

FRIDAY MONDAY TUESDAY WEDNESDAY **TODAY**

Feedback | FAQ

TODAY'S COLUMNS LIBRARY

NEWS RULINGS VERDICTS

Search &gt;&gt;

Bookmark Reprints

## State law heads to Supreme Court

Erwin Chemerinsky is Dean and Distinguished Professor of Law at University of California, Irvine School of Law.



On Wednesday, April 25, the Supreme Court will conclude hearing oral arguments this term with one of the most high profile and controversial issues of the year: whether Arizona's SB 1070 is preempted by federal law. In *Arizona v. United States*, the Court will consider whether it is constitutional for states to require that state and

local police aggressively enforce federal immigration laws. This should be an easy case if the Court follows long-standing precedents which clearly establish that control over immigration is the exclusive control of the federal government.

SB 1070, titled, "Support Our Law Enforcement and Safe Neighborhoods Act," was enacted in 2010. The preamble to the law states that its purpose is to decrease the number of undocumented immigrants in Arizona. The preamble says that the goal is make "attrition [of undocumented aliens] through enforcement the public policy of all state and local governments in Arizona."

In the summer of 2010, federal district court Judge Susan Bolton issued a preliminary injunction as to four provisions of SB 1070. The 9th Circuit, in a 2-1 decision, affirmed. Thus, the matter before the Supreme Court is not the overall constitutionality of SB 1070, but rather whether four specific provisions are preempted.

Also, the case focuses entirely on whether these four provisions of SB 1070 are facially invalid as preempted by federal law. Thus not before the Court is the question of whether SB 1070 inevitably will lead to racial discrimination in law enforcement. If the Court upholds these provisions of SB 1070, there surely will be "as applied" challenges on this basis. SB 1070 has a provision that outlaws racial profiling, but how will a police officer have reasonable suspicion that a person is unlawfully in the country except on the basis of a Hispanic surname and skin color?

The first challenged provision of SB 1070, Section 2, requires state and local officers to verify the citizenship or alien status of people arrested, stopped, or detained. Section 2(B) provides that "[f]or any lawful stop, detention or arrest made" by Arizona law enforcement, "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person."

### For the Supreme Court to uphold SB 1070 would require a dramatic change in the law.

The second provision that Judge Bolton found to be preempted, Section 3, makes it a crime in Arizona for a person to be unlawfully in the United States and to fail to register with the federal government. It requires that non-citizens carry registration papers showing that they are lawfully in the United States.

#### SPECIAL REPORT

#### Intellectual Property



Thursday, April 19, 2012

#### U.S. Court of Appeals for the 9th Circuit Panel hears arguments on NFL players' malpractice suit

Retired pro football greats Paul Hornung, John Brodie, Bernie Parrish and others took their beef with their former lawyers at Manatt Phelps & Phillips LLP to the 9th U.S. Circuit Court of Appeals Wednesday.

#### Intellectual Property

#### Google CEO avoids questions in Java trial testimony

Google Inc. Chief Executive Officer Larry Page bobbed and weaved on the witness stand Wednesday trying to avoid questions on his company's alleged infringement of Oracle's Java.

#### Litigation

#### Parents seek changes in child abuse reporting

Two married California attorneys who had their infant son briefly removed from their custody for suspected abuse are fighting back with litigation that could set new standards for determining whether state-employed physicians should be immunized.

#### Real Estate

#### Real Estate Deals

A roundup of recent real estate deals and the attorneys involved

#### Large Firms

#### Orrick IP litigator hops to Baker Botts

Baker Botts nabbed an intellectual property litigator from Orrick, Herrington & Sutcliffe, the second IP partner to depart from Orrick's Menlo Park office in the last month.

#### Government

#### Key mortgage bills face trouble amid industry opposition

A central front took shape in the debate over several mortgage reform bills pitting the financial industry against lawmakers and the attorney general. The major sticking point: a "private right

The third provision before the Supreme Court, Section 5, makes it a crime in Arizona for a person who is not lawfully in the United States to work or seek work in the state. Section 5(C) makes it a misdemeanor for "a person who is unlawfully present in the United States and is an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor in this state."

The final provision found to have been preempted, Section 6, authorizes state and local police to arrest without warrants when "the officer has probable cause to believe ... [t]he person to be arrested has committed any public offense that makes the person removable from the United States."

The district court and the 9th Circuit were correct in finding that these provisions are preempted. The Supreme Court long has held that control over immigration is the exclusive domain of the federal government and that state efforts to supplement federal efforts are preempted. The Supreme Court's decision in *Hines v Davidowitz*, 312 U.S. 52 (1941), is exactly on point. The case involved a Pennsylvania law, which like SB 1070, required that non-citizens carry papers proving that they are lawfully present and to show them to the police when requested to do so. The Pennsylvania statute also required aliens to register with the state, carry a state-issued registration card, and pay a small registration fee.

The Supreme Court found the Pennsylvania law to be preempted by federal law. The Court explained that inevitably immigration enforcement efforts can implicate "important and delicate" international relationships. States have no role in foreign policy under the Constitution. In words that are quite apt for its consideration of SB 1070, the Court said that Congress "plainly manifested a purpose ... to protect law-abiding aliens though one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance." The Court concluded that in the area of immigration, states cannot "conflict or interfere with, curtail [or complement], the federal law, or enforce additional or auxiliary regulations."

SB 1070 does exactly this. For example, Sections 2 and 6 of SB 1070 require state and local police enforce federal immigration law, including checking the immigration status of those stopped and arresting and detaining those suspected of being illegally in the country. But the United States has discretion to choose whether and how to enforce immigration law; state efforts like those mandated by SB 1070 are inconsistent with that discretion.

