



REPORT ON THE CONSTITUTIONALITY OF
ARIZONA IMMIGRATION LAW S.B. 1070

Committee on Immigration & Nationality Law

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**REPORT OF THE IMMIGRATION AND
NATIONALITY LAW COMMITTEE
REGARDING THE CONSTITUTIONALITY
OF ARIZONA'S S.B. 1070**

I. Introduction

The Committee on Immigration and Nationality Law of the New York City Bar Association has examined the Arizona Revised Statutes known as “SB 1070 Anti-Immigration Act,” as amended by HB 2162, and concluded that its core sections are unconstitutional in whole or in part under the Supremacy Clause of the United States Constitution and violate the First, Fourth and Fourteenth Amendments. The body of this Report sets forth the Committee’s analysis, and provides an overview of the Arizona legislation in the broader context of needed federal immigration reform.

II. Executive Summary and Historical Overview

The passage by the Arizona legislature of SB 1070 has stimulated substantial debate within the United States and marks a mistaken trend in the direction of future state legislation. Despite the filing of at least five lawsuits, and the threat of more, other states, including New York, may well see the Arizona law as a model. Ten states are currently contemplating similar legislation, including Utah, Georgia, Colorado, Maryland, Ohio, North Carolina, Texas, Missouri, Oklahoma, and Nebraska.¹ At the federal level, only recently has the U.S. Department of Justice commenced litigation challenging the constitutionality of the Act.² We believe that New York and other states should resist legislative proposals along the lines of the Arizona statute because such laws offend basic constitutional principles.

The Arizona law constitutes an excessive reaction to the long-awaited Comprehensive Immigration Reform which has proved to be so elusive over the last decade.³ Models for comprehensive reform have long been discussed, and their broad outline is generally known: a strengthening of federal enforcement coupled with modifying the Immigration and Nationality Act so as to provide for the admission of workers who are less than skilled or professional (with appropriate safeguards under U.S. labor policy), and a corresponding “earned citizenship”

¹ Nicole Belle, Ten States Now Contemplating Arizona-Like Anti-Immigration Legislation, Crooks and Liars, Apr. 29, 2010, <http://crooksandliars.com/nicole-belle/ten-states-now-contermplating-arizona> (last visited June 4, 2010).

² Tim Lynch, *Feds Challenge Arizona Immigration Law*, CATO @ LIBERTY, available at <http://www.cato-at-liberty.org/2010/07/07/feds-challenge-arizona-immigration-law/> (last visited July 7, 2010).

³ Peter Slevin, *Both Sides Blame Congressional Inaction for Arizona Law*, WASH. POST, April 27, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/26/AR2010042600226.html> (last visited June 4, 2010).

program for workers who are already here.⁴ The vehemence of efforts such as Arizona's to formulate legislative policies which are, in their essence, anti-immigrant, runs the risk of coarsening the dialogue which must support and eventually lead to a rational federal program.

The substantive content of these state statutes, as manifested by SB 1070, promotes racial profiling while infringing upon the exclusive role of the federal government to regulate immigration. Our analysis shows that the Arizona statute is preempted under the Supremacy Clause for several reasons which are set out below, but chiefly because it adopts a parallel immigration enforcement program to the one maintained by the federal government through the pretext of conflating civil and criminal provisions of the Immigration and Nationality Act. At the same time, the statute fails on due process and Fourth Amendment grounds⁵, in that it offers insufficient guidance to officials administering it as to when "reasonable suspicions" of unlawful presence exist, and will target the foreign-born. The anti-work solicitation provisions violate the First Amendment. We urge New York and other states to resist emulating Arizona's SB 1070 because of these grave constitutional concerns and we urge instead that the federal government undertake necessary, comprehensive immigration reform. Failure to enact comprehensive immigration reform is providing the fuel for states to overreach in this area of exclusive federal regulation.

⁴ See, e.g., Michael O'Brien & Russell Berman, Reid, Schumer, Menendez to Unveil Immigration Reform Plan, The Hill, April 29, 2010, <http://thehill.com/blogs/blog-briefing-room/news/95121-senate-democrats-set-to-unveil-immigration-plan> (last visited June 4, 2010).

⁵ For selective incorporation of the Fourth Amendment into the due process clause of the Fourteenth Amendment so as to make its restrictions applicable to the States, see *Mapp v. Ohio*, 367 U.S. 643 (1961).

III. Summary of Principal Provisions of SB1070 as Amended by HB 2162

Generally, the Arizona Revised Statutes expand the reach of federal immigration regulation and increase the powers of state and local law enforcement agents. The legislative intent behind the bill is Arizona's "compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona." This section of the Report analyzes the principal provisions of SB 1070, as modified by HB 2162 and their constitutional implications.

Arizona Revised Statutes Section 11-1051 is the core provision in the new Arizona Anti-Immigration Act. It contains the requirements that have given rise to most of the controversy surrounding the legislation. This section provides that no state and local officer or agency may restrict enforcement of federal immigration laws and provides that any legal Arizona resident may bring a civil action in Superior Court against any officer or agency that adopts a policy whose practical effect is to limit the enforcement of federal immigration laws. Further, this section provides that whenever a local or state law enforcement official or agency makes a lawful stop, detention, or arrest of an individual, a reasonable attempt shall be made to determine the immigration status of that individual "where reasonable suspicion exists that the person is an alien who is presently unlawfully present in the United States." Stops, detentions and arrests are limited to those arising from violations of state, county or municipal law. Pursuant to recent amendment under HB 2162, the individual's race, color or national origin may not be considered in connection with making this determination except as permitted by the U.S. or Arizona constitutions. The provision of certain identity documents, including an Arizona driver's license, will give rise to a presumption that the individual is not present pursuant to violation of law.⁶

⁶ ARIZ. REV. STAT. § 11-1051, as amended by HB 2162, *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf> (last viewed June 4, 2010). Arizona Revised Statutes

Section 13-1509 codifies federal alien registration laws and creates new state sanctions for violating these laws. Section 13-1509 requires aliens to register with the federal government and carry appropriate identification documents at all times. Specifically, the statute provides that a person is guilty of willful failure to complete or carry an alien registration document if that person is in violation of 8 U.S.C. §§ 1304(e) or 1306(a). Section 1304(e) requires aliens eighteen years of age and over, who complied with the Alien Registration Act of 1940 and have been registered and fingerprinted, to carry a government-issued registration certificate or receipt. Violation of this federal law is punishable by up to 30 days imprisonment and up to a \$100 fine. Section 1306(a) requires aliens to apply to register with and be fingerprinted by the government. A willful violation would result in a misdemeanor punishable by up to six months imprisonment and up to a \$1,000 fine. Offenses under the new Arizona law range from a misdemeanor with six months imprisonment and a \$500 fine to felonies for non-citizens found in the U.S. after having been ordered deported or granted voluntary departure within the last five years.⁷

Section 13-3883 grants state and local law enforcement the power to make warrantless arrests. This section sets forth permissible applications of the warrantless arrest authority, noting that such arrests may be made if a felony has been committed, a misdemeanor has been committed in the officer's presence, or a misdemeanor or petty offense has been committed and the officer has probable cause to believe the arrestee has committed the offense. Of special note is that a person

Section 11-1051 previously gave law enforcement officers authority to conduct arrests without warrant of persons who are reasonably believed to have committed public offenses which make such persons removable. Although this provision has been moved, it apparently remains a part of the statute.

