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US IMMIGRATION & NATIONALITY LAW

CROSS CURRENTS IN FEDERAL PREEMPTION OF STATE AND LOCAL IMMIGRATION LAW UNDER TRUMP

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Preemption of federal immigration law over punitive state immigration laws was a hot topic until very recently, especially when Arizona enacted a tough enforcement law known as SB1070. The Obama administration fiercely challenged the law under the preemption doctrine, which ended up in the Supreme Court in *Arizona v. USA*. Although the majority opinion found most of the provisions of SB1070 preempted, the Supreme Court nevertheless upheld Section 2B, popularly referred to as the "show me your papers law." The Court's logic of upholding Section 2B was that it did not create a new state immigration law, but merely allowed state enforcement personnel to obtain a federal determination as to whether a person they had lawfully apprehended was lawfully present in the United States. Many other states introduced copycat "show me your papers laws."

Texas just passed a law SB 4 that includes not only "show me your papers" provisions, but also imposes sanctions on sheriffs, local police and even campus police departments if they do not share information with federal immigration authorities, do not honor a detainer or prevent a state enforcement officer from seeking a determination of immigration status of a person under a lawful detention or arrest. The sanctions include civil penalties and criminal penalties, as well as removal of persons holding elective or appointed positions who violate the law.

Will the Trump administration challenge similar state encroachments on federal immigration law like President Obama did? Or do we need to be writing the obituary of the preemption doctrine when it relates to federal immigration law? Even if the Texas law goes unchallenged by the federal government which

it likely will, will private plaintiffs be able to challenge the law under the preemption doctrine? Preemption stems from the Supremacy Clause of the United States Constitution (Article VI, Clause 2), which establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the supreme law of the land. While there are notable exceptions when a state immigration law is not preempted, a state law that conflicts with federal immigration law stands a good chance of being preempted under the Supremacy Clause.

A good test of how preemption will play out in the future is Arizona's appeal of the Ninth Circuit decision in *Arizona Dream Act Coalition v. Brewer*. The Ninth Circuit held that Arizona was precluded from discriminating against an employment authorization document (EAD) issued to a recipient under President Obama's Deferred Action for Childhood Arrival (DACA) program as valid proof of eligibility for an Arizona driver's license. Under DACA, young people who came to the United States before the age of 16 and fell out status could apply for deferred action and an EAD.

On August 15, 2012, when DACA took effect, Arizona's then Governor Janet Brewer tried everything in her book to de-legitimize DACA in Arizona. DACA would not confer lawful or authorized status, according to an Arizona executive order signed by Governor Brewer. Arizona's Motor Vehicle Division announced that it would not accept an EAD issued to DACA recipients pursuant to 8 CFR 274a.12(c)(14) with code C33 as proof that their presence was authorized under federal law for purpose of granting a driver's license.

In 2013, the Arizona Department of Transportation (ADOT) further tried to justify its animus toward DACA by revising its policy to only recognize EADs if 1) the applicant has formal immigration status; 2) the applicant is on a path to obtain formal immigration status; or 3) the relief sought or obtained is expressly pursuant to the INA. Under these new criteria, Arizona refused to grant driver's licenses not only to DACA recipients but also to beneficiaries of traditional deferred action and deferred enforced departure. It continued to grant driver's licenses only from applicants with EADs pursuant to 8 CFR 274a.12(c)(9), those who had filed adjustment of status applications, or 8 CFR 274a.12(c)(10), those who had applied for cancellation of removal. Under this revision, even one who received deferred action other than DACA under 8 CFR274a.12(c)(14) would now be deprived of a driver's license.

On April 5, 2016, the Ninth Circuit in *Arizona Dream Coalition* found that these arbitrary classifications defining authorized status were preempted under federal law and put to rest Arizona's "exercise in regulatory bricolage." Although the Ninth Circuit also found that these distinctions between different EADs likely violated the Equal Protection Clause, in order to avoid unnecessary constitutional adjudications, the Court found that these arbitrary classifications under Arizona's law were preempted as they encroached on the exclusive federal authority to create immigration classifications. While Arizona sought to exalt the status of an EAD that was obtained when one sought adjustment of status or cancellation of removal, the Ninth Circuit gave short shrift to such arbitrary classification. There is no difference if one receives an EAD though cancellation of removal or through deferred action as submitting a cancellation application does not signify that the applicant is on a clear path to formal legal status. Such an application could well be denied. In this regard, noncitizens holding an EAD under C9 or C10 are in no different a position than one who has received an EAD pursuant to DACA under C33. The following extract from the Ninth Circuit's opinion is worth quoting:

> *Arizona thus distinguishes between noncitizens based on its own definition of "authorized presence," one that neither mirrors nor borrows from the federal immigration classification scheme. And by arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design*