As for Section 5, Congress specifically considered and rejected a provision which would have imposed penalties on undocumented immigrants who sought or received employment. Congress expressly chose to put sanctions solely on employers who hire undocumented workers.

For the Supreme Court to uphold SB 1070 would require a dramatic change in the law. In fact, the brief filed by Arizona in the Supreme Court is surprising in the extent to which it is asking the Court to change the law. The Arizona brief does not mention *Hines v. Davidowitz* until page 52 and makes no effort to distinguish the case.

Moreover, Arizona states that in the absence of an express preemption provision in a federal law, a state law is preempted only if there is a conflict between federal and state law. Its brief states: "The bottom line is that there is no preemption unless state law conflicts with some identifiable federal statute." But never has the Supreme Court held that a conflict is needed for preemption. In *Hines*, there was no conflict, and in many cases the Court has found preemption without a conflict when it concludes that a state law will impede the achievement of a federal objective.

In its brief, Arizona repeatedly contends that states have the "inherent" power to enforce federal law. But no Supreme Court case ever has held this. There are many areas - such as copyright and patent law - where states play no role enforcing federal law. In fact, that is what preemption is all about: areas where the federal government has the exclusive role in enforcing federal law.

If not for the intense politics surrounding SB 1070, it would be easy to predict that Arizona law would be struck down. It is worth noting that Justice Elena Kagan has recused herself from participating in the case because of her involvement with the case when she was the Solicitor General of the United States. There is thus a real possibility of a 4-4 split in the Supreme Court, which would mean that the 9th Circuit

of action" for consumers.

## Entertainment & Sports

### Judge sets "Desperate Housewives" retrial

A superior court judge has set a retrial date in actress Nicollette Sheridan's wrongful termination dispute with the producers of ABC's "Desperate Housewives."

## Perspective

### State law heads to Supreme Court

Controversial Arizona immigration law heads to the US Supreme Court. By **Erwin Chemerinsky**

### Are we seeing a patent bubble?

The dramatic rise in patent valuations reflects a fundamental perception shift in the way that patents are 'monetized.' By **Suzanne S. Harrison and Ron Laurie**

**Harrison and Ron Laurie**

## Intellectual Property

### Apple, Samsung ordered to settlement talks

Prodded by U.S. District Judge Lucy H. Koh, Apple Inc. and Samsung Electronics Co. Ltd. have agreed to try to settle their patent infringement lawsuit.

## Environmental

### CVS reaches \$13.8 million settlement

District attorneys from 44 counties as well as the cities of San Diego and Los Angeles announced Wednesday they reached a \$13.8 million settlement with CVS Pharmacy, Inc. over alleged mishandling of hazardous waste.

## U.S. Supreme Court

### Supreme Court rejects PTO's appeal

Rejecting an appeal lodged by the U.S. Patent and Trademark Office, the U.S. Supreme Court unanimously held Wednesday that patent applicants can introduce new evidence in a little-used civil action to challenge rejected applications.

## Perspective

### The battle over life settlement policies

Insurance companies don't like investors owning policies because investors exercise contractual rights that insurance companies tout, but don't expect consumers to take advantage of. By **William Molinski and Khai LeQuang**

## Judges and Judiciary

### Orange County judge hopeful rated "not qualified"

The only lawyer running for election against a sitting Orange County Superior Court judge has been rated "not qualified" by the county bar association.

## Bar Associations

decision would be affirmed without opinion.

Since Arizona adopted its law, Utah, Indiana, Georgia, South Carolina, and Alabama have adopted similar and even more restrictive statutes. These laws have an enormous effect on the lives of people, including those lawfully in the United States. The Supreme Court should strike down SB 1070 and by doing so make clear that all of these state efforts to control immigration are preempted by federal law.

### **Attorneys vie for State Bar Board of Trustees**

Five California lawyers have filed to run for two spots on the State Bar Board of Trustees even as the bar begins to shrink and reconfigure its governing board.

### **U.S. Supreme Court Corporations can't be sued under torture act, high court rules**

Corporations and other organizations can't be sued under a federal law designed to crack down on perpetrators of torture abroad, the U.S. Supreme Court unanimously ruled Wednesday.

### **Alternative Dispute Resolution**

#### **Kenneth A. Feingold**

For Feingold, a practicing attorney and a neutral at Alternative Resolution Centers LLC, timing is everything.

### **U.S. Supreme Court Corporations can't be sued under torture act, high court rules**

Corporations and other organizations can't be sued under a federal law designed to crack down on perpetrators of torture abroad, the U.S. Supreme Court unanimously ruled Wednesday.

### **Perspective**

#### **Private parts aren't private: Florence v. Bd of Chosen Freeholders**

In a 5-4 decision, the Supreme Court held that police officers may require persons arrested for minor criminal offenses to expose the most intimate parts of their bodies. By **Nanci L. Clarence** and **Mario A. Moya**

#### **A 'titanic' task: the courts must protect consumers**

Letter to the editor. By **Drew Pomerance**

### **Judicial Profile**

#### **Tamila E. Ipema**

Before becoming a judge, Tamila Ipema used the law to win her family passage to America.

### **Corporate Counsel**

#### **Donald E. Royer**

Executive Vice President, General Counsel for Opus Bank Irvine

### **Government**

#### **Court leaders rally to protest budget issues**

In an industry filled with people who are paid to disagree with each other, one issue many attorneys share a near-unanimous opinion on is that more funding is needed for the courts.