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On May 26, for the first time in 35 years, the United States Supreme Court issued an opinion on whether states may take action to stop illegal immigration. In *Chamber of Commerce v. Whiting*, the Supreme Court upheld the Legal Arizona Workers Act of 2007 against multiple challenges claiming that it was preempted by federal law. This act requires all employers in the state to use the E-Verify Internet system to check the work authorization of new hires, and it penalizes employers who knowingly hire unauthorized aliens by suspending their business licenses. (E-Verify, run by the federal government, checks data supplied by immigrants against Homeland Security and Social Security records to make sure they are eligible for employment.)

It was a 5–3 decision, with the conservative justices, plus Anthony Kennedy, siding with Arizona. Justice Elena Kagan recused herself because the Obama Justice Department had weighed in against Arizona when she was solicitor general.

The Justice Department urged the Supreme Court to take the case and participated in the oral argument on the losing side. The Obama administration has made no secret of its hostility toward Arizona and other states that want to use state powers to restore the rule of law in immigration. The Justice Department's pending lawsuit against Arizona's SB 1070, a 2010 law governing police procedures when officers encounter illegal aliens, is another example of this hostility.

Arizona's victory in the high court also gave an unmistakable green light to the other states. A week later, the Alabama legislature passed HB 56 — the strongest law against illegal immigration that any state has enacted to date — and on June 9, Gov. Robert Bentley signed it into law. This measure, known as the Beason-Hammon Act after its main sponsors, includes everything that Arizona has done on the subject, plus a good deal more: prohibiting illegal aliens from attending public universities in the state, providing for civil forfeiture of vehicles used to knowingly transport illegal aliens, prohibiting landlords from knowingly harboring illegal aliens in apartments, and requiring public schools to count the number of illegal aliens receiving a free K–12 education at taxpayer expense.

Behind Alabama and Arizona are a growing number of other states that have taken significant steps down the same road, including Missouri, Mississippi, South Carolina, Georgia, Oklahoma, and Indiana. And the list of states seeking to deter illegal immigration is sure to grow in the future.

These states are motivated by two powerful forces: public frustration over lax enforcement of federal immigration laws, and the fiscal burden that illegal immigration imposes on taxpayers.

The Federation for American Immigration Reform calculates that the net fiscal burden caused by illegal immigration is \$100 billion per year for all levels of government combined. That's a *net* figure, taking into account any taxes that illegal aliens may pay.

About \$80 billion of that total falls at the state and local levels — meaning that state and local governments have to pick up the tab when federal immigration laws go unenforced. The biggest items are free K–12 education for children in illegal-alien households; costs incurred through the arrest, trial, and imprisonment of illegal aliens who commit additional crimes; and medical costs imposed on public budgets by illegal aliens. In effect, the federal government's failure to enforce immigration laws is a massive unfunded mandate. And unlike the federal government, nearly all of the states have a constitutional obligation to balance their budgets, so these costs cannot be ignored.

If a state can encourage illegal aliens to go home, however, the fiscal burden can be reduced dramatically. State laws like Alabama's and Arizona's are based on the principle of attrition through enforcement: If a state ratchets up the level of enforcement, illegal aliens will weigh the costs and benefits of remaining unlawfully, and will leave. Using calculations from a study by Robert Rector of the Heritage Foundation, we can expect that for every illegal-alien-headed household that returns to its country of origin, on average, taxpayers realize a net fiscal benefit of \$19,588 per year.

Arizona's success in encouraging illegal aliens to self-deport has been impressive thus far. Between 2008 and 2010, the population of illegal aliens in the United States decreased by 7 percent, but in Arizona it decreased by 18 percent. This exodus is widely attributed to two law-enforcement efforts: the implementation of the Legal Arizona Workers Act, beginning Jan. 1, 2008, and the contemporaneous enforcement of Arizona's 2005 anti-smuggling law by Sheriff Joe Arpaio of Maricopa County, which contains the majority of Arizona's population and is the hub of alien-smuggling operations into the United States.

While it is undoubtedly true that some of Arizona's illegal aliens simply packed their bags and moved to states such as California, where liberal laws welcome them, it is also true that many left the United States altogether. This was dramatically illustrated in early 2008, when legislators from the Mexican border state of Sonora sent a delegation north to Arizona. Their mission? To complain to Arizona officials that the Legal Arizona Workers Act was sending too many Mexican nationals home too quickly, and that Sonora could not handle the burden on its public services and infrastructure.

Although the Supreme Court's decision in *Whiting* did not directly address Arizona's SB 1070, it greatly boosts the prospects of success not only for that law, but also for immigration-enforcement bills in a number of other states. Realizing this, the ACLU, the Mexican American Legal Defense and Education Fund (MALDEF), and other open-borders groups launched into damage-control mode in the wake of the decision. They tried to spin the *Whiting* opinion as an extremely narrow holding that has no bearing on other laws or other states.

This mischaracterization may have gotten a lot of play in press releases and cable-news appearances, but it won't hold up in court. The Supreme Court's opinion made clear that state

and local governments have a significant role to play in deterring illegal immigration.

The ACLU's challenge to such laws has rested principally on the concept of "conflict preemption." This concerns cases in which a state or local law poses an obstacle to the accomplishment of Congress's objectives as spelled out in federal law. If that happens, the state law is invalid.

The problem for the ACLU is that there is no federal law prohibiting states and cities from taking steps to stop illegal immigration. On the contrary, there are numerous federal statutes *inviting* state assistance in the enforcement of immigration laws. So the ACLU is reduced to arguing that the state and local laws are somehow in "tension" with federal law, even if there is no conflict on the face of the statutes.