⁷ ARIZ. REV. STAT. § 13-1509, as amended by HB 2162, *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf> (last viewed June 4, 2010).

may be arrested if he or she committed a public offense that causes him or her to be removable under federal law.⁸

Section 13-2928 makes it a class 1 misdemeanor to attempt to hire or pick up day laborers if the driver is impeding the flow of traffic, or for the worker to get into the car under these circumstances. The solicitation of work (by gesture or nod) by undocumented immigrants in any public place is also criminalized.⁹ Though this statute is only applicable in instances where a motor vehicle is blocking the flow of traffic, its emphasis is on the act of solicitation itself.

Section 13-2929 makes it a class 1 misdemeanor, minimally punishable by a fine of \$1,000, for any person who is “in violation of a criminal offense” to transport, move, conceal, harbor, shield from detention, or attempt to do any of the above, with regard to any undocumented immigrant if the putative violator knows or recklessly disregards the fact that the immigrant has entered or remained in the United States illegally. Section 13-2929 also criminalizes the encouragement or inducement of any immigrant to come to, enter, or reside in Arizona if such entering or residing is in violation of law.¹⁰ Additionally, Arizona police officials are given the authority to arrest anyone found to be in violation of the federal harboring statutes.¹¹

⁸ ARIZ. REV. STAT. § 13-3883, as amended by HB 2162, *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf> (last viewed June 4, 2010).

⁹ ARIZ. REV. STAT. § 13-2829, as amended by HB 2162, *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf> (last viewed June 4, 2010).

¹⁰ ARIZ. REV. STAT. § 13-2929, as amended by HB 2162, *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf> (last viewed June 4, 2010).

¹¹ 8 U.S.C. § 1324(c) (2010).

The following analysis will focus only on those sections of the Arizona Revised Statutes summarized above. As will be set forth at greater length below, these provisions are of the most concern and import, in that they run afoul of federal preemption under the Supremacy Clause and violate the First, Fourth and Fourteenth Amendments of the U.S. Constitution.

IV. Legal Analysis

A. Well Settled Doctrine of Federal Preemption in Immigration Law

1. Impingement on Foreign Affairs

It is long established that the federal government has exclusive power over immigration matters. The U.S. Constitution grants the federal government the power to “establish a uniform Rule of Naturalization,” U.S. CONST. art. I, § 8, cl. 4, and to “regulate Commerce with foreign Nations,” U.S. CONST. art. I, § 8, cl. 3. In addition, the federal immigration power rests on attributes of sovereignty.¹² The authority to enact and implement immigration laws is premised, generally, on the notion that the United States must have the power to regulate the admission, detention and expulsion of aliens in order to qualify as a nation within a civilized community of nations. Where state action would impinge in some major way upon the constitutional objectives of the federal government’s power to regulate immigration, a case for constitutional preemption will be made out, -- even in the absence of federal statutory enactment.¹³

¹² *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). It is also sometimes said that the government has been entrusted by the Constitution to adopt uniform rules of naturalization. See *DaCanas v. Bica*, 423 U.S. 909 (1976), discussed *infra*.

¹³ See generally *Tayyari v. N.M. St. U.*, 495 F.Supp. 1365 (D.N.M. 1980).

The power to regulate immigration must be taken together with the power over foreign affairs generally and in conjunction with the diplomatic function of the political branches of the national government with which it is has been historically associated.¹⁴ The implementation of immigration law often raises questions with respect to the administration of foreign policy, as has been noted by commentators and in the case law.¹⁵ In this instance, the foreign policy implications of the Arizona statute have manifested themselves through the actions of the Mexican Department of State, which has now issued an advisory to Mexican citizens traveling to Arizona in light of the new statute.¹⁶

Mexico's anxieties (certainly well-founded) and the responsibility of the U.S. Department of State to address these, unambiguously place the matter squarely within the province of national power. Moreover, United Nations experts have concluded that the Arizona law could well offend certain affirmative human rights obligations to which the United States is subject.¹⁷ To allow a state to assume the kind of authority asserted in this instance by Arizona gives rise to the oxymoron of power without responsibility: A state would have the authority to raise an international crisis through implementation of its own statutes without the corresponding responsibility to redress the resulting concerns in any meaningful way.¹⁸

¹⁴ See generally LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 16–18 (1st ed. 1972).

¹⁵ T. ALEXANDER ALEINIKOFF & DAVID MARTIN, *IMMIGRATION PROCESS AND POLICY* 16–18 (1st ed. 1985).

¹⁶ Martha Mendoza, Mexico Issues Travel Alert Over New Arizona Law, Police Link, Apr. 27, 2010, available at http://policelink.monster.com/news_feeds/visit?uri=http%3A%2F%2Fwww.elpasotimes.com%2Fnationworld%2Fci_14966737 (last viewed June 4, 2010).

¹⁷ Eliane Engeler, *UN Human Rights Experts Say Arizona Immigration Law Could Violate International Standards*, THE EXAMINER, May 11, 2010, available at <http://www.washingtonexaminer.com/nation/un-human-rights-experts-say-arizona-immigration-law-could-violate-international-standards-93510164.html> (last visited June 4, 2010).

¹⁸ See generally Daniel Booth, Note, *Federalism on Ice: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063 (2006).

The leading case on preemption of state laws encroaching on federal immigration law is *Hines v. Davidowitz*, 312 U.S. 52 (1941). In *Davidowitz*, the Court linked the issue of federal preemption in the immigration field to the powers of the national government to regulate foreign affairs and its related powers to engage in diplomatic relations with foreign sovereigns. In explaining its position, the Court said:

One of the most important and delicate of all international relationships, recognized immemorially as a responsibility of government, has to do with the protection of the just rights of a country's own nationals when those nationals are in another country. Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted or permitted by a government. This country, like other nations, has entered into numerous treaties of amity and commerce since its inception -- treaties entered into under express constitutional authority, and binding upon the states, as well as the nation. Among those treaties have been many which not only promised and guaranteed broad rights and privileges to aliens sojourning in our own territory, but secured reciprocal promises and guarantees for our own citizens while in other lands. And apart from treaty obligations, there has grown up in the field of international relations a body of customs defining with more or less certainty the duties owing by all nations to alien residents -- duties which our State Department has often successfully insisted foreign nations must recognize as to our nationals abroad. In general, both treaties and international practices have been aimed at preventing injurious discriminations against aliens.¹⁹

The court went on to characterize the role of treaties in the area of immigration as springing from the need to “avoid injurious discrimination in either country against citizens of the other.” *Id.* at 65.²⁰

¹⁹ *Davidowitz*, 312 U.S. at 64–65.

