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Justices Seem Open To Upholding Ariz. Immigration Law

By **Abigail Rubenstein**

Law360, New York (April 25, 2012, 4:53 PM ET) -- The federal government appeared to find little support at the U.S Supreme Court on Wednesday for its arguments that one key provision of Arizona's controversial immigration law is preempted by federal law, though the justices' position on other provisions, including one related to employment, seemed less clear.

The high court heard oral arguments Wednesday in the state's appeal of an injunction blocking four parts of S.B. 1070. The blocked provisions of the law would make it a crime for an illegal immigrant to apply for jobs, require police officers to verify the immigration status of detainees during a lawful stop or arrest if there is reasonable suspicion, make it a crime for an immigrant not to carry identification papers and authorize the warrantless arrest of a person who could be deported due to a public offense.

Based on their questions, the justices appeared inclined to uphold the portion of the law requiring police to determine the immigration status of any person stopped under state or local law if reasonable suspicion exists that the person is unlawfully present in the U.S., an attorney who attended the arguments told Law360.

"From oral arguments, it seemed reasonably clear that the court was likely to uphold the provision requiring checks on people's immigration status when they come into contact with police, although some of the justices were interested in finding a way to construe it very narrowly to say that it is okay as long as it doesn't require that people be in custody for longer than they would otherwise," said Paul Smith, chair of Jenner & Block LLP's appellate and Supreme Court practice, who attended the arguments.

The high court appeared unsympathetic to the government's claims that while police could take such actions on an ad hoc basis, a law requiring them to do so was preempted by federal law because it interfered with the federal government's immigration law enforcement priorities.

"It's not selling well," Justice Sonia Sotomayor told Solicitor General Donald B. Verrilli Jr. of the argument that "systematic cooperation is wrong."

However, the government seemed to find more traction for its arguments against the part of Arizona's law that would make it a state law crime for an individual to fail to comply with a federal law requiring them to apply for registration with the federal government and to carry their registration card, Smith said.

"I thought the government made headway pointing out that this could lead to mass incarceration of undocumented individuals, which could cause problems for the country

particularly for relations with Mexico," said Smith, who filed a brief in the case on behalf of the National Immigrant Justice Center.

The court's thinking on the other two provisions was less evident from their questions as they were less the focus of the arguments, he said.

There was some back and forth between the justices and both Verrilli and Paul Clement of Bancroft PLLC, who argued the case for Arizona, as to whether the federal government's immigration laws' focus on the employer, rather than the employee, in connection with the legislative history was sufficient to preempt the provision making it a criminal offense for illegal immigrants to seek work in Arizona.

"The court is likely to split the difference," Smith said. "It was a well argued case in which the court will probably uphold some but not all of the law."

Whatever it ultimately decides on the law, the high court seemed eager Wednesday to steer the discussion away from concerns that the law would lead to racial profiling.

"Before you get into what the case is about, I'd like to clear up at the outset what it's not about. No part of your argument has to do with racial or ethnic profiling, does it?" Chief Justice John Roberts asked the solicitor general before he began to speak.

The solicitor general agreed that that was not the case the government was making.

Nonetheless, critics say the law will disproportionately affect racial minorities in the state.

"The reasonable suspicion standard is so problematic because it relies on the subjectivity of an officer and there is no way to know how much that subjectivity is informed by racism or local prejudice or popular debates against certain groups," Douglas Hauer of Mintz Levin Cohn Ferris Glovsky & Popeo PC told Law360.

"Mistakes will happen, and they will be disproportionately felt by those in border states who are American citizens or permanent residents but who are Hispanic or have an accent," Hauer said.

The stakes of the case are high as a ruling in favor of the Arizona law is widely expected to lead to the enactment of similar laws in other states.

Arizona is represented by Paul D. Clement, H. Christopher Bartolomucci and Nicholas J. Nelson of Bancroft PLLC and John J. Bouma, Robert A. Henry and Kelly Kszywienski of Snell & Wilmer LLP.

The case is State of Arizona et al. v. USA, case number 11-182, in the U.S. Supreme Court.

--Editing by Andrew Park.

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