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COMMENTARY

Lozano a Guide for Supreme Court In Immigration-Enforcement Debate

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In *Lozano v. City of Hazleton*, Chief Judge Theodore McKee of the Third U.S. Circuit Court of Appeals has given the U.S. Supreme Court, and other federal courts, a thoughtful and thorough roadmap through the immigration-enforcement minefield.

Eschewing the rhetoric and hyperbole that has surrounded the immigration reform debate, but acknowledging that it "is of course not our job to sit in judgment of whether state and local frustration about federal immigration policy is warranted," McKee, declared, "[w]e are, however, required to intervene when states and localities directly undermine the federal objectives embodied in statutes enacted by Congress."

And intervene the unanimous panel did on Sept. 9 by affirming the district court's decision declaring Hazleton, Pa.'s immigration enforcement statutes offensive to the Supremacy Clause.

The path the court took, however, was slightly different than that taken by the district court and most others that have addressed the legal issues presented.

First, the court took great pains to follow the clear language of the relevant statute and find that the employer-sanctions provisions of Hazleton's law were not "expressly" pre-empted because, by their express language, they were "licensing" laws that were specifically excluded from express pre-emption.

By not stopping at that point, however, the court exhibited a more expansive understanding of congressional intent and federal imperatives when it comes to immigration policy and enforcement.

According to the court, "Hazleton has enacted a regulatory scheme that is designed to further the single objective of federal law that it deems important — ensuring unauthorized aliens do not work in the United States. It has chosen to disregard Congress's other objectives: protecting lawful immigrants and others from employment discrimination, and minimizing the burden imposed on employers. Regulatory 'cherry picking' is not concurrent enforcement, and it is not constitutionally permitted."

Here, the court parted company with the Eighth and Ninth circuits because they undervalued "the emphasis Congress placed on preventing discrimination, and the pain-staking care Congress took to achieve that objective" by ensuring that, (1) burdens placed on employers for complying with the new requirements under the Immigration Reform and Control Act (IRCA) were not overly excessive, (2) penalties for violating the prohibitions against knowingly hiring unauthorized aliens were severe but not crippling, and (3) penalties for discrimination in the name of compliance were at least equal to the penalties for violating the law.

Because the federal scheme carefully balanced and addressed these competing goals, state and local efforts aimed only at enforcement impermissibly conflict with the federal scheme.

Further addressing congressional concern about burdens on employers, the Third Circuit found that "a patchwork of state and local systems independently monitoring, investigating and deciding whether employers have hired unauthorized workers could not possibly be in greater conflict with Congress' intent for its carefully crafted prosecution and adjudication system to minimize the burden imposed on employers."

Similarly, the Court found that mandated use of E-Verify (an experimental and voluntary Internet-based system to verify Social Security numbers by checking them against databases maintained by the Social Security Administration and the Department of Homeland Security) also impermissibly tips the careful federal balance against employers. IRCA established the I-9 paper verification system for checking the work authorization status of potential employees.

According to the Court, in setting up E-Verify as a pilot program with a limited duration, Congress meant to give employers a choice between the I-9 process and E-Verify. Indeed, Congress went so far as to prohibit the Secretary of Homeland Security from requiring participation.

The Third Circuit's decision is a roadmap for the U.S. Supreme Court in its consideration of nearly identical

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issues presented by *Chamber of Commerce v. Whiting*, challenging Arizona's Legal Arizona Workers Act, set for argument on Dec. 8.

First, the Third Circuit's analysis of Congress' purpose and design in IRCA is comprehensive. After identifying Congress' competing goals of immigration enforcement while preventing discrimination against authorized immigrant workers and citizens, the court explained how and why Hazleton's efforts at immigration enforcement, an area traditionally, exclusively a federal province, conflicted with IRCA and stood as an obstacle to fulfilling the goals of federal immigration law.

Second, contrary to assertions by some attorneys on the losing side in *Lozano*, the Third Circuit is not on the extreme end of the spectrum. Rather, the unanimous panel has nearly 60 years service on the federal courts of appeal and comes from diverse political and sociological backgrounds. McKee was appointed to the Third Circuit by President Bill Clinton in 1994, Judge Richard Nygaard to the Third Circuit in 1988 by President Ronald Reagan, and Visiting Judge Eugene Siler Jr. to the Sixth Circuit in 1991 by President George H.W. Bush.

The Supreme Court is now called on to perform its constitutional duty and declare what the law is in this hotly contested area. Its decision will be anxiously awaited, unquestionably timely and far-reaching. In *Lozano*, the Third Circuit has given the Supreme Court a clear, comprehensive path to follow. ■