²⁰ *Id.* at 52. Even outside the specific immigration context, state laws having an effect on the admission or removal of non-citizens can find themselves preempted on the ground that they pose an unconstitutional interference with the foreign affairs power. Accordingly, in *Chy Lung v. Freeman*, 92 U.S. 275 (1876), the Court struck down a California statute which purported to keep foreign prostitutes from immigrating to California. In explaining its reasoning, the Court held:

If that government has forbidden the states to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

It is precisely these considerations which are raised by the terms of the Arizona statute: the need to protect in this instance springs not so much from an inherent sense of fairness, but from the federal government's historical role to safeguard the human rights of foreign nationals because it is expected that the same courtesy will be extended to United States citizens abroad. Where such considerations of international comity are directly threatened (as they manifestly are in this instance), cardinal rules of constitutional interpretation teach that the power being exercised is, and must be, exclusively national in scope.

2. The federal government's preemption of the field

Where foreign policy implications are strong, it is clear that arguments favoring federal field preemption will be paramount. In *Davidowitz*, the Court reasoned that the state scheme put forward by Pennsylvania would have international implications; accordingly, “where the federal government ... has enacted a complete scheme of regulation and has therein provided a standard for registration of aliens, **states cannot**, inconsistently with the purpose of Congress, conflict or interfere with, curtail or **complement, the federal law, or enforce additional or auxiliary regulation.**”²¹ Under these circumstances, the Court characterized the Alien Registration Act as creating a “single integrated and all-embracing system.”

The Constitution of the United States is no such instrument. The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government.

92 U.S. at 280.

²¹ *Id.* at 66–67 (emphasis added).

*Lozano v. City of Hazleton*²² makes clear that state regulatory structures that parallel those of the federal government in the area of immigration law will be subject to “field preemption.” First to consider is the strength of the federal government’s interest in immigration as opposed to that of the states.²³ Here the national government’s interest in promoting uniform laws in the immigration field together with standard implementation thereof must outweigh the states’ subsidiary interest in enforcement which stems largely from the lawful exercise of its own police

²² 496 F.Supp. 2d 477 (M.D. Pa. 2007).

²³ As noted by the court:

The first factor we will consider is the dominance of the federal interest in the field of immigration. The history of federal regulation of immigration is one of the creation of an intricate and complex bureaucracy that restricted who could immigrate to the United States and under what terms. Those immigration regulations have also come to define the conditions under which aliens can find employment in the country. The creation of this complex federal bureaucracy not only altered the role of the federal government in relation to immigration. It also transformed the status of immigrants in American society. A foreign-born person in the United States in 1870 had a presumptively legal status; no careful legal inquiry was required to determine whether that person had a right to reside in the country. By 1990, however, determining whether a foreign-born person enjoyed a legal right to remain in the United States demanded a detailed legal examination that involved numerous federal status, several adjudicatory bodies, and a number of appeals and exceptions. More than one hundred years of federal regulation have made the federal supremacy over immigration an intricate affair. . . .

The federal government possesses an especially strong interest in immigration matters. The United States Constitution provides that Congress shall have the power “[t]o establish a uniform Rule of Naturalization[.]” U.S. CONST. art. I, sect. 8, cl. 4. Thus, “[t]he power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). The *Valenzuela-Bernal* Court states that “[o]ne cannot discount the importance of the Federal Government’s role in the regulation of immigration.” *Id.*

Conversely, the individual states, or municipalities located in those states, do not have a strong interest in immigration. The Supreme Court has explained that “[t]he States enjoy no power with respect to the classification of aliens. See *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). This power is “committed to the political branches of the Federal Government.” *Mathews [v. Diaz]*, 426 U.S. [67], at 81, 96 S. Ct. 1883, 48 L. Ed. 2d 478 [1976)]. *Plyler v. Doe*, 457 U.S. 202, 225, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).” (Emphasis added).

[*Lozano v. City of Hazleton*, at 521–22].

power and which can be independently realized.²⁴ Certainly, the current framework of federal statutory enactments under the Immigration and Nationality Act pervasively regulate the field of immigration. Section 236 of the Immigration and Nationality Act provides for the apprehension, detention, and release of aliens.²⁵ Section 236A governs the detention of suspected terrorist. Section 212 provides for grounds of inadmissibility with regard to those seeking admission.²⁶ For those who have been inspected and admitted, section 237 establishes grounds of deportability.²⁷ The procedures in which removal can be effected are governed by section 240 which contains, *inter alia*, complex rules governing the burden of proof with respect to such issues as alienage and deportability.²⁸ Elaborate rules now also exist for the conduct of section 240 removal proceedings which are to take place before a specialist known as an immigration judge. Those present within the United States may still be affected by the provisions of section 235 which establishes a regime of expedited removal under which certain aliens may be returned without a hearing.²⁹

²⁴ Supporters of SB 1070 may point to *Chicanos por La Causa v Napolitano*, 558 F.3d 856 (9th Cir. 2009), as indicating that case law is beginning to swing in their favor. However, to do so would in effect adopt an overbroad reading of a very narrow decision. In determining that the Legal Arizona Workers Act was not impliedly preempted through a conflict with the Immigration Reform and Control Act (IRCA), the court cited to the IRCA § 1324a(h)(2) which states that “The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws)...” Thus, the court reasoned that “the scope of the savings clause which permits state ‘licensing and similar laws,’ is a critical issue in this appeal.” *Chicanos*, 558 F.3d 856 at 861. In upholding the decision of the lower court, the appeals court rested its decision solely on the fact “that the Act is a ‘licensing’ measure that falls within the savings clause of IRCA’s preemption provision.” *Id.* at 866. No such savings clause exists with respect to those federal civil powers which Arizona would seek to exercise under SB 1070.

²⁵ 8 U.S.C. § 1226.

²⁶ 8 U.S.C. § 1226(a).

²⁷ 8 U.S.C. § 1227.

²⁸ 8 U.S.C. § 1229(a).

²⁹ 8 U.S.C. § 1225.

Moreover, a finding of deportability is often only the beginning of a long administrative process. There may well be a potential claim for acquired citizenship.³⁰ And a non-citizen charged in a removal setting may similarly be eligible for a form of lasting immigration relief such as political asylum,³¹ withholding of removal,³² relief under the Convention Against Torture,³³ or for Cancellation of Removal, Part A³⁴ or Part B.³⁵ The depth and scope of this statutory and regulatory regime which considerations of time and space prevent further elaboration upon, unmistakably spell out a pervasive federal scheme governing the removal of aliens from the United States which implicitly preempts any further state action in the field.

3. Preemption with Regard to Civil Immigration Enforcement

The case for federal preemption is even stronger when a state law seeks to enforce civil immigration law. While the enforcement of federal criminal laws may be shared by the states and a state's police powers do extend to some matters incidentally affecting non-citizens, this authority does not extend to civil enforcement of immigration laws.³⁶ The federal immigration

³⁰ See, e.g., STEPHEN H. LEGOMSKY & CHRISTINA RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1293–1295 (5th ed. 2009).

³¹ Immigration and Nationality Act § 208(a).

