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US IMMIGRATION & NATIONALITY LAW

HIDDEN TREASURE: HOW STATES THAT WANT IMMIGRANTS CAN TAKE ADVANTAGE OF ARIZONA V. US

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By Gary Endelman and Cyrus D. Mehta

Anyone in favor of federal preemption of state immigration laws, especially Arizona's SB 1070, was disappointed with the way the oral arguments before the Supreme Court justices on April 25, 2012 turned out in *Arizona v. US*. It appears that the core provision of SB 1070, Section 2(B), which mandates police officers to determine the immigration status of anyone they stop if they have a "reasonable suspicion" that the person in "unlawfully present in the United States" may be upheld even if other provisions are preempted. And while it is obvious that this provision would lead to racial profiling, the case that the United States brought against Arizona is more about whether federal immigration law preempts 2(B) and other provisions. Both conservative and liberal justices did not think so since 2(B) was not creating a new state immigration law. All it does is to allow police officers to determine if someone was unlawfully present by inquiring about that person's status with the federal Department of Homeland Security. Whether this would lead to the incarceration of both citizens and lawfully present non-citizens did not seem to concern the justices as the inquiry regarding immigration status would be made in conjunction with another state offense, such as speeding or driving without a license. Moreover, even without SB 1070, the justices noted that the federal government has allowed state enforcement personnel to do much the same thing, especially through its Secure Communities program or through cooperation in the "investigation, apprehension or detention of aliens in the United States" under INA § 287(g).

The colloquy, below, between Chief Justice Roberts and Solicitor General Verrilli

during oral argument gives us some insight into why 2(B) is likely to be upheld:

CHIEF JUSTICE ROBERTS: Right. So, apart from Section 3 and Section 5, take those off the table, you have no objection to Section 2?

GENERAL VERRILLI: We do, Your Honor. But, before I take 3 and 5 off the table, if I could make one more point about 3 and 5, please? The — I think -because I think it's important to understand the dilemma that this puts the Federal government in.

Arizona has got this population, and they've — and they're, by law, committed to maximum enforcement. And so the Federal government's got to decide, are we going to take our resources, which we deploy for removal, and are we going to use them to deal with this population, even if it is to the detriment of our priorities –

CHIEF JUSTICE ROBERTS: Exactly. You — the Federal government has to decide where it's going to use its resources. And what the state is saying, here are people who are here in violation of Federal law, you make the decision. And if your decision is you don't want to prosecute those people, fine, that's entirely up to you. That's why I don't see the problem with Section *2(B).*

We hope we are proved wrong and the Supreme Court will find SB 1070 unconstitutional in its entirety, but even if we are not wrong, do not lose heart. Good things can also come out of it. Take a look at Peter Spiro's intriguing essay in the New York Times, where he argues that even if SB 1070 stands, it will ultimately wither as Arizona, and other copycat states, will continue to hurt economically. Thus, such laws that Arizona and some states will enforce with vigor will ultimately die their own natural death. Of course, this still does not excuse the fact that 2(B), while in existence, is likely to result in mass incarcerations, while the state police inquire about each detainee's status. One saving grace it that someone who is actually affected, such as an individual who is lawfully present, can mount another challenge based on due process and equal protection violations, rather than preemption, and this may have more of a chance to succeed. In the mean time, Spiro states, "One of federalism's core virtues is the possibility of competition among states. Competition in this context is likely to vindicate pro-immigrant policies." Thus, most other states that welcome immigrants, legal and undocumented, and recognize their contributions, will deliberately not pass similar laws like Arizona's. By not enacting similar laws, they will be competing with those states by enticing their corporations, as well as jobs, to move over.

While there are very good arguments in support of preemption, if part of SB 1070 is upheld, states that want immigrants can go even further than do nothing. For instance, a state can pass a law that encourages immigrants who reside within to apply for a personal endorsement from the state's governor in support of a national interest waiver request, which waives the job offer and labor certification requirement, when applying for permanent residency. The state can set criteria for whom it wants to encourage, such as entrepreneurs or robotics specialists, and its governor can write a personal letter in support of their petitions for permanent residency through the federal national interest waiver pursuant to INA § 203(b)(2)(B)(i). As in Arizona's Section 2(B), the state is not creating a new immigration category, but simply assisting the federal government to make a determination under federal law. Unlike Arizona's SB 1070, which is premised on driving away immigrants from the state through attrition, the purpose of a state law in our hypothetical example is to encourage the immigrant to remain in that state and contribute to its economy, which in turn will benefit the national interest of the US. Indeed, we commend noted attorney Rami Fakhoury of Troy, Michigan, who is proposing such standards for Governor Snyder of Michigan to implement in order to support a national interest waiver request from a Michigan resident.