Since the Ninth Circuit's ruling in Arizona Dream Act Coalition, there has been a dramatic shift in the way unauthorized immigrants are viewed since Trump's presidency. As part of his election campaign against unauthorized immigrants, Trump railed against DACA as a vivid example of President Obama's unconstitutional usurpation of powers from Congress. But after his inauguration, Trump did a volte face stating that he would not immediately rescind DACA and would deal with these kids "with heart." DACA's fate tenuously hangs in balance, and completely subject to the whims of a tempestuous president. Still, unauthorized immigrants who crossed the border are conflated with criminals, and any crimes that may have been perpetrated by such a noncitizen is viewed as preventable if the individual was either deported before the crime occurred or was not let in at all. The Trump administration issued an Executive Order that beefs up enforcement, essentially reverses carefully calibrated enforcement priorities of the Obama

administration and threatens to sanction sanctuary jurisdictions by cutting off federal funds.

Arizona, perhaps emboldened after Trump's presidency, recently challenged the Ninth Circuit ruling in the Supreme Court. In its March 29, 2017 petition for a writ of certiorari, Arizona contended that the Ninth Circuit erred by assuming that President Obama's DACA program that granted deferred action to young adults brought to the U.S. illegally as minors was a valid "federal law" that can trump state police power. The granting of licenses is a state concern and cannot be preempted by an unlawful exercise by Obama, Arizona further argued. Fourteen states have joined Arizona's bid to overturn the Ninth Circuit ruling by filing an amicus brief. Texas Attorney General Ken Paxton affirmed when unveiling the amicus brief, "We stand with Arizona against illegal federal overreach by the former president, who bypassed Congress to enact an immigration program he did not have the authority to create." It is unlikely that the Trump administration will come in the way of these states in their challenge.

Still, despite the Trump's administration's reluctance to defend preemption and DACA, the rule of law ought to trump presidential caprice. Although *Texas v. USA* challenging President Obama's Deferred Action for Parental Accountability (DAPA) ended up as a 4-4 draw in an 8-member Supreme Court after Justice Scalia's death, there are other robust decisions that uphold preemption by virtue of the fact that the federal government has the ability to exercise discretion regarding immigration enforcement. In *Villas at Parkside Partners v. Farmers Branch*, 726 F.3d 524 (5th Cir. 2013), the conservative Fifth Circuit struck down a Farmers Branch, TX, ordinance on preemption grounds because it conflicted with federal law regarding the ability of aliens not lawfully present in the United States to remain in the US. The Fifth Circuit also noted that the federal government's ability to exercise discretion relating to removal of non-citizens is a key reason for a state or local regulation of immigration being preempted under the Supremacy Clause of the US Constitution:

> *Whereas the Supreme Court has made clear that there are "significant complexities involved in . . . the determination whether a person is removable," and the decision is "entrusted to the discretion of the Federal Government," Arizona, 132 S. Ct. at 2506; see also Plyler, 457 U.S. at 236 (Blackmun, J., concurring) ("he structure of the immigration statutes makes it impossible for*

> *the State to determine which aliens are entitled to residence, and which eventually will be deported."), the Ordinance allows state courts to assess the legality of a non-citizen's presence absent a "preclusive" federal determination, opening the door to conflicting state and federal rulings on the question*.

However, the lower Fifth Circuit decision in *Texas v. USA* upholding the preliminary injunction still provides ammunition to those who wish to bolster state immigration laws. The states' amicus brief in support of Arizona's challenge in *Arizona Dream Coalition* draws heavily from the Fifth Circuit decision in asserting that DACA, like DAPA which conferred deferred action on undocumented parents of citizen or resident children, was viewed as unlawful. The states amicus argues that President Obama created a category that gave lawful presence to aliens who were otherwise not authorized to remain in the United States. Like DAPA, which was successfully challenged, DACA, according to the amicus brief, also cannot bestow lawful presence by the Executive, and thus DACA cannot preempt Arizona state law in not recognizing an EAD of a DACA recipient. If the Supreme Court decides to hear *Arizona Dream Coalition*, it will be pitted against *Arizona v. United States*.

Till then, notwithstanding the Trump administration disavowing prosecutorial discretion to broad classes of people, the federal government's discretionary authority as a basis for preemption still stands, as poignantly articulated by the Supreme Court in *Arizona v. United States*:

> *A principal feature of the removal system is the broad discretion exercised by immigration officials..... Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal....*
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> *Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria*

> *for admission. The foreign state maybe mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.*

Given strong precedents in favor of preemption, there is hope that state immigration enforcement laws can still be successfully challenged. On the other hand, it is not clear whether the broad discretion in federal immigration enforcement as recognized in *Arizona v. USA* be applicable to a federal program like DAPA or even DACA, and if DAPA or DACA is viewed as overstepping executive authority, whether they could be used as a basis for preempting a state law that does not accord recognition to recipients of such programs for state benefits such as driver's licenses. Now that Justice Gorsuch is the ninth nominee, it remains to be seen whether the Supreme Court's majority will uphold the reasoning of the Fifth Circuit in *Texas v. USA* or continue to uphold the federal government's broad discretion, as recognized in *Arizona v. USA*. Clearly, the current Trump administration would have no interest in again pursuing *Texas v. USA* on its merits even though it has not rescinded President Obama's DAPA memorandum of November 20, 2014. The current decision in *Texas v. USA* is a preliminary injunction and not a decision on the merits.