³² Immigration and Nationality Act § 241(b)(3).

³³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

³⁴ Immigration and Nationality Act § 240A(b)(1).

³⁵ Immigration and Nationality Act § 240A(a).

³⁶ The Supreme Court in *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), held that a state's police powers do extend to some matters incidentally affecting non-citizens. Especially in areas where the federal government has not asserted its presence the employment of undocumented aliens in *DeCanas*), states have the latitude to act where genuine local interests are at issue, and the state's exercise of power does not, on balance, constitute the unlawful regulation of civil immigration. In fact, the federal government has since asserted itself regarding the employment of undocumented aliens through the Immigration Reform and Control Act. And Arizona's SB 1070 is rife with overlap of, and conflicts with, the federal regulatory scheme.

statutes themselves provide no such authority. Section 274(c) of the Immigration and Nationality Act indirectly empowers state officials to make arrests for criminal violations of national immigration laws, but no corresponding authority exists for civil violations. This implies that there is no such authority.³⁷ Subsequent enactments at the federal level have reinforced this restriction on state activity. For instance, in 1996, Congress provided in section 439 of the Anti-Terrorism and Effective Death Penalty Act that State and local officials could be empowered to arrest and detain an individual who was illegally present, and who had departed the United States after conviction of a felony.³⁸ The severe limitations placed on this power, however (including a requirement that a federal official make the determination of immigration status) illustrate that the grant of such power was quite limited.³⁹

The distinction between civil and criminal enforcement was clarified by the Ninth Circuit in *Gonzalez v. City of Peoria*.⁴⁰ The appeals court was called upon to examine a Peoria ordinance which authorized officers to arrest undocumented immigrants for criminal entry into the U.S. In discussing the power of states to regulate aspects of immigration through exercise of their police power, the appeals court wrote:

³⁷ Courts generally have found that states do not have the power to enforce civil immigration laws. However, a controversial 2002 memorandum from the Office of Legal Counsel within the Department of Justice, for instance, concluded that states are sovereign entities and therefore have inherent authority to enforce both civil and criminal provisions of the INA. *See* Memorandum from Jay S. Bybee, Assistant Attorney General to Attorney General John Ashcroft, Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (April 3, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>. For a broader discussion of the divisions on this issue, *see* Stephen H. Legomsky & Christina M. Rodriguez, *Immigration and Refugee Law and Policy* 1277–78 (5th ed. 2009).

³⁸ 8 U.S.C. 1252(c).

³⁹ *See generally* LISA M. SEGHETTI, KARMA ESTER & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT (2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf>.

⁴⁰ 722 F.2d 468 (9th Cir. 1983).

We therefore conclude that state law authorizes Peoria police to enforce criminal provisions of the Immigration and Naturalization [sic] Act. We firmly emphasize, however, that this authorization is limited to criminal violations. Many of the problems arising from implementation of the City’s written policies have derived from a failure to distinguish between civil and criminal violations of the Act. Several of the policy statements use the term “illegal alien,” which obscures the distinction between the civil and criminal violations. In some instances, that term has been used by the City to mean an alien who has illegally entered the country, which is a criminal violation under section 1325. In others, it has meant an alien who is illegally present, without having entered in violation of section 1325. Examples include expiration of a visitor’s visa, change of student status, or acquisition of prohibited employment. Arrest of a person for illegal presence would exceed the authority granted Peoria police by state law.⁴¹

The Ninth Circuit held that the state and local enforcement of civil provisions of the INA would “lead to warrantless arrests of individuals who are undocumented but have not violated criminal provisions of the immigration law. This would allow for unlawful arrests.”⁴²

The higher preemption concern regarding civil enforcement, in such areas as the arrival, admission and removal of aliens, was addressed directly in a recent Congressional Research

⁴¹ 722 F.2d 468 (9th Cir. 1983).

⁴² As one often-cited memorandum of law, which reflects the prevailing scholarly view on the subject of civil enforcement of the immigration laws, has concluded:

“The power to regulate immigration is unquestionably exclusively a federal power.” *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). As *DeCanas* itself makes clear, the states’ police powers do extend to some matters affecting non-citizens; the *DeCanas* Court held that the states could sanction employers for hiring aliens who were not eligible for employment under federal immigration law. But the core questions of which aliens should be allowed into the country and which should be permitted to remain are, as matters of both constitutional structure and historical practice under the INA, purely federal. *See Toll v. Moreno*, 458 U.S. 1, 10-14 (1982); *id.* at 26-27 (Rehnquist, J., dissenting). The extent of federal power in this area, and the detail with which the INA treats the subjects of admission, detention, and removal of non-citizens, have led most authorities—including DOJ in its 1996 opinion—to conclude that Congress has preempted the field of civil immigration enforcement. *See also Gonzales v. City of Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983); *League of United Latin American Citizens v. Wilson*, 997 F.Supp. 1244 (C.D. Cal. 1997). Congress legislates against a longstanding background assumption that the federal government is principally, if not solely, responsible for civil immigration enforcement. That legislative context, and its constitutional underpinnings, strengthen our belief that the states are not intended to exercise enforcement authority outside the express grants of such authority in the INA.

Service report: “More serious preemption concerns may be raised by provisions that criminalize matters already regulated by federal immigration law. Of this latter category, the most serious preemption arguments likely exist where state law attempts to reach past traditional police powers to regulate matters closely related to entry and removal of aliens to the United States, and the conditions of their lawful presence within the country. State laws addressing such matters appear most susceptible to preemption challenges, as the federal law is arguably intended to wholly occupy this field.”⁴³

B. The preemption of Arizona’s SB 1070 by Federal Law

When examined against the foregoing analysis, SB 1070, even as amended, cannot withstand a preemption analysis. The statute evinces a pervasive scheme to undertake the civil enforcement of federal immigration laws. In this case, the preemption is both because the state arrangement interferes with the national government’s power over foreign affairs, and because the federal statutory scheme over civil enforcement constitutes an integrated whole indicating an intent to preempt the field.

Section 1 serves as a “preamble” that unambiguously sets forth that the intent of the Arizona legislature in adopting the Anti-Immigration Act was to impact the civil enforcement of immigration law (rather than to promote its own domestic law interests);⁴⁴ this declaration of legislative intent informs the statute as a whole and is reflected throughout the Act’s provisions:

⁴³ MICHAEL JOHN GARCIA, LARRY M. EIG & YULE KIM, CONG. RESEARCH SERV., R 41221, STATE EFFORTS TO DETER UNAUTHORIZED ALIENS: LEGAL ANALYSIS OF ARIZONA’S S.B. 1070 (2010), available at <http://www.fas.org/sgp/crs/homsec/R41221.pdf> (last visited June 5, 2010).

