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### IMMIGRATION

## Court signals trouble for SB 1070 employment provision

by Dinita L. James

*Arizona's Support our Law Enforcement and Safe Neighborhoods Act—more commonly known as Senate Bill (SB) 1070—brought a spectacle to the nation's capital when the federal government's lawsuit challenging it came up for argument before the U.S. Supreme Court on April 25. A clear majority of pundits and knowledgeable court watchers concluded the argument was a win for the state.*

*It did appear from the argument that there were at least five votes to overturn the U.S. Ninth Circuit Court of Appeals (whose rulings apply to Arizona employers) and the Phoenix federal district judge who threw out Section 2 of the law. That provision requires law enforcement officers to determine, "when practical," the immigration status of a person if there is reasonable suspicion that he is in the country illegally.*

*Based on our review of the transcript and audiotape of the oral arguments, we are predicting at least five votes to affirm the lower courts' determination that Section 5 of SB 1070 is preempted by federal immigration law. That provision makes seeking work in Arizona while in the country illegally a crime. Of course, where all pundits and court watchers agree is that you can't predict how the Court will rule based on the oral arguments. We will know the answer for sure by the end of June.*

### **Five votes to affirm injunction against Section 5**

Even though Section 5 of SB 1070 was mentioned only 12 times during the hour-and-20-minute argument, there were some clear indications that the justices were buying into the U.S. government's preemption argument regarding that section at least.

Chief Justice John Roberts first turned the discussion to Section 5 by noting that the section "does seem to expand beyond the federal government's determination about the types of sanctions that should govern the employment relationship."

Justice Anthony Kennedy, who is widely regarded as the swing vote on the Court, joined the discussion by asking Arizona's advocate, former Solicitor General Paul Clement, whether he would agree that the proper test for preemption was whether Arizona's law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress in enacting the comprehensive Immigration Reform and Control Act (IRCA) in 1986. After getting an affirmative answer from Clement, Justice Kennedy articulated what he thought current Solicitor General Donald B. Verrilli, Jr., would be arguing—that "the enforcement of the statute, as Arizona describes it, would be in considerable tension with . . . our basic [federal] approach."

Justice Sonia Sotomayor observed during the argument that "there seems to be quite a bit of legislative history [on the IRCA] that the—idea of punishing employees was raised, discussed, and explicitly rejected." Her comment appeared to cut in favor of finding the employment provision of SB 1070 to be preempted.

Justice Ruth Bader Ginsburg summarized Arizona's position as being that the IRCA regulated the supply side of the labor market, leaving the demand side—the employee side—open for regulation. She then challenged Clement, saying, "So we have the—what you call the supply side—[it's] regulated, but you want to regulate it more?"

If Chief Justice Roberts and Justices Kennedy, Ginsburg, and Sotomayor vote on Section 5 in the way their questions and statements appeared to lean during oral arguments and if Justice Stephen Breyer, whose questions and comments probably signaled problems he had with all of the SB 1070 provisions before the Court, votes with them, that would be five votes to affirm the Ninth Circuit and strike down the provision making seeking or doing work while present in the state illegally a crime.

Arizona Governor Jan Brewer, who attended the argument and addressed the media on the courthouse

steps afterward, predicted that the state would win its case. Former Arizona Senate President Russell Pearce (R-Mesa), who coauthored SB 1070, also expressed confidence in victory upon leaving the hearing.

Whatever the outcome of the other provisions of SB 1070, however, it appears likely that the employment-specific provision may stay struck down.

### ***The spectacle***

The hearing was the occasion of lively protests in Washington, D.C., and in Phoenix, where some protesters were arrested. On April 24, the day before the Supreme Court argument, the U.S. Senate Judiciary Committee's Subcommittee on Immigration, Refugees, and Border Security held a hearing on SB 1070. Governor Brewer declined the invitation, but Pearce testified and was the only witness in support of the law.

The other witnesses at the hearing were retired U.S. Senator Dennis DeConcini (D-Arizona), Arizona State Senator Steve Gallardo (D-Phoenix), and Todd Landfried, executive director of Arizona Employers for Immigration Reform. That organization submitted a friend-of-the-court brief against SB 1070.

DeConcini, who served Arizona in the U.S. Senate for 18 years, said he was embarrassed for his home state. "I apologize for Arizona's actions to the Latino community," he told the subcommittee members, only two of whom were in attendance, Democratic Senators Charles Schumer of New York and Dick Durbin of Illinois.

In an editorial, the *Arizona Republic* labeled the hearing "a genuine sideshow" and "a tawdry one."

### ***The latest data***

In a well-timed report, the Pew Hispanic Center, a nonpartisan nonprofit research center in Washington, D.C., reported equilibrium in the number of Mexicans coming to or going from the United States.

The report, released on April 23, the day before the Senate hearing and two days before the Supreme Court arguments on SB 1070, concluded that the historic wave of immigrants from Mexico had come to a standstill. Between 2005 and 2010, according to the Pew report, the same number of Mexicans came to the United States as

returned to Mexico—1.4 million. That compares to the five-year period from 1995 to 2000, in which three million Mexicans came to the United States and only 700,000 Mexicans and their U.S.-born children returned home.

The report pegged the number of undocumented immigrants from Mexico at 6.1 million in 2011, down significantly from the estimated peak of seven million in 2007.

The Pew data corresponds with Department of Homeland Security (DHS) estimates for Arizona. In 2000, the DHS estimated there were 330,000 illegal immigrants in Arizona, and by 2008, that number had increased to an estimated 560,000. The DHS' estimate for 2011 was that only 360,000 undocumented immigrants remained in the state.

Many experts believe the declining population of illegal immigrants in Arizona can be attributed to the Legal Arizona Worker's Act (LAWA), which effectively blocked illegal immigrants from getting jobs with invented social security numbers. The Supreme Court upheld the LAWA last June. The LAWA went into effect in 2008, just before the decline in Mexican immigrants began.

Since SB 1070's passage, the Arizona Chamber of Commerce and Industry has played a pivotal role in opposing any additional Arizona immigration legislation. A handful of immigration measures were introduced in the Arizona Legislature in both 2011 and 2012, but nothing has been passed since SB 1070.

### ***Bottom line***

The Supreme Court will announce the outcome of the SB 1070 case by the end of June. However, the judgment is already in that illegal immigration isn't the crisis it was a few years ago when SB 1070 was passed. Some Republicans in the Arizona Legislature who voted for SB 1070 have joined with Democrats to vote against state immigration legislation since then. So whatever the outcome of the SB 1070 case, Arizona employers likely have moved off the immigration issue now and are focused on other more pressing concerns.

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