There is yet another emerging trend that is worthy of observation. In the Trump era, immigration friendly states and localities, known as sanctuary jurisdictions, have decided not to cooperate with federal immigration authorities with respect to routinely sharing information of foreign nationals who may be arrested in the state penal system or honoring a federal immigration detainer. In *San Francisco v. Trump*, San Francisco and Santa Clara Country successfully challenged Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," which, in addition to outlining a number of immigration enforcement policies, purports to "nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law" and to establish a procedure whereby "sanctuary jurisdictions" shall be ineligible to receive federal grants." In the preliminary injunction order, the court in *San Francisco v. Trump*, among other things, held (citing *Printz v. United States*, 521 U.S. 898 (1997)) that the federal government cannot compel the states to enact or administer a federal regulatory program under the Tenth

Amendment. The new Texas law SB 4 was enacted by the state, and so it will be difficult to argue under *Printz v. US* that the federal government cannot compel a state to do its bidding. It is uncertain whether the show me your papers part of SB 4 can be preempted in light of *Arizona v. USA* upholding s similar show me your papers provision, Section 2B of SB 1070. A challenge will have to be brought by a private plaintiff that the Texas SB 4 law is preempted as it forces state entities to get into the business federal immigration enforcement, which is a purely federal matter. It also makes the state's compliance with a detainer mandatory, when federal courts have held that such compliance is not mandatory. See e.g. *Galazara v. Szalezyj*. At the same time, because Section 2B was upheld in *Arizona v. USA*, it may be difficult to challenge the similar show me your paper provision in SB 4. Still, a way to challenge this is to demonstrate that it penalizes an entity for preventing an officer from making such a determination, and so challenging the penalty rather than the ability of a local enforcement authority to make the determination of the immigration status may be a way to thread the needle. Moreover, Arizona's 2B was upheld as a preliminary injunction before the law took effect. If there are instances of egregious violations, 2B and other similar provisions can be challenged again.

There is some irony that those who disfavor Arizona style immigration enforcement laws, including yours truly, cheered when the federal district court ruled in favor of San Francisco and Santa Clara County. Upon careful reflection, this is not a case of double standards. From a policy perspective, state immigration enforcement laws ought to be preempted as they can lead to discrimination and uneven enforcement when untrained state police mistakenly detain people, including potentially US citizens, who may be here lawfully. Even state laws that "indirectly" enforce immigration law through landlord-tenant ordinances or by penalizing employers who hire unauthorized immigrants, state enforcers are more likely to make errors in determining who is authorized to remain in the United States and who is not. In *Chamber of Commerce v. Whiting*, the Supreme Court upheld Arizona's employment sanction law as it fell under a savings clause of a federal statutory provision, 8 U.S.C. § 1324a(h)(2), that otherwise preempted state law. Even in *Whiting*, Chief Justice Roberts assumed that there would be no errors in verifying the status of employees as the state would check with a federal database pursuant to 8 USC 1373(c). If the federal determination revealed the person was a US citizen, that would make it obvious that the person was authorized to work. Conversely, if

the federal determination revealed that the person has been removed, the Chief Justice erroneously assumed that this would reveal that the person is not authorized to work. However, even those with removal orders can obtain work authorization in many instances, a prime example being one who is under an order of supervision pursuant to 8 CFR 274a.12(c)(18). David Isaacson astutely points out, "The fact that even the Chief Justice of the United States could make this mistake may shed some light on why the prospect of state officials attempting to implement immigration law strikes many attorneys who work in the immigration field as highly inadvisable." On the other hand, the federal government should not be compelling states to share information as it would undermine trust in local the local policy who may need to work with local communities, including undocumented immigrants, in preventing crime. Even if there are a few cases of undocumented immigrants who have perpetrated crimes, using the immigration system as a pretext for preventing crimes is not the solution. Crimes are committed in every community, and even by Americans. Immigrants do not have a propensity to commit more crimes. Indeed, a Cato Institute report establishes that immigrants, even undocumented immigrants, commit lesser crimes than native Americans. There is a role for immigration enforcement under the INA by the federal government and states should not be in the same business.

There is a lot of turbulence in preemption doctrine, with some states passing immigrant unfriendly laws and others passing immigrant friendly laws. The prior Obama administration directed its ire at immigrant unfriendly states while the Trump administration is directing its ire at immigrant friendly states. Now is certainly not the time to close the book on the tumultuous story of preemption as a new chapter is being written.