

Ruling May Fuel Challenges to Arizona Immigration Law

by Julián Aguilar

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As the U.S. Supreme Court weighs whether to uphold certain provisions of Arizona's controversial immigration-enforcement law, a recent ruling has opened the door for opponents of the law to make new arguments against it no matter what the high court rules.

Texas is among several states keeping a close eye on the developments with the Arizona law, as some states have passed — or in Texas' case, attempted to pass — similar legislation. Justices heard oral arguments on provisions of the Arizona law in April and are expected to issue a ruling by the end of this month.

The U.S. Department of Justice sued the state after Arizona Gov. Jan Brewer signed Senate Bill 1070 into law in 2010. Among the controversial provisions of SB 1070 is one that requires police officers to verify the immigration status of any individual if there exists a "reasonable suspicion" the person is unauthorized. The department says federal law pre-empts state statutes on matters of immigration enforcement.

But now, an order from U.S. District Judge Susan Bolton may allow Arizona residents to challenge the law as individuals — even if the high court rules in the state's favor. Bolton also initially blocked a majority of the law's provisions in 2010. According to the East Valley Tribune, Bolton's ruling said individuals in Arizona may file suit if they feel they could be hurt if the law is put into effect.

Muzaffar Chishti, the director of the Migration Policy Institute's office at the New York University School of Law, said the order could be a game-changer because it presents a new argument for the law's opponents. The original claim against SB 1070 was based on pre-emption only, but court watchers said the justices didn't appear to embrace the department's argument. Some observers criticized U.S. Solicitor General Donald Verrilli's performance when he argued the government's position. Chishti says Bolton's latest action opens a new door for opponents who are "not hitching all their wagons to the pre-emption star."

"It potentially changes a number of things," Chishti said. "These [individuals] are obviously represented by prominent advocacy organizations like MALDEF, the National Immigration Law Center and the ACLU. But the plaintiffs in this case are individuals, so the first thing the decision did is it validates the ability of an individuals to bring a claim against the state of Arizona."

In Texas, a recent immigration-enforcement measure, which would have banned so-called sanctuary cities, failed to make it to Gov. Rick Perry's desk during the regular and special sessions of the 82nd Legislature. That bill's author, state Rep. Burt Solomons, R-Carrollton, decided not to seek re-election but told The Texas Tribune recently that he did not think the issue would go away. He said that some lawmakers would be prudent and wait until the high court made a ruling, but that others would probably move forward with similar legislation regardless of the outcome.

Bolton also rejected Brewer's request that the petitioners be denied consideration for class-action status. If Bolton grants the status, it would allow the individual plaintiffs to represent the interests of a larger group. That, Chishti adds, would do even more to bolster the case against the law.

“Assuming she grants class certification, then not only does it help people who have brought this lawsuit, but it helps people who are likely to be members” of the class-action lawsuit, he said. “So ostensibly the argument in this case is that this will lead to discrimination and profiling against Latinos, and if the classification is granted, then any Latino could also be a beneficiary of the lawsuit.”

Chishti said a decision on the class-action request could come as early as this week.

Texas immigration attorneys caution, however, that lawmakers in favor of such tough enforcement could use this latest development to further fine-tune legislation, using recent rulings as a blueprint.

“[Arizona law co-author and Kansas Secretary of State] Kris Kobach and his compatriots are refining and re-honing their briefs, their arguments, their strategies and their proposals to their clients, so yes, it helps them as well,” said Austin-based immigration attorney Dan Kowalski. “It tells them at least what certain judges have said and are likely to say in the future. They’ll be able to advise their clients on what the current limits are more precisely, so yes, it gives some ammunition to both sides.”

Like Solomons, Kowalski is inclined to think the issue will not fade soon, if at all, regardless of whether lawmakers think their bills will pass. He cited as proof the recent fervor surrounding the race for U.S. Senate, in which front-runner Lt. Gov. David Dewhurst accused his opponent, former Texas Solicitor General Ted Cruz, of supporting amnesty for illegal immigrants.

“Some aren’t necessarily about getting the bills passed and getting them signed by the state’s governor; they are also about generating attention and buzz and fundraising for their candidates,” he said.

Waiting on SCOTUS

Chishti and Kowalski argue that predicting how the court will rule based solely on oral arguments is risky. But most scholars and stakeholders agreed that the court appeared poised to uphold at least parts of the law. The justices are also considering a segment of the law that makes it a crime if an immigrant fails to carry proof of legal status and a provision that makes it a crime for an unauthorized immigrant to work, apply for work or solicit work. The final provision up for debate allows officers to arrest immigrants without a warrant if there is probable cause that they have committed a deportable offense.

If that happens, the class-action lawsuit will probably take center stage, including a likely appeal before the 9th Circuit Court of Appeals, which upheld Bolton’s original injunction against SB 1070 in 2010.

If the law isn’t upheld, however, the new arguments are moot because a permanent injunction barring the enactment of the law is likely. One thing Chishti said is fairly certain, however, is that the court is not split evenly. Because Justice Elena Kagan recused herself from the proceedings because of her former role as U.S. solicitor general, only eight justices will decide the case. Chishti said that if they failed to come to a majority decision, that development would have been made public by now.

“We would have known that the first week,” he said. “The court is definitely split 5-3, at least, in some form.”

<http://www.texastribune.org/texas-mexico-border-news/arizona-immigration-law/decision-sb-1070-case-could-give-opponents-more-am/>