⁴⁴ This discussion weaves together the brief’s main argument, preemption, with corollary arguments rooted in other constitutional considerations. When discussing the Arizona Revised Statutes, the parts may not be divorced from the whole; while specific clauses may raise discrete constitutional claims, the overriding intent, purpose and effect

The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present within the United States.⁴⁵

The broad introductory paragraph is followed by section 2 of the Act which prohibits cities, towns, and counties from having any policy in place limiting or restricting the enforcement of “federal immigration laws to less than the full extent permitted by federal law.” As determined by the ACLU of Arizona, this provision “requires police agencies to treat administrative violations of the immigration law on the same level as serious felonies.”⁴⁶ The amendment to SB 1070, HB 2162, reinforces this intent in its explanatory section: “The first thing the new law does is require that all state and local agencies and personnel refrain from not enforcing EXISTING federal laws” (emphasis added).

The broad scope of SB 1070 as amended by HB 2162 clearly reveals a significant array of activity which the statute purports to regulate, including the transportation, smuggling, trespass, harboring, registration, and employment of aliens.

of the statute is to i) create parallel state structures of immigration enforcement to those of the federal government; and ii) incorporate federal language into the Arizona statute while imposing additional penalties to those which federal law already provides, all in violation of the Supremacy Clause. The arrangement is thus preempted by the federal government's inherent and explicit control over foreign affairs and immigration regulation in general, while suffering at the same time from other constitutional infirmities. Therefore, the Report discusses both the main and corollary arguments when assessing each particular section of the Arizona Revised Statutes.

⁴⁵ Senate Bill 1070, section 1, *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf> [hereinafter SB 1070] (last viewed June 4, 2010).

⁴⁶ ACLU of Arizona, Section by Section Analysis of SB 1070 “Immigration Law Enforcement; Safe Neighborhood”, *available at* <http://acluaz.org/ACLU-AZ%20Section%20By%20Section%20Analysis%20of%20SB1070updated%204-14-10.pdf> (last viewed June 4, 2010).

Arizona's state registration provisions, which stand at the heart of its removal effort, are intended to mirror the federal statute, attempting to take over the broad areas of national immigration law, and using criminalization of essentially civil standards to do the job.⁴⁷

Arizona's broad goal is to use its law enforcement personnel, prodded by a private right of action, to force implementation of the law, to enforce federal immigration law as a whole, while not segregating (as it is obligated to do) civil from criminal provisions in the law. The *Gonzalez* court said, "an arresting officer cannot assume that an alien who lacks proper documentation has violated section 1325 [imposing criminal sanctions for improper entry]. Although lack of documentation or other admission may be some indication of illegal entry, it does not, without more, provide probable cause of the criminal violation of illegal entry." Yet this is the approach taken by SB 1070, whose illicit purpose is to regulate the admission, removal and conditions of stay of non-citizens, all integral to the federal civil immigration enforcement system.

In addition, the ambiguity inherent in the statutory terms virtually ensures that Arizona law enforcement will be forced to usurp the federal government's civil enforcement power. Determining whether an individual is "unlawfully present" or has committed a "public offense" that would make the person "removable" are complex administrative questions that must be determined by application of the procedures set forth in the INA. The databases maintained by ICE and U.S. Customs and Border Protection do not contain an individual's federally authorized

⁴⁷ It has been long recognized that a state's arrest of an alien for criminal violation of the federal registration provisions "may be legally suspect if there is reason to believe that the federal government will not prosecute the offender for the violation". See MICHAEL JOHN GARCIA, LARRY M. EIG & YULE KIM, CONG. RESEARCH SERV., R 41221, STATE EFFORTS TO DETER UNAUTHORIZED ALIENS: LEGAL ANALYSIS OF ARIZONA'S S.B. 1070, at 19 n.111 (2010), available at <http://www.fas.org/sgp/crs/homsec/R41221.pdf> (last visited June 5, 2010) (citing *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216 (9th Cir. 1995)).

immigration status. Rather, they inform users of whether an individual may be *charged* with deportability. They are not substitutes for an individual's immigration status.⁴⁸ Thus, in requiring an Arizona law enforcement officer to make such a determination requires an adjudication of federal law for which the officer has neither the training nor the resources to make. It substitutes for the federal authority and scheme the state's own ends -- the very evil the federal preemption doctrine was designed to protect against.⁴⁹

C. Specific Statutory Restraints on State Enforcement of Federal Civil Immigration Laws

SB 1070 also comes in conflict with the Anti-Terrorism and Effective Death Penalty Act, which sets forth critical limits on state enforcement of federal civil immigration law. Specifically, 8 U.S.C. § 1252(c) provides:

Sec. 1252(c). Authorizing State and local law enforcement officials to arrest and detain certain illegal aliens

⁴⁸ Under the terms of 8 U.S.C. § 1357(g), the federal government may “enter into a written agreement with a State, or any political subdivision” to execute the “function[s] of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.” What is more, the statute requires that the federal government ensure that the state or local officers are “qualified to perform [the] function[s] of an immigration officer” by ensuring their training and supervision. *Id.* SB 1070 violates the preemption doctrine with respect to this provision in two manners. Most obviously, the provision clearly circumscribes those state or local officers qualified to execute immigration related detentions. SB 1070 impermissibly widens this field to include all state law enforcement. Secondly, SB 1070 effectively empowers those state or local agencies subject to an agreement under 8 U.S.C. § 1357(g) to act as immigration officials even absent proper training and supervision. It therefore improperly expands the scope of permissible action for properly empowered state and local officials. In an attempt to defuse the above arguments, the terms of SB 1070 § 13-2928 and § 13-2929 state that the associated sections may be enforced only by “a law enforcement officer who is authorized by the federal government to verify or ascertain an alien’s status or the United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code section 1373(c).” Section 13-509 is even more lax in its ability to throw up a barrier to the above challenges. It allows enforcement by an authorized officer or one who is “communicating” with ICE or border protection officials. However, these patchwork remedies are necessarily insufficient. As the above arguments suggest, SB 1070 attempts to hide under the authorization while the statute itself allows them to expand the scope of their activity beyond the strict federal supervision envisioned under 8 U.S.C. § 1357(g). Further, as the term “communicating” is undefined, it could mean something as simple as a perfunctory phone call. Again, as with many provisions of this statute, it is disingenuous pretext.

⁴⁹ See Complaint at para. 119–22, *Friendly House et al v. Whiting*.

(a) In general. Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—

(1) is an alien illegally present in the United States; and

(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

(b) Cooperation. The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials.⁵⁰

The provisions of SB 1070 clearly exceed these restraints. As originally drafted and enacted, SB 1070 provided, as part of section 11-1051 of the Arizona Revised Statutes, that non-citizens who are reasonably believed to have committed a “public offense” which made them removable could be arrested and detained without warrant. Although this section has been moved,⁵¹ it appears to remain a central feature of the statute. The provision is manifestly of great concern in light of the restraints on state action under 8 U.S.C. § 1252(c). Furthermore, the statute uses arguably criminal law violations⁵² to establish an essentially civil standard -- deportability. Section 13-

⁵⁰ 8 U.S.C. § 1225(C).

⁵¹ ARIZ. REV. STAT. § 13-3883, as amended by HB 2162, *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf> (last viewed June 4, 2010).

