

What will the Supreme Court decide?

On April 25, 2012, in the case *Arizona v. United States*, the Supreme Court will hear arguments addressing whether four provisions of Arizona’s Senate Bill 1070 are preempted by federal law. When it passed in 2010, SB 1070 was the most sweeping state immigration enforcement law in the country. SB 1070 expressly makes “attrition through enforcement” the official state immigration policy, intending to create such harsh conditions that undocumented immigrants are forced to leave the state. The following provisions of SB 1070 are before the Court:

Section 2(B): Requires police officers to investigate the immigration status of any individual during traffic stops and other detentions based on “reasonable suspicion” that the individual is in the country unlawfully. This section also requires the mandatory detention of individuals who are arrested, even for minor offenses that would normally result in a ticket, if state officials cannot verify that they are authorized to be in the U.S.;

Section 3: Imposes state criminal penalties against immigrants who fail to register with the federal government, or who fail to carry federal registration documents;

Section 5(C): Makes it a state crime for an undocumented immigrant to seek or accept employment without federal work authorization; and

Section 6: Authorizes the warrantless arrest of individuals who are deemed by state or local police officers to have committed a “removable offense” under federal law.

How did this case get to the Supreme Court?

Arizona Governor Jan Brewer signed SB 1070 into law on April 23, 2010. Following its passage, two main lawsuits were filed challenging the law. The ACLU, MALDEF, the National Immigration Law Center (NILC) and other civil rights groups filed the first suit on May 17, 2010. The U.S. Department of Justice filed the second on July 6, 2010. Both suits sought a preliminary injunction temporarily blocking the law from going into effect while the lawsuits are pending. In order to obtain such an injunction, plaintiffs must show that there is a substantial likelihood that they will ultimately win their case, and that they will suffer irreparable harm unless the court acts to preserve the status quo.

After hearing arguments in both cases, a federal district court in Arizona issued a decision only in the federal government’s case, ruling that the federal government was likely to ultimately prevail on the merits of its challenge to the four provisions and blocked their implementation. The district court then ruled that the civil rights coalition’s motion to block those four provisions was “moot”—that it was unnecessary to rule on the motion since the provisions had already been blocked in the federal government’s case.

On April 11, 2011, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision blocking the four provisions. Following this decision, Arizona asked the Supreme Court to review the Ninth Circuit's decision, and on December 12, 2011, the Supreme Court agreed to hear it. Argument is scheduled for April 25, and a ruling is expected by the end of June.

What is the ACLU doing about the law, and how does its lawsuit differ from the challenge by the U.S. Department of Justice?

The ACLU and other civil rights groups filed a legal challenge to SB 1070 in federal court to stop it from taking effect. While the civil rights coalition's case also raises the claim that the state law is preempted by federal law, it includes additional constitutional claims not raised by the U.S. government, including arguments that SB 1070 will result in unreasonable searches and seizures under the Fourth Amendment and that it discriminates on the basis of race, ethnicity, alienage and national origin. These claims provide potential alternative bases for invalidating the provisions under the Supreme Court's consideration, and are being separately litigated by the coalition.

For example, on February 29, 2012, the district court issued another preliminary injunction against two provisions of SB 1070 that are not before the Supreme Court. The new injunction blocks provisions that criminalize expressive activity by day laborers and people who hire them. The district court ruled that the civil rights coalition is likely to prevail on its claim that those provisions violate the First Amendment right to free speech.

ACLU state affiliates across the country are also launching *Estamos Unidos*, a grassroots campaign to educate and mobilize affected communities about the case. Affiliates kick off a coast-to coast tour on April 22.

What are the legal issues before the Supreme Court?

The Supreme Court will consider whether the four provisions of SB 1070 exceed the state's power to act with respect to immigration.

As the United States asserts, it is well-established that the power to regulate immigration is exclusively a federal power, and states therefore have only limited authority to make laws concerning immigration. The United States argues that Arizona has far overstepped its authority because SB 1070 is fundamentally inconsistent with federal immigration law, and is therefore preempted by federal law. Specifically, the United States argues that Arizona has created its own, independent immigration policy aimed at maximum enforcement, which disregards the other important objectives mandated in the federal immigration laws, including foreign policy concerns and humanitarian goals. The United States also asserts that the Arizona law is invalid because it allows the state to make key decisions about immigration enforcement, wholly separate from any federal supervision, authorization, or control.

Arizona, by contrast, is arguing for a radical expansion of states' power to regulate and enforce immigration. Arizona proceeds from the premise that states have broad, inherent authority to enforce federal laws. Glossing over a line of Supreme Court cases holding that the federal government has

exclusive authority to regulate immigration, Arizona argues that immigration is no different from other areas where federal and state governments exercise “concurrent” enforcement power. And contrary to other Supreme Court precedents on federal preemption, Arizona suggests that in immigration enforcement, states have free rein except where Congress has specifically and explicitly prohibited their participation.

What legal issues are not before the Supreme Court?

The Court will only consider whether the four provisions are preempted by federal law. The Court will not consider whether any other provision in SB 1070 is unconstitutional, including the provisions creating a separate state crime for harboring or transporting unauthorized immigrants and criminalizing the solicitation of work by day laborers. Nor will the Court consider other constitutional issues that are raised in the civil rights coalition’s case, such as whether the laws discriminate against Latinos in violation of the Equal Protection Clause or result in systematic illegal seizures by police in Arizona in violation of the Fourth Amendment. Law enforcement officials from around the country have spoken out against SB 1070 in an amicus brief explaining how the “show me your papers” provision forces police officers to make assumptions about who looks or sounds like an undocumented immigrant, detaining people without justification and based on racial and ethnic stereotypes.

