was to make anyone who appeared vaguely foreign or different the possible target of questioning and racial profiling. Moreover, it created criminal penalties for being in the state illegally, essentially layering another level of punishment on people regardless of federal law.

- The only employment-related provision of SB 1070 sought to criminalize work by undocumented immigrants. The Ninth Circuit found this provision unconstitutional, in part because Congress decided to penalize employers, not employees, for the hiring of undocumented workers.
- *Whiting* affirmed a prior ruling by the Ninth Circuit Court of Appeals that Arizona's law was not preempted. By contrast, the District Court has already found SB 1070 to be preempted by federal law and the Court of Appeals found the arguments of plaintiffs so compelling that it issued an injunction, preventing the vast majority of the law from going into effect until the Court issues its opinion.

What is the practical impact of the E-Verify decision?

- Going forward, all employers in Arizona will be required to use E-Verify. In the absence of broader reforms to the immigration system, this is likely to fuel the underground economy, promote more discrimination, and create more problems for well-intentioned Arizona employers.
- Other states who favor mandatory E-Verify may adopt copycat versions of Arizona's law, creating the risk of a patchwork of conflicting employment verification schemes across the country.
- Ideally, Congress will realize that attempting to regulate undocumented employment without legalizing the current undocumented population is a no-win proposition, and take constructive steps to pass comprehensive immigration reform.