The *Whiting* decision made clear that that argument will no longer fly: "Implied preemption analysis does not justify a 'free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" And that's precisely the point. Congress has never acted to prohibit state and local laws that discourage illegal immigration, so the open-borders Left is asking the courts to do it instead.

Their favorite argument to demonstrate "tension" with federal law is to declare that Congress intended for immigration laws to be enforced uniformly across the land. They claim that aggressively enforced state laws in places such as Arizona disrupt this uniformity, and therefore the courts should throw them out. But the Supreme Court emphatically rejected this argument, stating: "Congress expressly preserved the ability of the States to impose their own sanctions through licensing; that — like our federal system in general — necessarily entails the prospect of some departure from homogeneity."

Perhaps most important, the Court also endorsed the constitutional doctrine of concurrent enforcement, on which Arizona, Alabama, and other states have relied in drafting their laws. If a state prohibits an activity that is already prohibited by federal law, then state and federal law are concurrent and no conflict can exist. The Supreme Court applied this doctrine and observed approvingly that "the Arizona law . . . trace[s] the federal law."

In particular, the Supreme Court gave Arizona high marks for adopting the definitions and standards of federal law verbatim. "Arizona went the extra mile in ensuring that its law closely tracks [federal statutory] provisions in all material respects. The Arizona law begins by adopting the federal definition of who qualifies as an 'unauthorized alien.' . . . Not only that, the Arizona law expressly provides that state investigators must verify the work authorization of an allegedly unauthorized alien with the Federal Government, and 'shall not attempt to independently make a final determination on whether an alien is authorized to work in the United States.'"

This was by design. The same deference to federal definitions and federal determinations of immigration status also appears in Alabama's Beason-Hammon Act, Arizona's SB 1070, Missouri's illegal-immigration act of 2008, Oklahoma's illegal-immigration act of 2007, and just about every other properly drafted state or local immigration law on the books. It is therefore

highly likely that these laws will withstand any legal challenge in the wake of *Whiting*.

But perhaps the best indication of how sweeping the *Whiting* opinion was came eleven days later, when the Supreme Court vacated the decision of the Third Circuit in *Lozano v. City of Hazleton*. In that case, the Third Circuit had struck down a municipal ordinance in Hazleton, Pa., prohibiting the hiring of unauthorized aliens by employers and the harboring of illegal aliens by landlords. The Supreme Court erased the Third Circuit's decision and directed it to reconsider the case in light of *Whiting*. Importantly, the Supreme Court remanded the entire decision, not just the employment part, for reconsideration. In other words, although the law at issue in *Whiting* specifically concerned the *employment* of unauthorized aliens, the principles enunciated by the Supreme Court were applicable to *any* state or local law concerning illegal immigration.

In summary, the road ahead for state and local laws deterring illegal immigration looks very good — at least in court. Yet some Republicans in Congress seem determined to snatch defeat from the jaws of victory. Treating the states as nothing more than a proving ground for “real” reform at the federal level, they are willing to sell out Arizona and the other states in return for modest improvements to federal law.

Specifically, they have approached the pro-amnesty U.S. Chamber of Commerce to see whether a deal can now be reached for a bill to mandate E-Verify usage nationwide. The Chamber, long opposed to enforcement of immigration laws in the workplace, has demanded a heavy price in return for its assent — the removal of the states from the field.

H.R. 2164, drafted under the watchful supervision of the Chamber and introduced on June 14 by Rep. Lamar Smith (R., Tex.), chairman of the House Judiciary Committee, achieves exactly that. It prohibits the states from suspending the business licenses of employers who knowingly hire unauthorized aliens. In other words, it stabs Arizona in the back right after the state's victory in the Supreme Court. Nothing would please the Chamber and the Obama administration more.

The members of Congress who back Smith's bill suffer from the same delusion that grips all too many politicians in Washington: that the ultimate solution to any problem lies in passing a law in Congress. What they fail to grasp is that the political will to enforce immigration laws, and the resources to do so, are far more important. If the federal immigration laws that are already on the books were adequately enforced, there would be no illegal-immigration problem.

Aliens have self-deported from Arizona not because they think U.S. Immigration and Customs Enforcement (ICE) will start enforcing federal laws more aggressively, but because they *know* state and local officials are very serious about enforcing state laws. When Obama's Department of Homeland Security began halting worksite enforcement raids across the country, Arizona's employer-sanctions law was kicking in. By the end of 2009, Maricopa County officials had investigated and/or raided more than two dozen businesses suspected of knowingly hiring unauthorized aliens. Word gets around very quickly when a law is being enforced, and many illegal aliens left the state on their own initiative. The same will happen in Alabama in September, when that state's new law goes into effect.

To take the states out of the enforcement game would be the height of foolishness. ICE has a

mere 6,000 interior (i.e. non-border) enforcement agents to cover the entire country. In contrast, state and local governments can bring nearly 800,000 law-enforcement officers to bear on the problem. That is why the Chamber of Commerce is so eager to pass Smith's bill and end the threat of state-level enforcement. That is also why the Obama administration and the ACLU launched a legal jihad against Arizona — to send a message to the other states.

With *Whiting*, the Supreme Court has dealt a decisive blow to the legal position of the Obama administration and the ACLU. Now is the time for the states to press forward and make additional progress in reducing illegal immigration.

Hopefully, after 2012, a new administration in Washington will be interested in vigorously enforcing immigration laws and will recognize that it is difficult, if not impossible, for the federal government to achieve that goal alone. The only way to end illegal immigration is for *both* the federal government and the states to take to the field, working together to restore the rule of law.

— *Kris W. Kobach, the secretary of state of Kansas, is a co-author of Arizona's SB 1070 and Alabama's HB 56 and has defended numerous state and local laws concerning illegal immigration in court. This article originally appeared in the July 4, 2011, issue of National Review.*