



# MEMORANDUM

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## Summary and Analysis of District Court Opinion in *United States v. Arizona*

July 29, 2010

In an opinion that tacks closely with the Department of Justice's brief, District Court Judge Susan Bolton struck down key provisions of Arizona's immigration law. With almost no analysis of the state's arguments in support of the law, the court enjoined the following provisions, holding that they were preempted by federal immigration enforcement policy.

- Section 2B requiring police who lawfully stop someone for a suspected crime to ascertain whether the person is in the country illegally — provided they have “a reasonable suspicion” of an illegal entry. The provision required further that the police officer verify immigration status before releasing the individual after arrest. Thus, section 2 merely codifies an officer’s judicially-recognized power to detain and contact federal authorities on reasonable suspicion of unlawful status.

The court held that the provision required police to ascertain the immigration status of *all* arrestees, even though the provision required such a status check only where the police had a reasonable suspicion that the person was in the country illegally. The court also held that Section 2B was preempted because it burdened federal immigration authorities even though federal law *requires* immigration authorities to respond to state and local inquiries seeking to “verify or ascertain the citizenship or immigration status of any individual.” The court held further that Section 2B burdened the rights of lawful immigrants in a way that frustrated Congress' goal of “nationally uniform rules governing the treatment of aliens.”

- Section 3 which provided penalties for aliens who violated federal registration laws. The court struck down the law, relying on an old Supreme Court case, *Hines v. Davidowitz*, in which there was a true conflict between a state law regulating the registration of all aliens, both legal and illegal, and federal law. The law at issue in *Hines* imposed new requirements above and beyond what the federal alien registration scheme required. The Supreme Court held that the state law conflicted with the federal law and was therefore preempted. By contrast, the Arizona law mirrors federal laws and sought merely to enforce those laws on a state-wide basis. The law in no way conflicted with federal law. Failing to note that critical distinction, the district court held that the *Hines* decision required that section 3 be struck down.
- Section 5(C) prohibiting illegal aliens from soliciting work, or performing work as an employee or an independent contractor. The statute was designed to deter *criminals* from

using illegal aliens to assist in their criminal conduct. The court sustained the Department of Justice's claim that the provision conflicted with federal immigration law regulating the employment of illegal aliens.

- Section 6 providing that an officer may make warrantless arrests if the officer has probable cause to believe that that the person has committed an offense that would make him removable from the country. Ignoring a Department of Justice legal memorandum supporting the constitutionality of warrantless arrests of illegal aliens in certain situations, the court held that Section 6 was preempted.

The district court's decision is flawed for three critical reasons. First, the court failed to adhere to the doctrine of constitutional avoidance which requires courts to interpret statutes to avoid constitutional difficulties. Casting that doctrine to the wind, however, the court adopted an irrational interpretation of the statutory language in Section 2B, reading it to require the police to check the immigration status of all arrestees, even when it is obvious that the arrestee is an American citizen. The court ignored the plain text of the statute as well as the clear intent of the Arizona legislature, in order to find an interpretation that allowed it to imagine a constitutional issue.

Second, the district court ignored the high burden imposed upon plaintiffs who bring facial challenges to statutes. The Supreme Court has been clear that those who facially challenge a statute must show that no set of circumstances exists under which the statute would be valid. When considering a facial challenge, the Court “must be careful not to go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.” Yet, the district court disregarded the innumerable cases in which the statute would be constitutional. Instead the court focused on extreme hypotheticals which have never happened, and are not likely to occur. For example, the court speculated that the law would permit police to arrest and detain for up to 8 hours a legal alien who did not carry proper identification while walking his dog without a leash. The court also assumed that the law would authorize the harassment of legal aliens, even though the statute prohibits no conduct that is not already prohibited under federal law.

Finally, the court's preemption analysis is deeply flawed. First, the court ignored the crucial fact that only Congressional statutes have preemptive force. The court confused the Executive branch's enforcement authority with Congress' plenary power over immigration. The Executive's discretionary power to enforce federal immigration law has no preemptive force. Because the Arizona statute is fully consonant with federal laws regulating immigration, it is not preempted. Second, the court misconstrued controlling Supreme Court precedents governing the preemption of state immigration laws. Moreover, the court largely ignored a key Supreme Court case, *De Canas v. Bica*.

The import of the court's decision is that because the current administration does not wish to aggressively enforce federal immigration law, states may not do so either.