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May State Law Take Away an Employer's Right to Do Business in the State as a Penalty for Employing Unauthorized Aliens, When Federal Law Handles Such Violations Differently?

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CASE AT A GLANCE

An Arizona law makes it a violation of Arizona law for employers to hire unauthorized aliens. Violators may be sanctioned by the loss of their licenses to do business in the state, including revocation of their articles of incorporation. The law also requires employers to use a federal electronic employment verification system to check whether new hires have the right to work in the United States. The Supreme Court will consider whether such a law is preempted by federal law.

Chamber of Commerce v. Whiting
Docket No. 09-115

Argument Date: December 8, 2010
From: The Ninth Circuit

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ISSUE

Does the federal government's scheme for regulating the employment of aliens in the United States preempt an Arizona law that may suspend the business license of an employer who knowingly employs an unauthorized alien?

FACTS

The petitioners are a group of business owners, civil rights lawyers, and immigrants' rights groups, who sought an injunction against enforcement of Arizona's Legal Arizona Workers Act (LAWA) based on facial constitutional challenges. This appeal concerns the petitioners' claims that LAWA is preempted by the federal Immigration Reform and Control Act of 1986 (IRCA). The respondents are various government officials, including the Arizona county attorneys who, under LAWA, are charged with enforcement of the provisions outlawing employment of unauthorized aliens.

Relevant History of Federal Regulation of Employment of Aliens
Prior to Congress's 1986 enactment of IRCA, states were free to sanction the employment of unauthorized aliens, in exercise of their "broad authority under their police powers to regulate the employment relationship to protect workers within the State." *De Canas v. Bica,* 424 U.S. 351 (1976). The parties concede that the states' power to regulate the employment of aliens was significantly narrowed by the passage of IRCA, which states expressly that "[t]he provisions of this section preempt 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." With IRCA, Congress created a broad federal regulatory scheme designed to combat the employment of unauthorized aliens by requiring employers to review identification documentation to confirm new hires' right to work in the United States, i.e., by completing the now-familiar I-9 form. The IRCA scheme includes a set of civil and criminal penalties, along with procedures by which employers may protect themselves by documenting their efforts to verify employees' right to work. Good faith compliance with the I-9 procedures generally provides employers with a defense against IRCA sanctions.

During the debate surrounding the passage of IRCA, various members of Congress expressed concern that sanctioning the employment of unauthorized aliens would lead to unfair discrimination against applicants, for example, discrimination based upon appearance or manner of speech. To prevent such discrimination, the sanctions for employing unauthorized workers were matched with equally severe sanctions for unlawful employment discrimination. IRCA's balancing act can be seen in the I-9 form itself; on the one hand, the form empowers employers to demand proof of work authorization, while on the other hand it restricts the types of identification documents that employers may demand as proof as well as the manner in which they may demand the documents.

After the passage of IRCA, the numbers of undocumented immigrants in the U.S. fell sharply, but within a decade those numbers were again rising. In response to concerns that IRCA was failing to combat unauthorized employment, in 1996 Congress (as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)) directed the federal government to introduce a number of so-called "pilot programs," which were alternative methods of verifying employment. The first pilot program, an electronic employment authorization system, still exists today and is now called "E-Verify." E-Verify is an Internet-based system for verifying work applicants'

work authorization. Employers who use E-Verify generally have a defense to federal sanctions for employing unauthorized aliens, just like employers who in good faith comply with I-9 requirements.

E-Verify began as an experimental, voluntary system, but in recent years it has increasingly become a requirement for some employers. From 2006 onward, states began passing laws requiring the use of E-Verify, and in 2008, the federal government began to require that all federal contractors use E-Verify. (Indeed, in its amicus brief, the United States acknowledges that in proceedings in another case, in a different legal context, it remarked in a brief that "[t]he State of Arizona has required all public and private employers in that State to use E-Verify * * *. This is permissible because the State of Arizona is not the Secretary of Homeland Security." The United States points out in this case, however, that this past statement was made in a very different legal context, in which federal preemption of state regulation of alien employment was not at issue.)

