

# **Statement of Omar Jadwat**

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## **Court to Address State Authority to Enact Laws Regulating Immigrant Employment**

*Chamber of Commerce v. Whiting* (09-115) challenges an Arizona law enacted in 2007 that creates new, state-level requirements and penalties relating to the employment of non-citizens. The ACLU is co-counsel in the case, directly representing several civil rights and immigrant groups.

The Arizona law is one of a number of laws that cities and states have enacted over the past four years to punish individuals that they determine to be “illegal” immigrants, as well as persons and businesses that interact with such immigrants. Many of these laws have been challenged in litigation, from the Hazleton, Pennsylvania ordinance (enacted in 2006 and permanently enjoined by the courts) to Arizona’s SB 1070 (enacted earlier this year and currently subject to a preliminary injunction).

*Whiting* is the first challenge to a recent state or local anti-immigrant law to reach the Supreme Court. The issue before the Court is whether Arizona’s law is preempted by federal immigration law, which since 1986 has included a national employer sanctions and employment verification system.

### **Background**

The Arizona law, entitled the “Legal Arizona Workers Act,” has two major components. The first establishes a system under which state officials investigate and adjudicate allegations that an employer has knowingly employed an unauthorized worker, and apply penalties up to and including a “business death penalty” to employers found to have violated the law’s prohibition of such employment. The “death penalty” is applied by cancelling or revoking all certificates, registrations, approvals, permits, and other authorizations issued to the business, including articles of incorporation and certificates of partnership. The second component of the Act requires all employers in the state of Arizona to use the federal e-Verify system to verify the employment authorization of their workers.

Federal immigration law contains an elaborate and delicately balanced system governing employer sanctions and employment authorization. Included in that system are a federal investigation and adjudication scheme; a graduated scale of penalties that does not include anything resembling a “death penalty” for employers; and an anti-discrimination scheme deemed essential by Congress to reduce the likelihood that employers would simply avoid hiring those perceived as possibly “foreign” once the employer sanctions scheme took effect. The law includes a provision expressly “preempt[ing] any State or local law imposing civil or criminal sanctions (other than through licensing and similar

laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”

Federal law also mandates the familiar “I-9” paper-based employment verification system, which is also designed to be minimally burdensome on businesses and to reduce the likelihood of discrimination by employers. Under federal law, e-Verify is a voluntary and experimental system and DHS is expressly prohibited from requiring employers to enroll in it.

## **Litigation**

An unusually broad spectrum of organizations brought challenges to the Arizona law before its effective date, including business, civil rights and immigrants’ rights groups. (Labor and religious organizations have also supported the challenges as *amici*.) The plaintiffs claim that the Act is expressly and impliedly preempted by federal law. The lower courts ruled against the plaintiffs, finding that the Act’s employer sanctions scheme falls within the federal express preemption provision’s parenthetical exception for “licensing and similar laws,” and that the state’s e-Verify mandate is lawful because it is not explicitly prohibited in federal law and is consistent with Congress’s general desire to encourage the use of e-Verify.

The plaintiffs petitioned for *certiorari*, and the Court called for the views of the Solicitor General. At that point, the federal government had not participated in or expressed a view regarding the Arizona litigation or any of the other cases that challenge related laws. The federal government responded by supporting the plaintiffs’ *cert* petition and agreeing that the Arizona law is preempted. The Court granted the petition.

The plaintiffs argue (and the federal government agrees) that the Act’s employer sanctions scheme is both expressly preempted and impermissibly conflicts with federal law; and that the e-Verify mandate is also preempted.

The plaintiffs first note that there is no dispute that the Act falls within the statute’s broad prohibition of any state or local law imposing sanctions on employers for hiring unauthorized workers. The question is rather whether the parenthetical for “licensing and similar laws” is so broad as to swallow the rule by allowing Arizona to enact a scheme that sweeps in a vast number of Arizona employers of all different types and imposes draconian sanctions that go far beyond what federal law allows based on Arizona’s determination that an employer has hired unauthorized workers. The plaintiffs demonstrate that Arizona’s law is not a licensing or similar law within the meaning of the statute, and several legislators who originally authored and/or enacted the federal employer sanctions system (including the express preemption provision) have submitted a brief confirming that view.

The plaintiffs go on to argue that even if the Act falls within the parenthetical savings clause, it plainly conflicts with the comprehensive framework established in federal law by disturbing the careful balances that Congress struck when crafting that scheme.

Finally, plaintiffs argue that the e-Verify requirement clearly and directly conflicts with Congress' manifest intent that e-Verify be a voluntary program.