⁵² Under Arizona Revised Statutes a “public offense” includes any offense punishable by fine or imprisonment under the laws of Arizona, or under any county or municipal ordinance, as well as an offense under the laws of another state if the offending conduct would have been punishable under the laws of Arizona. *See* ARIZ. REV. STAT. SEC. ANN. 13-105.

3883, as amended, illustrates forcefully the conflation of criminal and civil elements which informs the new law and renders it constitutionally vulnerable.⁵³

D. The Specter of Racial Profiling

Defenders of Arizona's law contend that, under Section 2 of SB 1070, as amended by HB 2162, race, color, or national origin may not be considered in determining an individual's immigration status. This amendment, although clearly necessary in order to avoid a prima facie finding of unconstitutionality, does not preserve the statute. The impermissibly broad nature of the criteria to be relied upon ("reasonable suspicion") reveals nothing of the kind of examination the inquiring official is to make.⁵⁴ Nor does it preclude inquiry along the lines of equally offensive criteria, including language or ethnic identification of a surname.⁵⁵ The open-ended nature of

⁵³ A report prepared by a group of professors at the Arizona College of Law concludes that the amendments effected to Arizona Revised Statutes § 13-3883 are innocuous, noting that the Ninth Circuit Court of Appeals as well as other authorities have ruled that local police have inherent authority to arrest for federal crimes, including immigration misdemeanors. *See* GABRIEL J. CHIN ET AL., ARIZONA SENATE BILL 1070: A PRELIMINARY REPORT ON LEGAL ISSUES RAISED BY ARIZONA'S NEW STATUTE REGULATING IMMIGRATION 15 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440 (last visited June 5, 2010). The drafters of the report, however, do not appear to have been concerned with the impermissible melee of civil and criminal criteria which plays such a strong role in this analysis.

⁵⁴ As drafted, Arizona's Anti-Immigration Law effectively invites, and arguably forces, its law enforcement officers to administer this law in a way that will be subject to equal protection claims based on race or national origin discrimination. The Arizona law *requires* ("a reasonable attempt *shall* be made") law enforcement officers to attempt to determine a person's immigration status "for any lawful stop, detention or arrest" if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States," and it permits Arizona residents to bring actions for civil penalties against officials or agencies that limit or restrict the enforcement of federal immigration laws. Section 11-1051. The term "reasonable suspicion" is undefined, but the statute permits authorities "implementing the requirements" of the statute to consider race, color, or national origin to the extent permitted by the United States or Arizona Constitution. *Id.* The vagueness of the term "reasonable suspicion," combined with the threat of civil penalties for not enforcing the law, make it highly likely that authorities will engage in racial profiling and target non-Caucasians, and persons of Hispanic descent in particular, for questioning about their immigration status.

⁵⁵ If state and local officials inquire into immigration status and find the alien either has not registered or is not in possession of the required documentation, they may arrest on this basis. Cooperation between state and federal authorities is not required when determining immigration status in such instances, -- another feature of the Arizona law which brings it into conflict with federal standards. Instead, Section 11-1051, added by HB 2162, now provides that the determination of an individual's immigration status *may be* determined by a federally authorized official or, in the alternative, by USICE or USCBP. The language of the Arizona statute is permissive rather than mandatory, thus bringing it into conflict with federal requirements.

the inquiry does not contain, for instance, even the “articulable basis” test which has prevailed in Fourth Amendment cases before the federal courts where the powers of federal officials are involved,⁵⁶ nor a recital of objective circumstances setting out when inquiry would be reasonable.⁵⁷

Moreover, there is an exception permitting “race” to be considered to “the extent permitted by the United States or Arizona Constitutions.” And the Supreme Court’s decisions allow race to be considered in immigration law enforcement. “The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.”⁵⁸ Hence, under federal law at least, in order to justify a “stop” or “detention,” there must be some additional factor to “race.” Yet that additional factor can be quite liberal. As explained in a recent memorandum drafted by several law professors at the University of Arizona College of Law, the “reasonable suspicion” analysis can be based on several inter-related criteria, which are connected to race or ethnicity:

The existing law of reasonable suspicion allows the use of multiple factors that are correlated with race and ethnicity. There is no hard and fast rule as to the number of factors necessary or the weight to be assigned to particular factors. “Reasonable suspicion” is a low standard. It is less than probable cause, which is less than a preponderance of the evidence. [Citation omitted]. But federal and state courts have also said again and again that reasonable suspicion is context specific and not quantifiable. Reasonable suspicion can be based upon entirely legal conduct, and conduct consistent with innocence, since its only function is to determine whether it is appropriate to investigate further. On the other hand, there are many cases where courts find no reasonable suspicion, even when there is

⁵⁶ The need for suspicion to have a reasonable basis originated in “probable cause” criminal cases arising under the 4th Amendment. *See Terry v. Ohio*, 392 U.S. 1 (1968).

⁵⁷ *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975).

⁵⁸ *Id.* at 887.

some evidence, if it appears the police were on a fishing expedition or acted precipitously.⁵⁹

SB 1070, as amended by HB 2162, creates an independent state offense for violating 8 U.S.C. §§ 1304(e) or 1306(a) [relating to registration by aliens and the carrying of registration papers]. The inclusion of this offense under state criminal jurisdiction presumably was intended to facilitate the making of “stops” of non-citizens having the appearance of being foreign. The provision also enables Arizona’s enforcement to “bootstrap” its way into administering federal civil immigration standards by openly inquiring into immigration status without having to be concerned about whether “reasonable suspicion” exists. With the incorporation of failure to register or carry documentation into the state’s criminal jurisdictional base, anyone appearing foreign can arguably be lawfully stopped and asked about his or her registration documents as a pretext for determining immigration status.⁶⁰

E. Violations of the Fourth Amendment and Due Process

As a whole, the statutory scheme would appear an effort to side-step the Fourth Amendment prohibitions on “unreasonable” stops as articulated by the Supreme Court and lower federal courts. The federal standard has insisted upon a broad prophylactic rule that “stops” not be based on nationality or ethnicity alone. Hence, the Fourth Amendment has been held not to allow “a roving patrol of the Border patrol to stop a vehicle near the Mexican border and question its occupants about their citizenship and immigration status, when the only ground for

⁵⁹ GABRIEL J. CHIN ET AL., ARIZONA SENATE BILL 1070: A PRELIMINARY REPORT ON LEGAL ISSUES RAISED BY ARIZONA’S NEW STATUTE REGULATING IMMIGRATION 15 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1617440 (last visited June 5, 2010).