The Legal Arizona Workers Act

The Arizona legislature passed the Legal Arizona Workers Act (LAWA) in 2007. Section 23-212 of the law prohibits Arizona employers from employing "unauthorized aliens," relying on the federal scheme for determining which aliens are authorized to work in the United States. LAWA imposes various sanctions for violation of the section, depending on severity and repetition of the violation, with the most serious penalty being suspension of "all licenses necessary to operate the business" in the state. The definition of "license" is quite broad, defined in 23-211(7) to mean "any agency permit, certificate, approval, registration, charter or similar form of authorization that is required by law and that is issued by any agency for the purposes of operating a business in this state." LAWA specifically includes articles of incorporation and certificates of partnership; professional licenses, however, are excluded.

Section 23-214 requires all employers to use the E-Verify system for verification of employment authorization. Such use creates a "rebuttable presumption" that the employer did not knowingly or intentionally employ an unauthorized alien.

An action against an employer for violation of LAWA may be brought by an Arizona county attorney in the county in which the alleged unauthorized employment occurred. Section 23-212(H) of LAWA specifically provides that in such actions, "the court shall consider only the federal government's determination pursuant to 8 U.S.C. 1373(c)," a federal statute that directs the Department of Homeland Security to verify a person's citizenship or immigration status to federal, state, and local government agencies upon request.

Procedural History of This Appeal

The case has a complicated procedural history, having begun as two separate actions, filed against the incorrect defendants and raising due process and First Amendment challenges in addition to the preemption issues. Eventually the cases were consolidated and were refiled against the correct defendants (the county attorneys).

After hearing the parties' arguments on the merits, the district court rejected all of the petitioners' constitutional challenges. The Ninth Circuit affirmed, holding that LAWA falls within IRCA's savings clause, which expressly permits states to regulate alien employment through "licensing and similar laws." Furthermore, the Ninth Circuit held, LAWA's requirement that employers use E-Verify did not mean that LAWA was impliedly preempted by federal law because "Congress could have, but did not, expressly forbid state laws from requiring E-Verify participation."

The Supreme Court granted certiorari on June 28, 2010. The parties agreed not to oppose the filing of amicus briefs, and numerous amici have filed briefs in support of each side.

CASE ANALYSIS

The petitioners begin their argument with the Supremacy Clause's provision that "the Laws of the United States shall be the supreme Law of the Land any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." They argue that Congress specifically intended, with the passage of IRCA, to preempt state regulations like the one in Arizona. While acknowledging IRCA's savings clause, the petitioners maintain that LAWA "is not a licensing scheme" but rather an alternative scheme for regulating employment of unauthorized aliens. They assert that the savings clause was intended to preserve particular licensing powers, related mostly to permission to employ migrant workers, and that such laws "impose [before the grant of a specific license] a condition of complying with other specified laws or regulations," rather than suspending a business's right to do business in the state. Characterizing LAWA as a licensing law would, according to petitioners, mean that the savings clause would swallow the rule—i.e., would gut the preemption provision.

Moreover, claim the petitioners, IRCA impliedly preempts LAWA's sanctions against employers for employing unauthorized workers, first, because it creates a state forum for adjudicating aliens' right to work, and, second, because LAWA disrupts the careful balance Congress struck between its interests in combating illegal employment and combating illegal discrimination. The petitioners cite *Hoffman Plastics v. NLRB,* 535 U.S. 137 (2002), in which, in the context of determining whether an arbitrator determining that an employer had violated a worker's unionization rights could award backpay if the worker was an unauthorized alien, the Court described IRCA as "a comprehensive scheme that made combating the employment of illegal aliens in the United States central to the policy of immigration law." In light of Congress's intent to occupy the field of regulation of alien employment, the petitioners argue, the Ninth Circuit's reliance on *De Canas*'s discussion of the presumption against preemption was misplaced.