Who will argue in the Supreme Court case?

The Solicitor General or another attorney from his office will argue for the United States. The State of Arizona and Governor Brewer will be represented by Paul Clement, a lawyer in private practice who was the Solicitor General of the United States from 2004-08.

When the Supreme Court rules, what might it do?

It is impossible to predict how the Supreme Court will rule in this or any other case. A majority of the Court (*i.e.*, at least 5 votes) could decide to affirm the Ninth Circuit’s decision in its entirety, reverse it in its entirety, or issue a mixed ruling. Since Justice Elena Kagan has recused herself from the case, only eight Justices will decide the case. If the Court is split 4-4, the Ninth Circuit decision will stand, but the Supreme Court will not issue an opinion setting forth its reasoning.

Who filed amicus briefs (friend-of-the-court briefs) opposing SB 1070?

There has been an outpouring of opposition to SB 1070. Twenty-five amicus briefs were filed before the Supreme Court in support of the United States, representing a diverse group of individuals and organizations. Following are some of the key amicus briefs:

- The ACLU, MALDEF, NILC and several other civil rights groups explained that under settled constitutional law, states do not have the “inherent authority” to enforce federal immigration laws;

- Faith organizations, including the Catholic Church, stated that SB 1070 infringes on religious values by criminalizing humanitarian acts towards certain individuals;
- Numerous states and cities argued that SB 1070 will divert scarce resources used to address local priorities and public safety;
- Top law enforcement officials and a bipartisan group of former state attorneys general explained in two briefs that SB 1070 will undermine effective policing and erode trust within the community;
- Members of Congress clarified that SB 1070 gives local officers a role far beyond what has been authorized by Congress;
- A bipartisan group of former U.S. officials, including former Secretary of State Madeleine Albright and former Secretary of Defense William Cohen, argued that SB 1070 has a significant negative impact on foreign relations and obstructs uniformity in the treatment of foreign nationals.
- AFL-CIO, Change to Win, and other labor organizations filed briefs explaining that states are preempted from criminalizing the act of seeking employment, and underscoring how laws like SB 1070 undermine all workers' rights.

Arizona argues that it is simply cooperating with federal authorities. What is wrong with that?

SB 1070 does not “help” the federal government and does not provide for “cooperation” with the federal government, as Arizona claims. The Arizona legislature passed the law because it disagrees with federal immigration policy.

SB 1070 conflicts with federal immigration law and disrupts the federal system for immigration enforcement. Those federal laws create a system for determining when non-citizens are in the United States without authorization, imposing consequences for immigration violations, and deciding when immigrants deserve to have forms of relief, such as asylum. Those federal laws cannot work properly if state and local police aggressively arrest and detain anyone they deem to be an “illegal alien.” That would fatally undermine Congress’s efforts to provide meaningful protection to domestic violence victims, asylum seekers, and other categories of non-citizens designated by Congress, even if they lack lawful immigration status at the time they are stopped by local police.

Furthermore, laws like SB 1070 undermine public safety and national security. Law enforcement leaders, including police chiefs around the country, have cautioned against putting local police in the position of enforcing federal immigration laws for fear that this will alienate the communities they serve and endanger everyone’s public safety by making victims and witnesses afraid to come forward. SB 1070 superimposes an immigration enforcement priority on police, diverting resources away from the investigation and pursuit of serious crimes posing danger to community residents. And as current and

former U.S. State Department officials have pointed out, SB 1070-type laws permit states to impose burdens on foreign nationals and interfere with the federal government's ability to manage international affairs in the national interest.

How does the outcome of the Supreme Court case affect other state immigration enforcement laws?

In 2011, five states—Alabama, South Carolina, Georgia, Utah, and Indiana—passed laws with provisions similar to those in SB 1070. The ACLU and a coalition of civil rights organizations have sued in each of these states, and lower courts have blocked core provisions of each of the laws. The Supreme Court's ruling could affect provisions of those laws that are similar to those in Arizona's SB 1070. The Supreme Court's ruling is less likely to affect provisions of the other state immigration laws that are not at issue in *Arizona v. United States*, as the questions before the Supreme Court are limited to whether the four specific provisions in SB 1070 are preempted by federal law. And the Supreme Court's ruling on federal preemption issues will not decide other constitutional questions about SB 1070 and the other state immigration laws, including the civil rights coalition's claims that they result in illegal detention and discrimination.

Beyond the court rulings on legal issues, the impact of the Supreme Court's decision may be limited as state legislatures consider the policy impact of SB 1070-type laws. Last year, two dozen states considered Arizona-styled laws, and five states passed laws with similar provisions, despite the pending legal challenges. With nearly every one of this year's state legislative sessions completed or well underway, it is clear that a shift is occurring. While the Supreme Court case has been pending, copycat legislation has failed in legislatures that had vowed to adopt sweeping new immigration restrictions. Although states are aware of the pending Supreme Court decision, other factors appear to be driving this shift away from Arizona's approach.

Public opposition to comprehensive state immigration enforcement laws is growing. Public officials have taken notice of the humanitarian and civil liberties crises that ensued in Alabama, the one state where some of these provisions went into effect. Legislators are also coming to grips with the fiscal costs and economic damage imposed by these laws, as well as the reputational harm they cause to states. Businesses are asserting their opposition more strongly. Finally, politicians are increasingly concerned about the possibility of constituent backlash, as State Senator Russell Pearce, the architect of Arizona's law, was recalled by the voters of Arizona, who expressed frustration with the legislature's fixation on immigration while failing to grapple with the state's serious economic problems.

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