⁶⁰ *See, e.g.*, News Release, MALDEF, MALDEF to Arizona: New Fix Amounts to Nothing More Than a Cynical Manipulation of the Legislative Process (May 4, 2010), *available at* http://maldef.org/news/releases/maldef_to_arizona_new_fix_05042010/ (last visited June 5, 2010).

suspicion is that the occupants appear to be of Mexican ancestry. Except at the border and its functional equivalents, patrolling officers may stop vehicles only if they are aware of specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion that the vehicles contain aliens who may be illegally in the country.”⁶¹

The statute also raises serious due process concerns through the open-ended nature of some of its provisions. Due process requires that the law be framed with sufficient particularity so as to be governed by known standards.⁶² Defenders of the Arizona law point to the fact that HB 2162 amends the Senate Bill so as to eliminate the prospect of an individual’s being asked about his or her immigration status upon lawful “contact” with a state law enforcement official. The statute now provides that there must have been a lawful stop, detention or arrest under Arizona law or under a municipal or county ordinance. This change will not save the statute. As noted above, “stops” can still be made based upon “suspected” documentary violations which now constitute a state offense.⁶³ The vagueness of the term “suspected” documentary evidence raises particular concerns in light of Arizona’s checkered history with respect to making pretextual “stops.”⁶⁴

⁶¹ United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

⁶² See, e.g., Terry v. Ohio, 392 U.S. 1 (1968).

⁶³ See Arizona Revised Statutes Section 11-1051, as amended by HB 2162.

⁶⁴ Indeed, that history cannot be ignored when assessing the potential for constitutional violations presented by the current text of Arizona Revised Statutes Section 11-1051. Stephen Legomsky and Christine Rodriguez, for instance, make note of the following general history in the current version of their text:

But even if local police do possess inherent authority—a debatable proposition—and even if [section] 287(g) agreements are constitutional—the likely conclusion—state and local enforcement of immigration law still might be a bad idea. Sheriff Joseph Arpaio of Maricopa County, Arizona, has attracted infamy for his use of 287(g) authority. He has allegedly engaged in racial profiling of Latinos while implementing a policy of arresting individuals for minor traffic infractions, such as broken taillights, in order to apprehend undocumented immigrants; housed immigrant detainees in tents in the Arizona desert; and paraded detainees in public dressed in striped prison jumpsuits and shackled to one another for media consumption. [Citation omitted]. On March 10, 2009, the Department of Justice announced an investigation into the Maricopa County Sheriff’s Office pursuant to federal civil rights law and the Violent Crime Control and

Moreover, the statute continues to provide for warrantless arrests of any alien who has committed a “public offense” which has rendered him or her deportable.⁶⁵

This range of new arrest powers gives Arizona law enforcement personnel far too much leeway to stop and question people who could appear to have to carry documentation (i.e., people of Hispanic origin). In the words of MALDEF’s President and General Counsel:

Finally, the amendments' purported limitation of officers' duty to determine whether they suspect someone of being undocumented is the most cynical and valueless change of the bunch. Anyone who is familiar with patterns of racial profiling in Arizona or anywhere else knows that pretextual stops can be disguised, after the fact, as resting on some minor violation to place a veneer of legitimacy over a detention and arrest. More important, because SB 1070 purports to create a new state crime for failure to carry proof of status, the law itself carries its own supposed 'justification,' before the fact or after the fact, for a police officer to question anyone about status..⁶⁶

F. Prospective Equal Protection Claims

The open-ended nature of the test to be applied under the Arizona statute, coupled with its potential to result in warrantless arrests, gives rise to equal protection concerns under the 14th

Law Enforcement Act of 1994, 42 U.S.C. § 14141. See Letter from Loretta King, Acting Assistant Attorney General, to Sheriff Joseph Arpaio, Re: Investigation of the Maricopa County Sheriff’s Office, March 10, 2009 (“Our investigation will focus on alleged patterns or practices of discriminatory police practices and unconstitutional searches and seizures conducted by MCSO, and on allegations of national origin discrimination, including failure to provide meaningful access to MCSO services for limited English proficient individuals”).

STEPHEN H. LEGOMSKY & CHRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1279 (5th ed. 2009).

⁶⁵ ARIZ. REV. STAT. § 13-3883, as amended by HB 2162, *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070h.pdf> (last viewed June 4, 2010).

⁶⁶ *See, e.g.*, News Release, MALDEF, MALDEF to Arizona: New Fix Amounts to Nothing More Than a Cynical Manipulation of the Legislative Process (May 4, 2010), *available at* http://maldef.org/news/releases/maldef_to_arizona_new_fix_05042010/ (last visited June 5, 2010).

Amendment. Alienage remains a suspect category for equal protection analysis. To the degree that the law has the potential to discriminate against aliens who are, for instance, foreign born or members of distinct national minorities, it should be deemed offensive on equal protection grounds as well.⁶⁷

In one of the recently filed challenges to the Arizona law, *Friendly House et al v Whiting et al*, ("The ACLU complaint"), a group of civil rights plaintiffs claim that SB 1070 as amended by HB 2162 "was enacted with the purpose and intent to discriminate against racial and national origin minorities, including Latinos, on the basis of race and national origin" and "impermissibly and invidiously targets Plaintiffs who are racial and national origin minorities, including Latinos, residing or traveling in Arizona and subjects them to stops, detentions, questioning, and arrests because of their race and/ or national origin."⁶⁸

Equal protection claimants promise to be myriad and will seek to offer credible evidence that the law has "discriminatory effect and invidious discriminatory intent or purpose."⁶⁹ Statistical evidence, taken in conjunction with "the historical background of the decision, the sequence of events leading up to the decision, and any relevant legislative or administrative history" are clearly germane to these issues.⁷⁰

⁶⁷ *Graham v. Richardson*, 403 U.S. 365 (1971).

⁶⁸ Complaint at para. 187–88, *Friendly House et al v. Whiting*.

⁶⁹ *See Washington v. Davis*, 426 U.S. 229 (1976); *see e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

⁷⁰ *The Committee Concerning Community Improvement v. City of Modesto*, 583 F.3d 690, 703 (9th Cir. 2009) (citing *Arlington Heights*, 429 U.S. at 26768).

Evidence derived from the Arpaio Department of Justice criminal civil rights investigation that is currently pending should provide a transparent historical record here. This evidentiary corpus can be bolstered by private studies of trends in Arizona policing practices showing explicit patterns of racial discrimination.⁷¹ Even if this evidence falls short of making out a clear intent to discriminate on the part of the Legislature, it would be relevant to show that “the effect of a law may be so harsh or adverse in its weight against a particular race that an intent to discriminate is not only a permissible inference but also a necessary one.”⁷² The statistical data cited above is therefore relevant for the purpose of inferring intent as well.⁷³

Against this general backdrop showing a pattern or practice of past discrimination, the broad holdings of the U.S. Supreme Court that alienage is a “suspect” classification will play a decisive role in any future litigation. Classifications based on alienage require the application of heightened scrutiny by the courts.⁷⁴ Applying heightened scrutiny here, it is difficult to locate a compelling state interest for the use of alienage, especially in light of the fact that state

⁷¹ ACLU, DRIVING WHILE BLACK OR BROWN (2008), available at <http://acluaz.org/DrivingWhileBlackorBrown.pdf> (last viewed June 5, 2010); see also Daniel Gonzalez, *Sheriff's Office Says Race Plays No Role in Who Gets Pulled Over*, ARIZ. REPUBLIC, Oct. 5, 2008, available at <http://www.azcentral.com/news/articles/2008/10/05/20081005arpaio-profiling1005.html> (last viewed June 5, 2010).