Particular amici supporting the petitioners press some related points even more strongly. The Asian American Justice Center cites research tending to show that, due to rates of response and error in E-Verify, Hispanics and Asians suffer disproportionately from unfair discrimination when E-Verify is used. And in what is perhaps the most interesting amicus brief, legislators who were themselves involved in the drafting and enactment of IRCA in 1986 write in support of the petitioners' view of the legislative history, arguing that LAWA is just the sort of law that Congress intended to clear away with IRCA's comprehensive reforms.

In response, the respondents argue, first and foremost, that LAWA's regulation of licensing in the state of Arizona falls squarely within IRCA's savings clause and therefore cannot be preempted on any basis. The respondents note that nothing in the savings clause limits

the word "licensing" to any particular type of license, nor to the issuance of licenses rather than the suspension of licenses. They assert that suspension of the right to do business is undoubtedly a form of licensing regulation. Furthermore, they stress that states have, and retain, strong police power in the regulation of employment to protect state citizens.

Concerning IRCA's legislative history, the respondents note that legislative history is irrelevant where the text is clear, and argue that the text here clearly permits LAWA's license-based system of sanctions. Furthermore, the respondents quote language from a House Report on IRCA, which states that the legislation would not preempt state laws that "require [the] licensee … to refrain from hiring, recruiting or referring undocumented aliens."

Next, the respondents argue that, in addition to being inconsistent with the express language of the preemption clause, the petitioners' implied preemption argument fails because nothing in LAWA interferes with the operation of IRCA. LAWA, in the respondents' view, simply imposes different, additional sanctions from those imposed by IRCA—licensing sanctions. Except for those sanctions, the respondents argue, LAWA's requirements harmonize with federal law. The absence of antidiscrimination requirements in LAWA does not change this fact, respondents assert, because the federal sanctions for discrimination remain in full force.

As for the E-Verify program, the respondents emphasize that requiring participation in E-Verify broadens participation in a program that the federal government has made available to employers nationwide, on a voluntary basis. Mandating participation in E-Verify thus, respondents claim, cannot be interference with the achievement of federal objectives under IRCA or IIRIRA.

The amici supporting respondents likewise stress that LAWA's requirements are consistent with, and in large part mirror, federal law, and thus, they argue, create no conflict with the federal immigration laws or IRCA. To the contrary, they assert, LAWA supports IRCA's objectives—to prevent the employment of unauthorized aliens in the United States.

SIGNIFICANCE

The case is significant, first, to resolve the questionable validity not only of LAWA but of other, similar state laws. An amicus brief filed on by business organizations supporting the petitioners suggests that confusion and expense will result from allowing individual states to impose their own procedures for employment verification and sanctions for violating such procedures. Employers could face the burden of compliance with a 50-state patchwork of employment verification procedures in place of the relatively simple, uniform federal scheme under IRCA and IIRIRA. In addition to the "patchwork" problem, a very real employment discrimination problem seems inevitably to result from increased reliance on the E-Verify system, according to the studies cited by certain amici supporting petitioners.

While a decision striking down LAWA might simplify matters for employers and better protect against employment discrimination, it would cut short state efforts to reduce employment of undocumented workers. Striking down LAWA would surely only heighten the tension between the federal and state governments with regard to federal efforts to control immigration and employment of undocumented workers. State lawmakers would be limited, perhaps, to imposing compliance with employment verification laws as a condition of the issuance of a license in the first place, but lacking any means to sanction employers who fail to comply.

Beyond resolving the validity of this particular statute, the decision in this case also may provide a significant precedent with respect to Congress's reach in IRCA, and with respect to preemption in general. While *Hoffman Plastics* did not concern preemption, the Court there did label IRCA a "comprehensive scheme," to support its conclusion that the National Labor Relations Board (NLRB) could not upset that scheme by awarding backpay to an unauthorized worker, even though the employer had violated the worker's right to unionize. Will the Court now narrow IRCA's reach, when it comes to Congress's interest in controlling the rules regarding employment of aliens?

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PREVIEW of United States Supreme Court Cases, pages 121–123.

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