



Written by [Joe Wolverton, II, J.D.](#) on December 16, 2011

## Supreme Court to Hear Challenge to Arizona Immigration Law

On Monday, the justices of the Supreme Court were very busy issuing orders and approving petitions. Already having committed themselves to considering the constitutionality of the individual mandate of ObamaCare, and the legality of recent redistricting in Texas, the nation's highest court has now agreed to review another controversial conflict between the Constitution and the law.



The latest dramatic legal dispute into which the Supreme Court has cast itself as arbiter involves the anti-illegal immigration statute passed last year by the state of Arizona.

With its [grant of certiorari in the case of \*Arizona v. the United States\*](#), the Supreme Court will hear oral arguments from both sides and ultimately issue a ruling deciding whether the legislature and Governor of the Grand Canyon State were preempted by federal law from enacting a law establishing immigration policy.

As has been [reported previously](#), the law, S.B. 1070, authorizes law enforcement to require production of immigration documents from an individual already the subject of a lawful stop who is reasonably suspected of being illegally present in the state.

The case is on appeal from a decision of the Ninth Circuit Court of Appeals wherein that court upheld an injunction issued in April by the federal district court that prevented four key provisions of the law from being enforced.

Governor Jan Brewer (pictured above) is pleased with the high court's decision to grant her state's petition. [In a statement](#), she said:

I would like to commend the U.S. Supreme Court for its decision to review and hear arguments pertaining to the federal court injunction against critical portions of SB 1070. I am confident the High Court will uphold Arizona's constitutional authority and obligation to protect the safety and welfare of its citizens.

This case is not just about Arizona. It's about every state grappling with the costs of illegal immigration. And it's about the fundamental principle of federalism, under which these states have a right to defend their people.

Governor Brewer's assessment of the fundamental issue is at the core of the case.

Since the beginning of the federal government's assault on Arizona's right (and that of each state) to govern itself and set guidelines for who may and may not enter its sovereign territory, the Obama administration has insisted that the federal government has exclusive jurisdiction over immigration and states are preempted from entering that field.



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The argument is that once the feds have “occupied the field,” of this or that area of the law or policy, then no other government (state or local) may trespass therein.

This theory of constitutional law is known as [preemption](#).

As a [story in Forbes](#) explained:

Corporate lawyers love preemption when it prevents a civil jury in, say, Illinois, from deciding that a drug is unreasonably dangerous even though the Food and Drug Administration ruled it safe and effective. Liberal politicians and the plaintiff lawyers who contribute to their campaigns hate preemption because they believe it prevents ordinary citizens from dispensing justice as they see fit. The states, they argue, should have broad police powers to protect their citizens from rapacious corporations.

In short, the question before the Court is this: At what point does the federal government have such a compelling interest in the establishing of laws and policies in a certain area that any legislation in that area passed by another entity would interfere with the enforcement of the federal statutes?

Secretary of the Department of Homeland Security, Janet Napolitano, explained the federal position this way:

The Arizona immigration law will likely hinder federal law enforcement from carrying out its priorities of detaining and removing dangerous criminal aliens. With the strong support of state and local law enforcement, I vetoed several similar pieces of legislation as Governor of Arizona because they would have diverted critical law enforcement resources from the most serious threats to public safety and undermined the vital trust between local jurisdictions and the communities they serve. I support and am actively working with bipartisan members of Congress to pass comprehensive immigration reform at the federal level because this issue cannot be solved by a patchwork of inconsistent state laws.

Of course, such a “patchwork” of laws is precisely the way issues will be solved and be solved most effectively. States are more capable than the national government of identifying and rectifying problems that affect them directly, particularly the continued physical and fiscal wellbeing of their citizens. This is the arrangement anticipated by our Founding Fathers in establishing our federal system of government — that is to say, a government comprised of a national government endowed with an enumerated slate of limited powers, and state governments empowered by the people themselves to carry out other governmental functions not delegated to the national government.

Perhaps the Supreme Court’s decision will address the equally salient question of where, exactly, in the Constitution is found congressional authority to regulate immigration. The enumeration in the Constitution of specific powers delegated to the federal government is the cornerstone of American political theory and of the constitutional Republic established in 1787. The basic definition of enumerated powers is that the best limitation on power is to not give it in the first place. Powers, as understood by Madison, Jefferson, et al., were only legitimate if they had been granted to the government by the people and written specifically in the document through which the governed gave life to the government — the Constitution.

“We the People, of the United States” established this government. All powers assigned to the government in the document were originally (and ultimately) held by the people. No original, organic, or self-possessed powers exist in any government. All government is an artificial creation of the people and is powerless but for their endowment of a specific roster of limited powers to it.



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In all of the complaints filed against the various states that have enacted Arizona-style immigration laws, U.S. Attorney General Eric Holder insists that the federal footprint has marked the legal limits within which a state may make laws in the field of immigration.

In light of the lack of enumeration of such a power in the Constitution, however, the question becomes whether the government of the United States enacted a slate of laws for which there is no constitutional authority.

In the absence of explicit, enumerated authority to legislate, the power remains with the states and the people. The responsibility for deciding who may or may not enter a state is upon the government of that state, and not the national government.

Arizona's expression of its legislative will setting criteria for whether an immigrant may remain within its borders is, therefore, absolutely legal and without vulnerability to claims of federal exclusivity. Moreover, not only is there no federal supremacy over state laws with regard to immigration policy, but there is no constitutional accession of federal jurisdiction over immigration whatsoever.

As President Ulysses S. Grant wrote in a memo to the House of Representatives: "Responsibility over immigration can only belong with the States since this is where the Constitution kept the power."

Soon, both sides of the preemption issue likely will be addressed and decided within the pages of the Supreme Court's decision in the case of *Arizona v. U.S.*

Regardless of that decision, however, given the apparent lack of any constitutional grant of power to the Congress to legislate in the arena of immigration, it would seem that the federal government cannot leave a legal footprint as it doesn't have a constitutional leg to stand on.

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