What does the Supreme Court ruling on immigration mean?

By Jennifer Rubin

The Associated Press reported on the Supreme Court's 5-3 decision (Justice Elena Kagan recused herself) on an Arizona immigration law:

> The Supreme Court on Thursday upheld an Arizona law that penalizes businesses for hiring workers in the country illegally, buoying the hopes of supporters of state crackdowns on illegal immigration.
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> They predicted the ruling would lead to many other states passing laws that require employers to use the federal E-Verify system to check that workers aren't illegal immigrants. And some said the ruling bodes well for the prospects of a much broader and more controversial immigration law in Arizona, known as SB1070, to be found constitutional.

Hans von Spakovsky at the Heritage Foundation explained the Supreme Court's reasoning in *Chamber of Commerce v. Whiting*:

> The federal Immigration Reform and Control Act (IRCA) makes it illegal to knowingly hire or recruit an alien who is unauthorized to work in the United States. While IRCA imposed civil and criminal penalties on employers who violate this provision (when it is actually enforced by the Justice Department), it restricts the ability of states to implement similar penalties with one conspicuous exception. The federal law (8 U.S.C. §1324a(h)(2)) specifically allows states to impose sanctions on such employers "through licensing and similar laws." That is exactly what Arizona did in 2007 when it passed the Legal Arizona Workers Act (LAWA).
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> LAWA allows Arizona courts to suspend or revoke the licenses necessary to do business in the state of any employer who knowingly or intentionally employs an unauthorized alien. . . The [U.S. Chamber of Commerce] argued that because the law only suspends and revokes licenses rather than grant them, it is not really a licensing law. However, Chief Justice John Roberts dealt with this strained and dubious legal argument in short order, calling it "without basis in law, fact, or logic." In fact, Arizona's definition of a business license "largely parrots the definition of 'license' that Congress codified in the Administrative Procedure Act." Further, Arizona does not interfere with federal law by making its own determination of whether an alien is "unauthorized." No independent determination can be made – the state courts must "consider only the federal government's determination." The state statute very carefully tracks the

> language of IRCA. Thus, the Court concluded that Arizona's licensing law clearly falls with the plain text of the savings clause of IRCA and is not preempted by federal law.

Not surprisingly, advocates and lawyers on both sides of the issue are anxious to determine if the decision provides guidance in the more controversial case of SB 1070.

In the latter case the 9th Circuit recently ruled that key provisions of the statute, including Section 2(B) that provides "when officers have reasonable suspicion that someone they have lawfully stopped, detained, or arrested is an unauthorized immigrant, they 'shall' make 'a reasonable attempt … when practicable, to determine the immigration status' of the person."

I spoke with Ilya Shapiro, senior fellow in constitutional studies and editor in chief of the Cato Supreme Court Review at the Cato Institute, about the implications of the *Whiting* case. He explained that in pre-emption cases a careful analysis of the particular statute at issue is essential. In essence, he said that in yesterday's case the Supreme Court found that the Arizona statute "carefully tracks" federal law, therefore sidestepping federal preemption. As for SB 1070, the court, if it agrees to hear the case, will need to go through the same case by case analysis. However, in Shapiro's view, yesterday's case makes it more likely that Arizona will prevail in the SB 1070 case, although he predicts that Section 5(C) of SB 1070, which penalizes an illegal alien for working or seeking work, may run into trouble under Chief Justice John Roberts's ruling because that section adds a penalty (on employees) not present in the federal immigration enforcement scheme.

Lyle Denniston over at the invaluable SCOTUS blog sees it slightly differently. He agrees that the "Supreme Court on Thursday sent a strong signal that states will be free to experiment with new laws dealing with unlawful aliens living within their borders, at least when the states seek to control access to jobs." However, with regard to SB 1070, Denniston argues:

> It is far from clear that the same majority that assembled Thursday would come together in a decision on S.B. 1070. The controversy over that law raises preemption issues, of course, but it also raises issues about potential racial discrimination based upon police actions aimed at people who "look like" aliens. If the case over S.B. 1070 should turn, in some ways, upon the question of bias through "racial profiling," that might raise issues about violation of federal workplace anti-discrimination laws. The Chief Justice's opinion mentioned those anti-bias laws Thursday, suggesting that they could be invoked against employers who, trying to avoid violating the Arizona worker control law, simply refused to hire

> anyone they thought might be an unlawful alien, just to be on the safe side.
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> Even before Arizona's appeal on S.B. 1070 reaches the Court, the Justices now have on their docket two cases that might provide hints, when the Justices react to them, about how the Court feels about other issues of immigration policy in the wake of *Whiting*.

In sum, *Whiting* suggests Arizona will have a sympathetic majority if the dispute over SB 1070 reaches the Supreme Court. But the only certainty is that the Supreme Court will engage in a painstaking analysis to determine if particular sections of that law run afoul of or go beyond the contours of federal immigration law.

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