In the same vein, a state can designate certain occupations as shortage occupations, which may assist the Department of Labor in more easily certifying a labor certification pursuant to INA § 212(a)(5) of an employer filed on behalf of a non-citizen resident in the state. A state can be a more effective judge of shortage occupations than the federal government, and if a labor certification is filed on behalf of a non-citizen in that particular state designated shortage occupation, the DOL may be more influenced in making a favorable determination on the labor certification. Similarly, even with regards to an undocumented immigrant, a state may be able to enact criteria for recommending that such a person, who has otherwise not been convicted of serious crimes and is say an essential farm worker, is deserving of prosecutorial discretion by the federal government under its new prosecutorial discretion policy and thus be permitted to remain in the state and prevent its farm produce from otherwise rotting away. There may already be such authority under INA § 287(g), which authorizes the federal government to enter into a written agreement with a state to perform the function of a qualified immigration officer in relation to the "investigation, apprehension and

detention" of non-citizens. In the era where the government has implemented a broad prosecutorial discretion policy, a state can assist the federal government in the "investigation, " rather than the apprehension or detention, of an individual who may merit such discretion from the federal government.

While Utah has also passed an enforcement oriented immigration law similar to Arizona's, it contains one unique provision quite unlike any other state's law. The Utah provision offers work permits to undocumented immigrants who pass background checks, have paid fines and can demonstrate a work history. The measure does not offer legal status or citizenship, but would allow unauthorized workers who meet its criteria to continue working in Utah. This provision also requires a federal waiver. If the Utah provision, which is currently enjoined, is allowed to go forward, in the event that the Supreme Court gives a green signal to states in *Arizona v. US*, we estimate that there will be more states that will enact laws similar to the Utah guest worker provision than Arizona's SB 1070.

There is no reason to think that it will always be punitive. Many of the progressive achievements in modern American history, such as women suffrage, popular election of senators, wage and hour laws, occupational safety, and most recently same sex marriages, to name but a select few, first appeared on the state level. The many instances where federal intervention has been necessary to protect civil rights against state abuse should not blind us to the possibility that state action can also be a force for good. Long ago, Justice Brandeis recognized that federalism offered a constitutional framework for experimentation and creativity:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country...

New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S.Ct. 371, 76 L.Ed. 747 (1932)(Brandeis, J. dissent)

Since the New Deal, the operating assumption in American politics has been that reform must come from Washington DC to be imposed upon the states. The growth of the imperial presidency has flowed directly and inevitably from this core conviction. This is certainly the case with immigration reform given the

plenary federal power over this issue as an extension of foreign policy. The inability or unwillingness of Congress to deal effectively with undocumented migration to this country on an unprecedented level has created the impetus for state action to fill up the vacuum. We advocate that Congress must deal with this situation by creating more pathways to legal status over an enforcement only approach, which is what states like Arizona have done. Until now, such state action has been deprived of constitutional legitimacy; the Supreme Court may be ready to change that. Indeed, the first signs of this came with *Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 179 L.Ed.2d 1031 (2011)* when a 5-3 ruling upheld the 2007 Legal Arizona Workers Act thus transforming the power of state regulators to grant or withhold business and professional licenses into tools of immigration enforcement. Should the High Court sustain SB 1070, for the first time since the 1870's, the states will be able to take advantage of a constitutional regime that not only tolerates but welcomes their presence and invites their participation. Of course, Congress can also deal with states legislating on immigration by expressly preempting such action, but one will need to wait for that day to happen.

Those who think immigration is good for America will then have to find a way to review and revise their most basic assumptions on the nature of American reform. There is a way to make lemonade out of lemons. Even now, not all state and local action has been negative. Utah is but one such example. Look and you will find others. Congress may not have passed a federal Dream Act but California and Illinois have done precisely that on the state level. Maryland too adopted its own Dream Act in 2011 and the Maryland Supreme Court will soon decide if this measure must go to a voter referendum this fall. In his most recent state-of-the-city address, New York City Mayor Michael Bloomberg vigorously supported a Dream Act for New York State, though Governor Cuomo has yet to declare his position. 12 states now grant in-state tuition rates to undocumented students. Texas, California and New Mexico provide financial aid to undocumented students. If we look north to our neighbor, Canada, its provinces have considerable influence in Canada's immigration policy. An intending immigrant to Canada will get a preference if he or she meets certain requirements of Quebec province, for example.

Our position on SB 1070 has not changed. We do not believe it is constitutional. We do not write to endorse a patchwork immigration system of 50 different approaches without unity or definition. The dangers of this are apparent to all

and we devoutly wish that our ideas will be made irrelevant when the Supreme Court finds SB 1070 to be constitutionally impermissible. Yet, candor requires us to admit that the result may not be as we would like. Now is the time to prepare for what may come and think the unthinkable. We owe it to our clients and our country to turn a problem into an opportunity. Until now, both supporters and critics of SB 1070 have assumed that if the Supreme Court were to uphold the law, it will unleash a tsunami of copycat legislation. This may happen and it may hurt. Yet, the future often has a way of surprising us. More may emerge; the outcome could well be different than what most hope or fear. This blog points a way forward. What happens next is up to you.

(The views expressed by guest author, Gary Endelman, are his own and not of his firm, FosterQuan, LLP)