⁷² *Flore v. Pierce*, 617 F.2d 1386, 1389 (9th Cir. Cal. 1980) (citing to *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

⁷³ Whether individuals targeted for questioning based on their race or national origin would ultimately prevail on equal protection grounds would depend on whether they could prove that such targeting had a discriminatory intent. See, e.g., *Ortega Melendres v. Arpaio*, 598 F. Supp. 2d 1025, 103637 (D. Ariz. 2009). However, in *Ortega Melendres*, the United States District Court for the District of Arizona recently held that plaintiffs adequately stated a claim under the Equal Protection Clause based on allegations that deputies from the Maricopa County Sheriff's Office (“MCSO”) profiled, targeted, and stopped and detained them based on their race. In addressing the specific issue of discriminatory intent, the court found sufficient allegations that Sheriff Arpaio “made a public statement that physical appearance alone is sufficient to question an individual about their immigration status, that MCSO's crime suppression sweeps have been allegedly targeted at areas having a high concentration of Hispanics, and that the MCSO has used volunteers to assist in these crime sweeps who have known animosity towards Hispanics and immigrants.” *Id.* at 1037. Given that the Arizona law effectively encourages law enforcement to engage in racial profiling, it seems likely that cases like *Ortega Melendres*, and the distressing allegations therein, will proliferate.

⁷⁴ See *Graham v. Richardson*, 403 U.S. 365, 37172 (1971) (“[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny”).

enforcement of civil immigration laws is federally preempted. Arizona has no compelling interest in enforcing federal immigration laws -- except to affect the discriminatory purpose of its law, to wit “make attrition (presumably of the undocumented community but potentially of a much larger class of immigrants) through enforcement the public policy of all state and local government agencies in Arizona.”

This law will deprive non-citizens of the equal protection of the laws, making them targets of law enforcement based on their alienage. Like the law at issue in *Plyler v. Doe*, 457 U.S. 202 (1982), Arizona’s use of alienage here threatens the creation of an underclass of individuals, who will be subject to apartheid-like pass laws.⁷⁵ Arizona’s law places non-citizens in a decisively subordinate status, and like segregation, is likely to generate “a feeling of inferiority in their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁷⁶ The Supreme Court has held that

The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide ‘in any state’ on an equality of legal privileges with all citizens under nondiscriminatory laws.⁷⁷

Arizona’s law violates this general policy embodied by the Fourteenth Amendment.

The Anti-Immigration Law also invites challenge based on the likelihood of discriminatory application. As the Supreme Court held more than a century ago:

⁷⁵ As Bishop Desmond Tutu recently wrote about Arizona’s law: “when you strip a man or a woman of their basic human rights, you strip them of their dignity in the eyes of their family and their community, and even in their own eyes. An immigrant who is charged with the crime of trespassing for simply being in a community without his papers on him is being told he is committing a crime by simply being. He or she feels degraded and feels they are of less worth than others of a different color skin. These are the seeds of resentment, hostilities, and in extreme cases, conflict.” Desmond Tutu, *Arizona: The Wrong Answer*, HUFFINGTON POST, Apr. 29, 2010, available at http://www.huffingtonpost.com/desmond-tutu/arizona---the-wrong-answ_b_557955.html.

⁷⁶ *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

⁷⁷ *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420 (1948).

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.⁷⁸

G. First Amendment Infringement on Churches and Work Solicitation Speech

Arizona Revised Statutes Section 13-2929 constitutes a state equivalent of the federal harboring statute. The problems are that it opens the way to a separate interpretation of “harboring” than does the federal statute. Courts have generally disallowed prosecutions under the federal statute where the defendant has offered free passage to an individual out of humanitarian motives rather than with the intent to enhance the violation.⁷⁹ Churches providing room and board to ministers and missionaries serving within their congregation are generally exempt from the law’s scope. To the extent that state law will be interpreted differently from the federal statute, it should be deemed preempted under the Supremacy Clause.

Finally, Section 13-2928 of the Arizona Revised Statutes provides Arizona local and state law enforcement with an additional weapon to effect attrition of illegal immigrants. Under the guise of maintaining a free flow of traffic on public roads, streets and highways, Section 13-2928 is pretext for Arizona law enforcement to attempt to regulate and administer federal immigration laws and will provide Arizona enforcement a false sense of legality to an otherwise impermissible stop. Section 13-2928 criminalizes the solicitation of work by undocumented

⁷⁸ *Yick Wo v. Hopkins*, 118 U.S. 356, 37374 (1886).

⁷⁹ In *United States v. Moreno*, 561 F.2d 1321 (9th Cir. Wash. 1977) the court states in a footnote (fn 3) that "Based upon purely humanitarian concern, the transportation of a known undocumented alien to a hospital following an injury or illness does not appear to come within the purview of § 1324(a)(2)."

aliens, prohibiting persons from stopping his or her vehicle on a street in an "attempt to hire or hire and pick up passengers for work." The statute prohibits solicitation of work, making unlawful such conduct as entering stopped vehicles for the purposes of employment and transport to a different work site. "Solicit" as defined in section 13-2928 is "verbal or nonverbal communication by a gesture or a nod that would indicate to a reasonable person that a person is willing to be employed." Therefore, section 13-2928 fails on First Amendment grounds. Solicitation of work has uniformly been held to be a First Amendment protected right.⁸⁰

V. Conclusion

The unlimited discretion to inquire into immigration status, the virtual assumption of broad administrative functions properly left to the Department of Homeland Security under long established interpretation of the preemption doctrine and the ineluctable confusion which the statute promotes between civil and criminal immigration law, all point to the inescapable conclusion that the Arizona law suffers from serious constitutional infirmity and its adoption by other state legislatures should be avoided.

Moreover, even if a facial constitutional attack based on preemption were to be withstood, any state seriously pursuing the path chosen by Arizona would face a barrage of costly constitutional challenges during implementation which would be prohibitive to litigate., and would incur other costs, including substantially increased funding for the additional assigned counsel who will be

⁸⁰ Regulations prohibiting day laborers from soliciting gainful employment have been held unconstitutional in violation of the First Amendment. *See* *Town of Herndon v. Thomas*, 2007 Va. Cir. LEXIS 161 (Va. Cir. Ct. Aug. 29, 2007) (explaining that a town ordinance that made unlawful persons hiring workers on the street and persons soliciting work violated the First Amendment because it did not allow effective channels for the proscribed behavior); *see also* *Comite De Jornaleros De Redondo Beach v Redondo Beach*, 475 F.Supp. 2d 952 (C.D. Cal. 2006) (stating that the town's ordinance which provided that persons standing on a street and soliciting or attempting to solicit work was unlawful, was not narrowly tailored in scope and did not provide other alternatives for such persons to freely communicate their prohibited speech).

needed to represent those facing the newly created state criminal charges. Other states therefore should not adopt the Arizona framework, which so substantially intrudes upon the federal role. Immigration reform should take place at the federal level, where it constitutionally belongs, and Congress and the Executive should move swiftly to address the need for reform.

Respectfully submitted.

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